H.L.GILLASPIE

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

HERETOFORE CONDENSED BY

HON. THOMAS SERGEANT, AND HON. THOMAS M'KEAN PETTIT.

Now Reprinted in Full.

VOL. XLIII.

CONTAINING

The Cases determined in the Courts of Queen's Bench and Common Pleas, in Easter Term and Vacation, Trinity Term and Vacation, and Michaelmas Term and Vacation, 1842, (*V. and VI. Victoria.*)

PHILADELPHIA:
T. & J. W. JOHNSON & CO., LAW BOOKSELLERS,
NO. 535 CHESTNUT STREET.
1869.

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COURT OF COMMON PLEAS,

WITH

TABLES OF THE NAMES OF THE CASES ARGUED, AND OF THE PRINCIPAL MATTERS.

BY

JAMES MANNING,
SERGEANT AT LAW,
AND
T. C. GRANGER,
OF THE INNER TEMPLE, ESQUIRE, BARRISTER AT LAW.

VOL. IV.

FROM EASTER TERM, 1842, TO MICHAELMAS TERM, 1842.
BOTH INCLUSIVE.

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JUDGES

OF

THE COURT OF COMMON PLEAS,

DURING THE PERIOD CONTAINED IN THIS VOLUME.

The Right Hon. Sir NICOLAS CONYNGHAM TINDAL, Knt., Ld. Ch. J.

Hon. Sir THOMAS COLTMAN, Knt.

The Right Hon. THOMAS ERSKINE.

Hon. Sir WILLIAM HENRY MAULE, Knt.

Hon. Sir CRESSWELL CRESSWELL, Knt.

ATTORNEY-GENERAL.

Sir F. POLLOCK, Knt.

SOLICITOR-GENERAL.

Sir W. W. FOLLETT, Knt.

A

TABLE

OF

THE NAMES OF CASES REPORTED

IN THIS VOLUME.

The figures refer to the English folios, which will be found in a bracket at the head of the page and in the margin of the text.

7

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Easter Term,

IN THE

FIFTH YEAR OF THE REIGN OF VICTORIA.

The judges who usually sat in banc during this term were,

Tindal, C. J. — Erskine, J.
Coltman, J. — Cresswell, J.

PRICE *v.* BIRCH.

By an indenture between the plaintiff and defendant, it was covenanted that the defenda should obtain a license from the lord of the manor, and should grant a lease to the plainti and that such lease should contain a covenant that the defendant would, during the tern repair the premises demised, and that till such license was obtained and such lease granted, the plaintiff should hold the premises as tenant from year to year *subject to the terms and conditions hereinbefore specified.*

In an action of covenant upon the indenture, the plaintiff, in his declaration, set out the covenant that the defendant should obtain the license and grant the lease, and the proposed covenant to repair, and then alleged that the parties *further covenanted* that till the license should be obtained and the lease granted, the plaintiff should be considered as tenant from year to year, &c., and that whilst the plaintiff should be possessed of the premises as tenant from year to year, under the provisions of the indenture, *the defendant should repair the said premises: Held*, no variance.

Covenant. The declaration stated that, by a certain indenture, bearing date on, &c., made between the defendant of the one part and the plaintiff
*2] *of the other part, &c., the defendant did covenant, &c. that he, the defendant, would (*inter alia*) procure from the lord or lady of the manor of Tettenhall Regis, a license to demise to the plaintiff a certain messuage, &c. for the term of ten years, and would make a good and sufficient lease unto the plaintiff, of the said messuage, &c. for ten years; and it was thereby covenanted that the intended lease should contain (*inter alia*) a covenant on the part of the defendant that the defendant, his heirs, &c., during the term so to be granted, should, at his or their own expense, repair, uphold, support and keep in repair the external parts of the outer doors and window frames, and the tiles, slates, &c., and all other the external parts of the said messuage, in good and tenantable order and condition, and would paint the outside wood, stone and iron work once in every third year of the said term; and each of the parties did further covenant that in the mean time and until the said license should be obtained and the said lease granted, the plaintiff should be considered as tenant of the said premises from year to year, at the rent, and subject to the terms and conditions

thereinbefore specified; and that, whilst the plaintiff, his executors, &c., should be possessed of the premises as tenant thereof from year to year under the provisions of the indenture, *the defendant*, his heirs, &c., *would*, at his and their own expense, *repair*, uphold, support and keep in repair the external parts of the outer doors and window-frames, and the tiles, slates, &c., and all other the external parts of the said messuage, &c., in good and tenantlike order and condition, and would paint the outside wood, stone and iron work of the premises once in every third year; (*prout patet.*) *Averment:* that, by virtue of the indenture,—the license not being obtained and the lease not being granted,—the plaintiff entered and became possessed as tenant from year to year, at the rent and subject to the *terms and conditions aforesaid, and continued so possessed, &c. [*3 and had performed all covenants, &c. *Breach:* that the defendant did not repair, &c.

Plea: *non est factum.*

At the trial before PATTESON, J., at the last Staffordshire assizes, the indenture in question was given in evidence. It contained covenants, as stated in the declaration; that the defendant would obtain the license and make the lease, and that such lease should contain (*inter alia*) the covenant by the defendant to repair, and concluded as follows:—

"And each of the parties hereto doth hereby further covenant with the other of them, that in the mean time and until the said license shall be obtained and the said lease granted, the said Richard Hope Price, (the plaintiff,) his executors and administrators, shall be, and be considered as, tenant of the said premises from year to year, at the rent, and *subject to the terms and conditions, hereinbefore specified.* In witness," &c.

The counsel for the defendant applied for a nonsuit upon the ground of a variance between the declaration and the deed produced, no express covenant being contained in the latter that the defendant should execute the repairs during the tenancy from year to year, as alleged in the declaration.

The learned judge thought there was no variance, and refused to nonsuit the plaintiff; but gave the defendant leave to move to enter a nonsuit in case the court should think that there was a variance, and should refuse to amend, which, by agreement, they were to have the power to do The plaintiff having obtained a verdict.

Channel, Serjt., now moved to enter a nonsuit, pursuant to the leave reserved; and renewed the objection taken at the trial. It may be admitted that all the *covenants proposed to be inserted in the intended [*4 lease must, during the tenancy from year to year, be considered as amounting to agreements; but the objection is, that the declaration alleges a covenant to be contained in the deed, which, in fact, is not to be found there. [TINDALL, C. J. It would appear that the maxim—*verba relata inesse videntur*(a)—would apply in this case.] There is no doubt that a covenant may be stated according to its legal effect;(b) but here it is professed to be set out in express words, and also according to its legal effect, and it is not competent to a party to take both courses. The indenture is set out in terms, and then the plaintiff has superadded certain terms which are not in the deed.

(a) For the application of this maxim, see Co. Litt. 9 a, 1 Tho. Co. Litt. 500, 10 Vin. Abr. 235, tit. *Estate*, (K. 2,) pl. 5.

(b) Vide Com. Dig. tit. *Pleader* (C. 37;) 5 Mann. & Ryl. 451; ante, vol. i. p. 281 [39 E. C. L. R.;) post, 9, n. (b.)

TINDAL, C. J. The deed contains a covenant that until a lease be granted, the plaintiff shall hold the premises on the same terms as therein-before specified, that is, on the terms stated in the proposed lease; the plaintiff then sets out those terms. I think this is clearly no variance.

The other judges concurred.

Rule refused.

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*5] *GOLDSMITH v. MARTIN.

A. entered his horse for a race and paid the subscription money; the horse won, but it turned out that by the rules of the race he was not entitled to run. Notice of the objection had been given to A. before the race: *Held*, that he was not entitled to recover his subscription money.

ASSUMPSIT, for money had and received, and upon an account stated. Plea: non assumpsit.

The particulars of demand were as follows:—

"To the account of the hack stakes at the Cambridge Coronation Races, after deducting the stake of second horse - - £14 0

"To the account of the hurdle race sweep-stakes at the Cambridge Coronation Races, deducting the stake of the second horse - 30 0

"To cash received by defendant of plaintiff—entrance money to said races, and fees obtained as clerk of the course - - 3 10"

At the trial before TINDAL, C. J., at the last Cambridgeshire assizes, it was proved that the defendant was clerk of the course and stakeholder at the Cambridge "Coronation Races," which took place on the 30th June, 1841. There were two sweepstakes, in respect of which the action was brought, one of which was called the hack stakes, and the other the hurdle stakes. By the printed rules of the races, thorough-bred horses in the hack stakes were to carry seven pounds extra, and in the hurdle stakes they were not to run at all. The plaintiff entered his horse, Cavallo, as "not a thorough-bred" horse, for both stakes, and paid the defendant as clerk of the course, 1*l.* entrance money for the hack stakes, 2*l.* for the hurdle stakes, and 10*s.* fee. An objection to Cavallo, as a thorough-bred horse, was delivered to the plaintiff before the race. The horse, however, ran, and won both races. The question, had been referred to the stewards; who decided
*6] that Cavallo was a thorough-bred horse, *and, therefore, that the plaintiff was not entitled to either of the stakes.

On behalf of the plaintiff it was contended, that at any rate he was entitled to recover the 3*l.* 10*s.* entrance money; but the Lord Chief Justice, on the authority of *Marryat* v. *Broderick*, Murph. & Hurlst. 96, S. C. 2 M. & W. 369, directed a nonsuit, reserving leave to the plaintiff to move to enter a verdict for that amount.

Channell, Serjt., now moved accordingly, and contended that, either there was no satisfactory proof of the objection having been properly made before the race, or the entrance money had been paid without consideration; and that, either way, the plaintiff was entitled to recover the 3*l.* 10*s.*

TINDAL, C. J. This is not like the case of an insurance; where a party paying the premium may recover it back before the risk has commenced.(*a*) It is more like the case of money paid by a party in his own wrong. It is clear from the evidence in the cause, that the entrance money was to form part of the stakes.

(*a*) Vide dict. per Lord Mansfield, C. J., in *Tyrie* v. *Fletcher*, Cowp. 668; *Penson* v. *Lee*, 2 B. & P. 330.

COLTMAN, J. Suppose after the money had been paid, that the horse had not run, or had died—would the plaintiff have been entitled to recover the money back?

ERKSINE, J. If we were to hold that the plaintiff had a right to recover his subscription money, it would be offering a premium to a man to enter a horse under a wrong description. If no objection were taken, he might win the race; and if an objection were taken, he would have his money back.

*CRESSWELL, J. It is like the case of a joint fund. Each person contributes his share, and takes his chance of winning. [*7

Rule refused.(a)

(a) That the action, supposing any action to be maintainable, was properly brought against the stakeholder, see *Kerr* v. *Osborne*, 9 East, 378; *Robson* v. *Hall*, Peake N. P. C. 127, 128; *Munk* v. *Clarke*. 2 N C 299, 2 Scott, 475.

BLAKE v. BEAUMONT.

A., the drawee of a bill, accepts it payable at a particular place, without stating it to be payable there only or not elsewhere: *Held*: that such bill may, in action against A., be declared upon, as made payable at that place, although since the 1 & 2 G. 4, c. 78, such an acceptance amounts to a general acceptance.(a)

ASSUMPSIT, by the endorsee against the acceptor of a bill of exchange. The second count (upon another bill) stated that the drawers made their bill directed to the defendant, &c., "and the defendant then accepted the last mentioned bill, payable at a certain place in London, to wit, at the banking house of W. D. and Co., London;" averment of presentment to the defendant at W. D. and Co. and non-payment. The third count was upon another bill, accepted in a similar manner to that of the bill mentioned in the second count.

Plea: to the first count, first, that the alleged drawers did not draw, and secondly, that the defendant did not accept; to the second and third counts, *non acceptavit*,(b) only; upon all which pleas issue was joined.

At the trial before GURNEY, B., at the last assizes for the county of Surrey, the plaintiff gave in evidence bills accepted by the defendant, which corresponded literally with those set out in the second and third counts, and the jury found a verdict in his favour; leave being *however reserved to move to enter the verdict for the defendant on the issues upon the last two pleas. [*8

Shee, Serjt., now moved for a rule accordingly, upon the ground of variance. The declaration, though agreeing literally with the bills produced, is framed as upon an acceptance at a particular place. By the 1 & 2 G. 4, c. 78, s. 1, it is enacted "that the acceptance of a bill of exchange payable at the house of a banker or other place, without further expression in the acceptance, shall be deemed to be, to all intents and purposes, a general acceptance; but that if the acceptor in his acceptance express that he accepted the bill payable at a banker's house or other place *only, and not otherwise or elsewhere*, such acceptance shall be deemed to be a qualified acceptance." The acceptance, therefore, in this case not purporting that the bill was payable at the banking house of Messrs. W. D. & Co. *only*, was in law a general acceptance and should have been so declared upon. [TINDAL, C. J. No doubt, in point of law this is a general acceptance,

(a) Post 10 (c). (b) Vide 1 Mann. & Ryl. 395 (a), 398 (a), 399 (d), (17 E. C. L. R.)

but the question is, whether there is any variance. At most, the statement of the place where the bills were made payable was unnecessary, and the rule *utile per inutile non vitiatur*, would seem to apply.] The declaration states that the bills "were payable at a certain place," but in law they were not so, for they were payable any where. The plaintiff has treated the bills in his declaration as though they were payable only at that particular place; for he has answered a presentment there and nowhere else. In *Exon* v. *Russel*, 4 M. & S. 505,(*a*) which was an action by the endorsee against the maker of a promissory note, the plaintiff declared that the defendant made the note payable at the house of Messrs. B. and Co. London. Upon production of the note at the trial, it appeared that the address
*9] at *the house of Messrs. B. and Co., was written at the foot of the note. This was held to be a variance. Lord ELLENBOROUGH, C. J., in giving judgment, said, "The plaintiff had taken upon himself to aver that such is the import of the note; he has therefore, not truly stated the note; for he has stated that it is made payable at a particular place. Therefore he ought to have been nonsuited, upon the ground that he has misdescribed the note as payable at a particular place, which it is not; the address being no part of the contract, but a memorandum." That case was decided before the passing of the 1 & 2 G. 4, c. 78; but the principle is applicable to the present case; for that act declares that such an acceptance as the present shall be considered as a general acceptance. The statement of the place where the bill was made payable must, therefore, be considered only as a memorandum and not a part of the contract. [ERSKINE, J. These bills are so far payable at the particular place mentioned, that in an action against the drawer, presentment to the acceptor at that place must have been proved; *Gibb* v. *Mather*, 8 Bingh. 214, (21 E. C. L. R.,) S. C. 2 Moo. & Sc. 387, 2 Cro. & Jerv. 254.(*b*) [TINDAL, C. J. A party may either follow the words of a contract literally or state its legal effect.] Here, the statement in the declaration is different from the legal effect of the contract. In Chitty on Pleading, vol. i., p. 305, 6th ed.(*c*) it is laid down as a
*10] principle, "that a contract or written instrument should *be stated according to its legal effect," and the author adds, "indeed in some cases it has been held proper, and indeed absolutely necessary to depart from the terms of the contract; and a party has been defeated on the ground of variance where he has used the precise words of the contract, but mis-stated its legal operation." Thus, if a deed be by the words *dedi et concessi*, &c., yet if it operate as a bargain and sale, it ought to be so pleaded.(*d*) *Barker* v. *Lade*, 4 Mod. 149, S. C. 3 Lev. 291,(*e*) is to the same purport.

(*a*) See also *Williams* v. *Warning*, 5 Mann. & Ryl. 9, S. C. 10 B. & C. 2, (21 E. C. L. R.)

(*b*) And see *Saunderson* v. *Bowes*, 14 East, 500; *Roche* v. *Campbell*, 3 Camp. 247; Bayley on Bills, 220; *Lyon* v. *Holt*, 5 M. & W. 250. In *Higgins* v. *Nichols*, 7 Dowl. P. C. 551, the argument and judgment appear to have proceeded upon the assumption that the 1 & 2 G. 4. c. 78, applied to all actions *upon acceptances*, even those against *drawers* and *endorsers*.

(*c*) See also Stephen on Pleading, p. 417, 4th ed. In *Wickes* v. *Gordon*, 1 Chitt. Rep. 67, Holroyd, J., says, "The most correct way of pleading is, to plead the words according to their legal effect, instead of adopting the words used *which is not always safe*." And see Com. Dig. *Pleader* (C. 37); Wms. Saund. vol. i. p. 235, b. (1); vol. ii. p. 97, b. (2); *Howell* v. *Richards*, 11 East, 633; *Tempest* v. *Rawling*, 13 East, 18, 20; *Latham* v. *Rutley*, 2 B. & C. 20, (9 E. C. L. R.,) 3 D. & R. 211, (16 E. C. L. R.;) *Saunderson* v. *Griffiths*, 5 B. & C. 909, (12 E. C. L. R.,) 8 D. & R. 643, (16 E. C. L. R.;) 5 Mann. & Ryl. 451, Bac. Abr. Pleas & Pleading (I. 7), vol. v. 421, 6th & 7th ed.; antè, vol. i., p. 305, 306, (a). For the reason, vide antè, vol. i. p. 281, (d), (39 E. C. L. R.)

(*d*) Vide *Taylor* v. *Vale*, 6 Cro. Eliz. 166.

(*e*) See also 2 Wms. Saund. 96, b.(1.)

The acceptance, therefore, ought to have been pleaded according to its legal effect, that is, as a general acceptance.

TINDAL, C. J. I think the effect of the statute is to relieve a plaintiff from the difficulty under which he previously laboured, and to enable him to treat an acceptance as general, which, before the act, was a particular one. But although in this case there was, in law, a general acceptance—that is, an engagement to pay any where—such general acceptance would include, amongst others, the particular place mentioned in the declaration; and it does not lie in the defendant's mouth to say that the bill was not payable at that place, when he has himself referred the parties there for payment.

The rest of the court concurred.

Rule refused.(*a.*)

(*a*) See *Selby* v. *Eden*, 3 Bingh. 611; *Fayle* v. *Bird*, 6 B. & C. 531, (13 E. C. L. R.) The objection taken in the principal case appears to have been,—not that *the plaintiff had shown an insufficient presentment, but that having alleged a conditional and limited contract, he had proved an unconditional and general contract. If the defendant had traversed the presentment stated in the declaration, such traverse would have been material in respect of the contract declared upon, which would have been admitted by the traverse to be the true contract; but it would, for the reason pointed out in the judgment, have been immaterial with reference to the real contract between the parties, according to the provisions of the 1 & 2 G. 4, c. 78. In *Alsop* v. *Claydon* the declaration was upon a promise to pay the plaintiff 5*l* *when the defendant should be required.* The jury found that the defendant promised to pay the plaintiff 5*l*., but said nothing as to the request; judgment *quod querens nihil capiat per breve.* Sir F. Moore, 406, S. P.; *Peeter* v. *Carter*, 2 Roll. Abr. 719, 21 Vin. Abr. 463; and see *Barker* v. *Rowle*, ib.; *Kitchenman* v. *Evesque de Osorie in Ireland*, 2 Roll. Abr 720, 21 Vin. 464. [*11

BELL. Public Officer, &c. v. GARDINER.

A negotiable security given by a party in satisfaction of a liability from which he was discharged in law,—in ignorance of the facts which constituted such discharge, cannot be enforced against him, though he may have had the *means* of knowing those facts.

Therefore, where a bill of exchange endorsed by A. for the accommodation of the drawer, was afterwards altered in a material point, with the consent of the drawer, and when the bill was at maturity, B., the then holder, made a demand upon A., who, ignorant of the alteration, though he had ample means of knowing it, gave B. a promissory note for the amount of the bill and expenses: *Held*, that it was a good defence to the action on the note by B., that at the time A. gave it, he was not, in fact, aware of the alteration in the bill.

ASSUMPSIT, by one of the public officers of a copartnership, styled "The National Provincial Bank of England," upon a promissory note made by the defendant in favour of the bank, on the 22d August, 1840, for 203*l*. 5*s*. 6*d*., at two months after date.

Second plea: that before the making of the note, to wit, on the 11th April, 1840, one William Martin drew his bill of exchange directed to one Samuel Shirley, and thereby requested Shirley three months after the date thereof, to pay to the order of Martin 200*l*.; that Martin then delivered the bill to Shirley, and requested Shirley to accept the same for Martin's accommodation; *that Shirley then accepted the bill for the accommodation of Martin, and then redelivered the same, so accepted, to [*12
Martin; that Martin endorsed the bill with his own name, and then delivered the same to the defendant, and then requested the defendant to endorse the bill for the accommodation of him, Martin; that the defendant then, in compliance with such request, endorsed the bill for the accommodation of Martin, and then redelivered the same to Martin; that he, the defendant, so endorsed the bill for the accommodation of Martin merely, and without having received any consideration or value for such endorsement, and that

he had not since received any consideration or value for the same; that at the time he, defendant, so endorsed the bill, the same bore a certain date, to wit, the 11th of April, 1840, and that after the endorsement by the defendant, and after the bill had been redelivered by defendant to Martin as aforesaid, and before the same was paid and delivered to the said copartnership as hereinafter mentioned, to wit, on the day and year last aforesaid, the date of the bill was altered to a certain other date, to wit, the 21st April, 1840, and that such alteration was made without the knowledge or consent of the defendant, and that the defendant was and remained ignorant of such alteration having been made from thence until after the making by him, the defendant, of the said promissory note, and until after the delivery of the same to the said copartnership, as in the said declaration mentioned, to wit, until and upon the 1st day of September, 1840; that after the making of the alteration in the date of the bill as aforesaid, to wit, on the 21st of April in the year last aforesaid, the said bill with the date thereof so altered was paid and delivered to the said copartnership, who held the same from thence until afterwards, to wit, on the 22d of August in
*13] the *year last aforesaid; that on the day and year last aforesaid the said copartnership applied to the defendant for payment to them of the amount of the bill; and thereupon the defendant believing that the bill was in the same state in which it had been when he, the defendant, so endorsed it as aforesaid, and being ignorant of the said alteration in the date thereof, and never having assented or agreed thereto, agreed with the said copartnership to make and deliver to them the said promissory note in consideration of his said supposed liability to the said copartnership upon the bill, and for no other consideration whatever; that the defendant, in pursuance of such agreement, did make the said promissory note, and did deliver the same to the said copartnership as in the said declaration is mentioned, in consideration of his supposed liability upon the bill, and for no other consideration whatsoever. And so the defendant saith that he made the said promissory note, and delivered the same to the said copartnership in the mistaken belief that he was liable to pay to them the amount of the said bill; and that he, the defendant, never received any consideration or value for making the said promissory note, or for delivering the same to the said copartnership, or for the payment thereof. Verification.

Replication: *de injuriâ*.(a)

At the trial before TINDAL, C. J., at Guildhall, at the sittings after last Trinity term, it was proved, on the part of the defendant, that he had endorsed the bill for the accommodation of Martin, and that the bill then bore date the 11th of April; that the date was afterwards altered to the 21st, with Martin's consent, but without the privity of either the acceptor or the
*14] defendant; that the defendant had made a memorandum *of the time when the bill would fall due, viz. on the 14th July; that notice of the dishonour of the bill, stating it to be due on the 24th of July, was given to the defendant, and the amount was demanded from him; that on two occasions after this notice the defendant saw the bill, and that he gave the note, on which the action was brought, for the amount of the bill and the expenses.

The Lord Chief Justice left it to the jury to say whether, at the time of giving the note, the defendant had any knowledge of the alteration in the bill; and that the question was not, whether he had the means of know-

(a) Vide antè, vol. i. pp. 235, 720, (39 E. C. L. R.) (b); ii. 171, 298, 348.

edge, of which there could be no doubt. The jury having found that the defendant had no knowledge of the alteration when he gave the note, the verdict was entered in his favour on the issue on the second plea.

Channell, Serjt., in last Michaelmas term, obtained a rule nisi for judgment for the plaintiff *non obstante veredicto*, or for a new trial, on the ground, either that the plea was no answer to the action, inasmuch as it should have also alleged that the defendant, at the time he gave the note, had no means of knowing that the bill had been altered; or that, if the plea might be considered as also negativing the means of knowledge, then the direction of the Lord Chief Justice was incorrect. He put the case as standing upon the same ground as if the defendant had paid the note, and was seeking to recover back the amount in an action for money had and received; *Bilbie* v. *Lumley*, 2 East, 469; *Milnes* v. *Duncan*, 6 B. & C. 671, (13 E. C. L. R.,) 9 D. & R. 731.

Talfourd, Serjt. (with whom was *Gray*) now showed cause. The question is, whether the note was given by the defendant under a mistake as to the real facts; for, if so although that mistake may have arisen from his own *negligence, payment cannot be enforced. This case has been [*15 put by the other side on the same footing as an action for money had and received. It may be so considered; and none of the decided authorities, from *Bilbie* v. *Lumley* downwards, militate against the proposition contended for on the part of the defendant. But the question may be considered as set at rest by the recent case of *Kelly* v. *Solari*,(*a*) where it was held, that if a party pay money under a forgetfulness of facts at the time of payment, he is entitled to recover it back, though he had full means of knowledge at the time. That was an action by one of the directors of an insurance company to recover money paid to the defendant on an insurance upon the life of her deceased husband. The policy had, in fact lapsed just before the death of the party, by non payment of the last quarterly premium. The actuary of the office had informed two of the directors of this fact, and one of them had written the word "lapsed," in pencil, on the policy. Some months afterwards the defendant, as executrix of her late husband, applied to the office for the payment of the policy in question, and of two other policies. The directors drew up a cheque for the amount, having, as they stated at the trial, entirely forgotten that the policy had lapsed. Lord ABINGER, C. B., before whom the cause was tried, was at that time of opinion, that if the directors had had knowledge, *or the means of knowledge*, that the policy had lapsed, the plaintiffs were not entitled to recover; and that their subsequently forgetting it would make no difference; and the plaintiff was accordingly nonsuited. A rule nisi was obtained, on the part of the plaintiff, to set aside this nonsuit, and enter a verdict for the plaintiff, or for a new trial; and after argument, in which the various authorities were brought under the consideration of the court, Lord ABINGER, C. J., thus expressed himself:—

*" I think the defendant ought to have had the opportunity of taking [*16 the opinion of the jury on the question, whether, in reality, the directors had a knowledge of the facts, and therefore, that there should be a new trial, and not a verdict for the plaintiff; although I am now prepared to say, that I laid down the rule too broadly at the trial, as to the effect of their having had means of knowledge. This is a very vague expression, and it is difficult to say with precision, what it amounts to; for example it may be that

(*a*) Since reported, 9 M. & W. 54.

the party may have the means of knowledge on a particular subject, only by sending to and obtaining information from a correspondent abroad. In the case of *Bilbie* v. *Lumley*, the argument as to the party having means of knowledge was used by counsel, and adopted by some of the judges; but that was a peculiar case, and there can be no question, that if the point had been left to the jury, they would have found that the plaintiff had *actual* knowledge. The safest rule, however, is, that if the party makes the payment with full knowledge of the facts, although under ignorance of the law, there being no fraud on the other side, he cannot recover it back again. There may also be cases in which, although he might, by investigation, learn the state of facts more accurately, he declines to do so, and chooses to pay the money notwithstanding; in that case there can be no doubt that he is equally bound. Then there is a third case,—and the most difficult one,—where the party had once a full knowledge of the facts, but has since forgotten them. I certainly laid down the rule too widely to the jury, when I told them, that if the directors once knew the facts, they must be taken still to know them, and could not recover, by saying that they had since forgotten them. I think the knowledge of the facts which disentitles the party from recovering, must mean a knowledge
*17] existing in the *mind at the time of payment. I have little doubt in this case that the directors had forgotten the fact, otherwise I do not believe they would have brought the action; but as Mr. *Platt*(a) certainly has a right to have that question submitted to the jury, there must be a new trial." The other barons concurring, the rule was made absolute. That case, therefore, is a decisive authority in favour of the defendant. In *Bilbie* v. *Lumley*, 2 East, 469, it appeared not only that the party who made the payment had the means of knowledge, but also that he had the actual knowledge, of all the material facts. In every case where the plaintiff has been held entitled to recover money paid under a mistake of the facts, the means of knowledge existed, if they had been exercised. Thus, in *Bize* v. *Dickason*, 1 T. R. 285, where a bankrupt had underwritten a policy to a broker acting under a commission *del credere*, and losses on the policy happened before the bankruptcy and were adjusted by the bankrupt, it was *held* that, as the broker might have deducted the amount of the loss from the debt which he owed to the estate of the bankrupt, but had, by mistake, paid all that was due, to the assignees, without deducting such money, he might recover it from them, as money had and received to his use.(b) In
*18] that *case there is no doubt that the broker might have known all the circumstances. So, in *Cox* v. *Prentice*, (3 M. & S. 344,) where the

(a) Counsel for the defendant.

(b) *Bize* v. *Dickason* would seem to be the case of a payment made rather under a mistake of *law* than of *fact*. It does not appear from the report that the plaintiff was in ignorance of any of the facts. The rule laid down by Lord Mansfield is very broad. "Where money is paid *under a mistake*, which there was no ground to claim in conscience, the party may recover it back again by this kind of action." (p. 287.) Gibbs, J., in commenting upon this case in his judgment in *Brisbane* v. *Dacres* (5 Taunt. 154,) says, "It is most certain that the only question under the consideration of the court was, whether the right of the broker,—who had a *del credere* commission,—to make the deduction, ranged itself under the case of *Grove* v. *Dubois*, 1 T. R. 112, and Mingay declined all argument, and gave up the case. It was taken for granted without argument, that if the plaintiff would have had a right to make the deduction before payment, he might recover back the amount after payment." And afterwards, observing upon the passage from Lord Mansfield's judgment above cited, he adds, "Mistake may be a mistake of law or of fact; but I cannot think Lord Mansfield said 'mistake of law,' for Lord Mansfield had, six years before, in *Lowry* v. *Bourdieu*, 2 Dougl. 467, heard it said, 'money paid in ignorance of the law could not be recovered back,' and had not dissented from the doctrine, and Buller, J., sat by him, who had expressly stated the distinction six years be-

defendant had received from his principal abroad a bar of silver, and took it to the plaintiffs, who melted it, and sent a piece to an assayer to be assayed at the defendant's expense, and paid a price for the bar to the defendant, as for the number of ounces of silver which, by the assay, it was calculated to contain, which number was afterwards discovered to exceed the true quantity; it was held, that the plaintiff's might, after having offered to return the bar, maintain an action for money had and received against the defendant for the price thus paid to him under a mistake. There, also, the plaintiffs might, by inquiry, have ascertained the exact quantity of the silver before they paid the money over to the defendant. The principle upon which all these cases have been decided, has in truth, nothing to do with the fact of the party having or not having the means of knowledge. If, indeed, a payment be made voluntarily, either with a full knowledge of the facts, or under a determination not to inquire into them, the money so paid cannot be recovered: but that is not the present case; for it is obvious that this defendant always considered *himself liable upon the bill, and [*19] was so treated by the other parties, when, in fact, he was discharged from his liability by the alteration that had been made in the bill. The note, therefore, was given by the defendant under a belief that he was discharging a legal liability; there was a mistake in fact, and not in law; consequently the note cannot be enforced against him. [TINDALL, C. J. It appears that at one time the defendant must have known the bill had been altered; as the memorandum, in his own writing, shows the time when it was originally due.] The fact was not in his mind at the time he gave the note: the jury have so found, and that amounts to want of knowledge on his part.

Independently of the want of knowledge there is, moreover, enough upon the face of the plea to afford a good defence. It is stated, that the note was given without consideration; and that would be sufficient after verdict. In *Easton* v. *Pratchett*, 1 C. M. & R. 798., 4 Tyrwh. 472,(*a*) in assumpsit on a bill of exchange by endorsee against endorser, the defendant pleaded that he endorsed the bill to the plaintiff, without having or receiving any value or consideration whatsoever for or in respect of his said endorsement, and that he had not at any time had or received any value or consideration whatsoever, for or in respect of such endorsement. It was held that the plea was sufficient after verdict, although on special demurrer it might have been bad, for not setting forth the circumstances under which the bill was sought to be impeached. On the authority therefore of that case, the present plea would be sufficient, as alleging want of consideration; even should the court be disposed to think that the defendant, having had the means of knowledge, could not resist the payment of the note; for having been given without consideration, it would amount to *a mere present, and [*20] would afford no ground of action.(*b*)

fore, in *Lowry* v. *Bourdieu*, and would not have sat by and heard the contrary stated without noticing it."

Upon the point that money paid under a mistake of law, but with knowledge of the facts, cannot be recovered, *Brisbane* v. *Dacres*, 5 Taunt. 143, is a leading authority. And see post, 26.(a)

(*a*) Affirmed upon a writ of error, 2 C. M. & R. 542.

(*b*) Vide Pothier. Traité du Contrat de Change, No. 225, "*Des Rescriptions.*" No. 231, 235. "*Des Rescriptions pour cause de Prêt ou de Donation,*" as to orders for the payment of money made by way of *gift* to the payees.

And see antè, vol. ii. 691,(a) as to the the general rules by which *donations inter vivos* and *donations mortis causâ*, are governed.

Channell, Serjt., in support of the rule. The decision in *Kelly* v. *Solari*, 9 M. & W. 54, which had not been reported when the present rule was moved for, is undoubtedly adverse to the plaintiff; but still that case is to be distinguished from the present. The circumstances of this case are strong to show that the defendant had actual knowledge of the alteration of the bill at the time he gave the note; but as the jury have found the other way it must be so taken. Still there can be no doubt that he had the amplest means of knowing the fact. The previous authorities certainly seem to bear out the proposition, that it is not enough for a party to have made a payment in ignorance of the facts, but that if he had full means of knowledge he cannot recover the money paid. And this rule appears to be consonant with common sense. Suppose a party to make a payment in ignorance of facts, which, by using the most ordinary diligence he might have ascertained, it seeems hard upon the party receiving the money that he should be obliged to refund it, after a long period had elapsed, and when the situation of the parties may have been entirely changed; for if the rule contended for is strictly adopted, it would follow that the party paying under such circumstances might recover the money at any time within six years. In *Milnes* v. *Duncan*, 6 B. &. C. 671, (13, E. C. L. R.,) 9 D. & R. 731, a bill of exchange had been
*21] drawn in Ireland, upon the stamp required *by law, which was less in amount than the stamp required on a bill drawn for the same sum in England; but there was nothing on the face of the bill to show that it had been drawn in Ireland. The holder in England neglected to present it for payment, and held it a month after it was due. The acceptor having become bankrupt, the holder applied for payment to the indorser who paid it to him. The latter refused to pay it, alleging that the holder had made it his own by his *laches*. The holder then threatened to sue him, alleging that the bill was void on the ground that it was drawn on an improper stamp. The endorser inspected the bill, and finding that the stamp was not that required for a bill of the same amount drawn in England, but ignorant of the fact that it had been drawn in Ireland, paid the amount to the holder. It was held that the money, being paid in ignorance of the fact, and there being *no laches* imputable to the party who paid the money, he might recover it back in an action for money had and received. The want of *laches* was strongly relied upon in that case. BAYLEY, J. in giving his judgment said, "There is no doubt as to the rule of law applicable to this case. If a party pay money under a mistake of the law, he cannot recover it back. But if he pay money under a mistake of the real facts, and no *laches* is imputable to him, (in respect of his omitting to avail himself of the means of knowledge within his power,) he may recover back such money," 6 B. & C. 677, (13 E. C. L. R.) And LITTLEDALE, J added, "whether the bill was valid or not depended on a fact of which the plaintiff was at that time ignorant, viz., whether it was drawn in England or Ireland It is said, that he had means of knowing that, for he might have inquired of the prior endorser; but there being
*22] nothing on the face of the *bill to lead him to suppose that it was drawn in Ireland, he was not *bound* to make any inquiry," 6 B. &. C. 680. In the present case there was that on the face of the bill which ought to have induced a man of ordinary caution and prudence to make inquiries concerning the matter; the alteration was plain enough, and the defendant having had previous knowledge of the original date, ought to have had his attention alive to the fact. *Bilbie* v. *Lumley*, 2 East. 469, is also in favour of the plaintiff. *Kelly* v. *Solari*, though apparently an autho-

rity against him, may be supported upon a ground which is not applicable to this case. The passage cited from Lord ABINGER's judgment is most strongly in favour of the defendant; but a passage from the judgment of PARKE, B., shows the true ground of the decision. His lordship says, "I think that where money is paid to another under the influence of a mistake; that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back; and it is against conscience to retain it," 9 M. & W. 58. In that case it would undoubtedly have been most unconscientious in the defendant to keep the money when the policy had lapsed. But supposing the note had been paid in this case, and the defendant were seeking to recover back the amount, there would be nothing unconscientious on the part of the bank in retaining it; for it does not appear, they had any more knowledge of the alteration in the bill than the defendant. It might have been different if there had been any misrepresentation on their part; or if they had known of the alteration and that they had lost their remedy, and had not shown their bill to the defendant.

* As to the other point, the authority of *Easton* v. *Pratchett* is not disputed. A plea which distinctly alleges that a bill or note was given without consideration, is sufficient after verdict; but in this case there is no distinct statement of want of consideration. The plea says that the defendant, believing he was liable on the bill, and being ignorant of the alteration in the date, agreed to deliver the note "in consideration of his supposed liability, and for no other consideration whatever," and in pursuance of such agreement did deliver the same "in consideration of his said supposed liability upon the said bill, and for no other consideration whatsoever;" and then it concludes thus: "and *so* the defendant saith" that he made the note in the mistaken belief that he was liable upon the bill; "and that he, the defendant, never received any consideration or value for making the said promissory note." This is only a qualified statement of want of consideration; the words "and so," in the latter sentence, connecting both its branches with the former statement. [*23

TINDAL, C. J. The question before the court arises upon a plea in answer to a declaration against the maker of a promissory note; in which plea the defendant alleges that the note was given under a mistake as to the facts, and, in effect, states that the defendant having endorsed a bill of exchange for the accommodation of the drawer, the bill was afterwards, without the defendant's knowledge, altered in a material point, so as to relieve him from his liability; that a demand being made upon him in respect of the bill, he gave the note in satisfaction of that demand, being ignorant at the time that he had been discharged from liability by the alteration of the bill. That is the general substance of the plea. Then the question is, whether this plea is sufficient without further alleging that the defendant, at the time he gave the note, was *also without the means of knowledge of the alteration of the bill. Whatever doubts might have been created by the *dicta* in *Bilbie* v. *Lumley*, 2 East, 469, and other cases, it appears to me that the late case of *Kelley* v. *Solari*, 9 M. & W. 54, supra, 19, 21, is decisive upon the point, and establishes that it is not necessary to the validity of such a plea that it should negative the existence of the means of knowledge as well as actual knowledge. We can, in fact, regard the possession of the means of knowledge only as affording a strong observation to the jury to induce them to believe that the party had actual [*24

knowledge of the circumstances; but there is no conclusive rule of law that, because a party has the means of knowledge, he has the knowledge itself. There is no ground, therefore, for a rule for judgment *non obstante veredicto*.

There may be cases where the existence of the means of knowledge might lead irresistibly to the inference that the party had actual knowledge; but I think, as the jury have found that the defendant had not knowledge, in fact, when he gave the note, that this rule must be discharged. I may add, however, that the case of the present defendant is, in my opinion, stronger in his favour than if the money had been actually paid over and was sought to be recovered back; for *here* the defendant stands upon the invalidity of the document which he is called upon to pay.(*a*)

COLTMAN, J. The case of *Kelly* v. *Solari* has certainly modified an impression which previously existed in the profession, that a party, in order to recover back money paid under a mistake of facts, should also show that he had no means of knowing them. The inconvenience that has been
*25] pointed out in argument may *undoubtedly exist; but it is not sufficient to induce us to differ from that case, which must decide this question. I agree also, that this is a stronger case than the recovering back of money actually *paid;* for this is no more than a *promise* to pay.

ERSKINE, J. I am of the same opinion. It appears that the late case of *Kelly* v. *Solari* has overruled the *dicta* in the other cases cited at the bar; and it must now be taken that it is no answer in an action for money had and received, brought to recover back money paid by mistake, to say that the party had the means of knowing the facts, if he had not the knowledge in reality. But I think this case does not wholly depend upon that point. This is not an action to recover back money. If a party has *paid* money with a full knowledge of all the circumstances, he cannot recover it back; it is like a gift or a present (*b*); but this is an action brought on a note, for which the defendant says there was no consideration. He says, in effect, "I thought I was liable upon the bill at the time I gave the note; but I was ignorant of a fact that had freed me from my liability, and therefore there was no consideration for my signing the note." The jury have found that the note *was* given in ignorance of that fact; there was therefore no consideration for it. It is a much stronger case than *Kelly* v. *Solari;* and there is nothing unconscientious in the defendant's resisting the claim.

CRESSWELL, J. I also am of opinion that this rule must be discharged. It has hardly been contended that the direction of the Lord Chief Justice was incorrect. The question left to the jury was, whether the note had
*26] been given in ignorance of the alteration of *the bill. They have found it was so given, and no attempt is made to disturb their verdict in that respect. But a point is now raised, whether it was sufficient for the defendant to negative knowledge of the alteration, or whether it was not necessary for him to negative also the possession of the means of knowledge. The case has been argued upon analogy to an action for money had and received; and in that view I should consider we were bound by the late case of *Kelly* v. *Solari*, 9 M. & W. 54; which does not appear to me to be at variance with the decisions in former cases. Where a party has the means of knowledge, it may be evidence of *actual* knowledge; but no case has been decided that means of knowledge are equivalent, as a matter of law, to actual knowledge. In *Milnes* v. *Duncan*, 6 B. &. C. 671,

(*a*) And see *Coles* v. *The Bank of England*, 10 A. & E. 437, (37 E. C. L. R.) 2 P. & D. 521.

(*b*) Vide ante, 20 (a).

9 D. & R. 731; a party who had paid money in ignorance of the real facts, though he had the means of knowledge, was held entitled to recover. But, supposing the means of knowledge to be equivalent to actual knowledge, I do not see how the absence of *laches* could make any difference.

On the second point the case in the Exchequer is strongly in favour of the defendant. This is not an action to recover money. If money be paid without consideration, and with a full knowledge of the facts, it cannot be recovered back; but a party who makes a promise without consideration, in ignorance of the true state of the facts, may certainly say he is not bound to the performance of it. Suppose, in this case, the defendant, omitting the latter part of the plea, had only stated that there was no consideration for the note by reason of his want of knowledge of the facts, and the plaintiff had replied, "you had the means of knowledge," would that replication have been sufficient? I *apprehend, clearly not. On the authority, therefore, of *Kelly* v. *Solari* I think the rule must be discharged. [*27

Rule discharged.(a)

(a) See *Hornbuckle* v. *Hornbury*, 2 Stark. N. P. C. 177; *Williams* v. *Bartholomew*, 1 Bos. & P. 326; *Stevens* v. *Lynch*, 12 East, 38, S. C. 2 Campb. 332; *East India Company* v. *Tritton*, 3 B. & C. 280, 290, S. C. 5 D. & R. 214, Dig. lib. 22, tit. 6; Doctor and Student, Dial. 2, cap. 46, 47; Pothier, Traité de l'Action Condictio indebiti, part. 2, sect. 3, art. 3, 2 Nev. & M. 711, 6 N. & M. 87, (a); *Chatfield* v. *Paxton*, 2 East, 471, n., more fully stated by Gibbs, C. J., in 5 Taunt. 155.

In *Lucas* v. *Worswick*, in the court of Common Pleas of the county palatine of Lancaster, 1 Moo. & Rob. 293, Lord Denman, C. J., and Bolland, B., held that money had and received lies to recover back the amount of a payment made under a *forgetfulness* of facts.

THOMAS WEBSTER and ELIZABETH his Wife to RICHARD CARLINE.

The two commissioners who take the acknowledgment in England, of a married woman, under sects. 79 & 81, of 3 & 4 W. 4, c. 74, must both be appointed for the county in which the acknowledgment is taken.

Talfourd, Serjt., moved that an acknowledgement by a married woman taken at Worksop, in the county of Nottingham, where the property lay, might be filed of record, under the 85th section of the 3 & 4 W. 4, c. 74, (the fines and recoveries act)(a). A difficulty *had been raised in the master's office because it appeared that one only of the commissioners before whom the acknowledgment had been taken, had been appointed for the county of Nottingham, the other being a commissioner for the county of Lincoln. The eighty-second section, it was submitted, had provided for such a case, having enacted, "that any person appointed commissioner for any particular county, riding, &c., shall be competent to take the acknowledgment of any married woman, wheresoever she may reside, and wheresoever the lands or money in respect of which the acknowledgement is to be taken may be." [28*

(a) Sect. 79 enacts, "That every deed executed by a married woman shall be acknowledged by her before a judge, a master in chancery, or two commissioners."

Sect. 80 enacts, "That the judge, &c., before receiving such acknowledgment, shall examine her apart from her husband."

Sect. 81 enacts, "That the Lord Chief Justice of the Common Pleas shall from time to time appoint persons for every county, riding, division, soke or place for which there may be a clerk of the peace, to be perpetual commissioners for taking such acknowledgments."

By sect. 85, the certificate of the acknowledgment, signed by the judge or commissioners, with an affidavit verifying the same, is to be lodged with some officer of the court of Common Pleas, who shall cause the same to be filed of record in the court.

TINDAL, C. J. That cannot mean that the commissioners are to act except in the county for which they are appointed. Otherwise what would be the use of appointing them for separate counties?

The learned serjeant consequently Took nothing.

DOE dem. NOTTIGE v. ROE.

Where judgment against the casual ejector is sought to be obtained upon service on the agent of the tenant, the tenant being abroad, the agency must be distinctly sworn to; and it is not sufficient that the party serving the declaration has been informed by the party served, and believes that such party is agent.

Channell, Serjt., moved for judgment against the casual ejector. It appeared from the affidavits that information had been obtained from certain parties,—who stated themselves to be the agents of Paine, the tenant in possession, for the purpose of letting the premises, (which information the deponent swore he believed to be true,)—that Paine was abroad; the declaration had been served on these parties, and had also been affixed on

*29] the door of the premises. He *cited *Doe dem. Dickens* v. *Roe*, 7 Dowl. P. C. 121, 6 Scott, 754, where, in ejectment to recover possession of a chapel, the tenant in possession having quitted the country, and not being likely to return, service had been effected on the person in whose custody the keys of the chapel were placed, on the wife of the tenant, and on his servant; and the court granted a rule absolute in the first instance; and *Doe dem. Scott* v. *Roe*, 6 New Ca. 207, (37 E. C. L. R.,) 8 Dowl. P. C. 254, where the tenant in possession having absconded, leaving the key of his house in the hands of a broker, with instructions to let the house; it was held that service of a declaration in ejectment, by delivering a copy to the broker, and fixing a copy on the door of the house, was a sufficient service.

TINDAL, C. J. In the case last referred to, it distinctly appeared that the broker, on whom the service was effected, was the agent of the tenant. Here, the fact of agency is only stated upon the authority of the agent himself; and it is the interest of the lessor of the plaintiff to believe the statement so made.

Rule refused (*a*)

(*a*) And see *Doe dem. Richard Barrow* v. *Roe*, antè, vol. i. 238, (39 E. C. L. R.,) and cases there collected.

*30]

*DOE dem. STANWAY v. ROCK.

In 1816 A. let B. into possession of lands under an agreement for purchase, which was never completed. B. continued in possession till his death in 1822, without having paid rent. He devised all his real estate to C., his widow, who entered into possession of the premises. Rent was demanded of her in 1827, which she promised to pay, but did not.

In ejectment for the premises brought in 1842 by parties claiming under A., it was left to the jury to say whether a tenancy at will had been created between A. and C.,—the action being otherwise barred by the 3 & 4 W. 4, c. 27, s. 7: *Held*, a proper direction.

EJECTMENT, for certain shambles in the market place of the town of Wednesbury.

At the trial before PATTESON, J., at the last assizes for the county of Stafford, the only question was, whether the lessor of the plaintiff was barred by the limitation of actions act, (3 & 4 W. c. 27.) The following facts were proved.

About the year 1816, one Richard Woolrich entered into an agreement for purchasing the piece of land in question from Sir Joseph Scott, Bart., and Mr. Foley, lords of the manor of Wednesbury, for the sum of 30*l.*; and under this agreement Woolrich was let into possession. In January, 1817, Woolrich entered into a written contract with one Thomas Butler for the sale of his equitable interest in the premises for 100*l.* This contract recited the former agreement, and that Woolrich had got no conveyance of the land, and was unable to pay the purchase-money; and that he had erected shambles on the land in question. Woolrich, however, continued in possession till his death, the exact date of which did not appear, but he was buried on the 8th of January, 1822. By his will he devised all his real estate (generally) to his widow; and she received the rents of the shambles in question down to her death in 1837. There was no evidence of any payment of rent by Woolrich or his widow to Scott and Foley; but it was proved, that in the year 1827 the latter held a rent day, and sent a message to Mrs. Woolrich, desiring her to come over and pay the rent for the shambles, and that she sent back word that she would come, or send over, presently; *but it was not proved that she either went or paid the rent. Mrs. Woolrich made a general devise of all her real estate, equally, among her children by a former marriage with one Rock. After her death the defendant, one of these children, received the rents of the shambles. No rent was ever paid by him to Scott and Foley. [*31

In 1836 Butler died, having appointed the lessor of the plaintiff one of his executors, and devised and bequeathed to him considerable interests both in his real and personal estates.

In 1839 (after previous negotiations) the representatives of Scott and Foley conveyed the premises in question, in fee, to the lessor of the plaintiff; but no notice was taken in the conveyance of the original contract for sale to Woolrich.

The declaration in the present ejectment was served on the 8th of January, 1842, exactly twenty years after the day of Woolrich's burial.

It was contended on the part of the plaintiff that, even supposing the evidence was not satisfactory as to a fresh tenancy having been created between the lords of the manor and Mrs. Woolrich, still, Woolrich having been let into possession under a contract for purchase before the conveyance, the lords of the manor were mere trustees for him; that his widow, claiming under him, was in the same situation; and that the case consequently fell within the provision of the seventh section of the stat. 3 & 4 W. 4, c. 27.(*a*)

*On the part of the defendant it was contended, that Mrs. Woolrich never was tenant to the lords of the manor; that Woolrich, under the circumstances, was merely a tenant at will under them; that his tenancy was determined, at the latest, by his death; and that consequently the action was not brought in time: and also that the proviso of the seventh section did not apply. PATTESON, J., (after consulting CRESSWELL, J.) was of opinion that the proviso applied only to cases of express trusts; and the [*32

(*a*) Which enacts "That when any person shall be in possession, or in receipt of the profits, of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: provided always, that no mortgagor or *cestui qui trust* shall be deemed to be a tenant at will within the meaning of this clause, to his mortgagee or trustee."

only question left to the jury was, whether Mrs. Woolrich had become tenant at will to Scott and Foley. The jury found in the negative, and returned a verdict for the defendant.

Talfourd, Serjt., now moved for a new trial, on the ground of misdirection. He renewed the objection taken at the trial, and contended that the right of the lessor of the plaintiff was preserved under the proviso of the seventh section of the act. In Sugden on Vendors and Purchasers, the rule is laid down that "when a contract is made for the sale of an estate, equity considers the vendor as a trustee for the purchaser of the estate sold, and the purchaser as a trustee of the purchase money for the vendor."(a) In the present case, therefore, the lessor of the plaintiff, claiming under the original vendors, is in the situation of trustee for the purchaser and those who claim under him; for, although there was no express trust, there was an implied one, which brings the case sufficiently within the terms of the statute. If the lessor of the plaintiff can avail himself of the equitable relation of trustee and *cestui que trust*, there has been no adverse possession. In *Hall* v. *Doe dem. Surtees*, 5 B. & Ald. 687, (7 E. C. L. R.,) 1 D. & R.
*33] 340, where premises were mortgaged in *fee with a proviso for reconveyance if the principal were paid on a given day, and in the mean time that the mortgagor should continue in possession: upon special verdict it was found that the principal was not paid on the given day, but that the morgagor continued in possession. There was no finding by the jury either that interest had or had not been paid by the mortgagor; and it was held that, upon the finding, it must be taken that the occupation was by the permission of the mortgagee; and consequently that, although more than twenty years had elapsed since default in payment of the money, still the mortgagee was not barred by the statute of limitations. [COLTMAN, J., referred to *Howard* v. *Shaw*, 8 M. & W. 118.]

At any rate, supposing Woolrich to have been tenant at will when he died, his widow must be taken to be in the same situation, as she claimed under him; she was in by permission of the lords of the manor, under a similar relation. In *Doe dem. Bennett* v. *Turner*, 7 M. & W. 226, the lessor of the plaintiff, had, in the year 1817, let the defendant into possession of lands as tenant at will, and in 1827 had determined such tenancy by entry upon the land, and cutting and carrying away stone without the tenant's consent; and the court held, that if the tenant was in afterwards by sufferance only, then the twenty years must be calculated from the expiration of the first year after the commencement of the original tenancy at will, viz. in the year 1818; but that, if a new tenancy at will was created between the parties, then the twenty years should be calculated from the expiration of the first year of such new tenancy, viz. in the year 1828. The determination of the first tenancy at will was, in that case, effected by the act of the landlord; here, by the death of the tenant; but if a new tenancy
*34] at will *was created, then the statute would not begin to run till the end of a year from the commencement thereof, viz. in 1823; and if that were so, the present ejectment was brought in time.

TINDAL, C. J. In order to constitute a tenancy at will something must be done by the lessor. It appears to me that it was properly left by the learned judge to the jury to say, whether a tenancy at will had been created between the lords of the manor and Mrs. Woolrich, that being the only fact on which there could be any question in the case.

(a) Vol. i. p. 273, 10th ed.

ERSKINE, J. There appears to have been no evidence to shew that Mrs Woolrigh claimed under her husband.

COLTMAN and CRESSWELL, JJ., concurring—

Rule refused.

*WARD v. KIRKMAN. [*35

The plaintiff issued a *distringas*, which was served on the defendant, together with the usual notice, stating that his goods had been distrained, though in fact he had no goods to distrain upon;(*a*) and the sheriff afterwards returned *nulla bona*.

Held, that the plaintiff was entitled to enter an appearance.

Channell, Serjt., moved on behalf of the plaintiff for leave to enter an appearance for the defendant pursuant to the 2 & 3 W. 4, c. 39, s. 3.(*b*)

It appeared from the affidavits that a writ of *distringas* *to compel an appearance, had issued and been delivered on the 30th of March [*36 to a sheriff's officer. On the 16th of April search was made for the return to the writ, and it was found that the sheriff had returned *nulla bona*. On the 2nd of April a copy of the *distringas*, with the usual notice at the foot,(*c*) had been served on the defendant personally, and that there were no goods of the defendant's which the sheriff could distrain.

TINDAL, C. J. Although the notice at the foot of the writ states what, in the particular case, is not strictly true, namely, that the sheriff had distrained upon the defendant's goods, the defendant himself must have been fully aware of the real state of the facts. The notice is sufficiently intelligible to relieve the case from any difficulty.

The other judges concurring— Rule granted.

(*a*) It is sometimes necessary to pursue an established form, where its terms are not strictly applicable to the particular case. Thus, "If a man has judgment to be hanged, his land escheats to the lord, though he die before execution; and the writ of escheat should say,—*quia suspensus*," F. N. B. 144, H.

(*b*) This section authorizes the court or judge to order a writ of *distringas* to be issued, directed to the sheriff, &c., which writ is to be in the form, and with the notice subscribed thereto, mentioned in the schedule, (as above,) "which *writ of distringas and notice*, or a copy thereof *shall be served on such defendant*, if he can be met with, or, if not, shall be left at the place where such *distringas* shall be executed; and a true copy of such writ and notice shall be delivered together therewith to the sheriff, &c., to whom such writ shall be directed," and if the writ shall be returned *non est inventus* and *nulla bona*, and the plaintiff does not intend to proceed to outlawry, and the defendant does not appear, and the court, &c. shall be satisfied that due and proper means were taken *to serve and execute the writ*, the court, &c. may authorize the plaintiff to enter an appearance for the defendant, &c.

It is not very easy to follow the course of proceeding pointed out by the legislature in this section. It would rather appear that the service of the writ *and notice* upon the defendant, if he can be met with, is to precede the delivery of the writ to the sheriff: but the notice states, that the defendant's goods have already been distrained by the sheriff. The power to order an appearance to be entered would also seem to be limited to cases where there has been a return of *non est inventus* and *nulla bona*; it having been perhaps thought that, if the defendant could be served with the writ of *distringas*, he might also have been served with the writ of summons.

(*c*) The form of the notice given in the schedule (No. 3) to the act (2 & 3 W. 4, c. 39,) is as follows:—

"Mr. C. D.—Take notice that I have this day distrained upon your goods and chattels in the sum of 40*s*., in consequence of your not having appeared in the said court to answer to the said A. B. according to the exigency of a writ of summons, bearing date the —— day of ———, and that in default of your appearance to the present writ within eight days inclusive after the return hereof, the said A. B. will cause an appearance to be entered for you, and proceed thereon to judgment and execution."

*37] *SHARP v. LETHBRIDGE.
Same v. N. FORD.
Same v. J. FORD.
Same v. SHERWELL.
Same v. BOON.

Where five separate actions were brought on five distinct guarantees of 50*l.* each, given by five several parties for the payment of 250*l.*, the proceedings, in four of the actions, were ordered, by a judge at chambers, to be stayed, the defendants consenting to be bound by the verdict in one, provided that such verdict were to the satisfaction of the judge who tried the cause, the plaintiff to be at liberty to apply to open the order after plea, on the ground that the issue would not decide the merits in the other actions:
***Held*, that this was a proper order.**

In the above actions MAULE, J., at chambers had made the following order, at the instance of the defendants:—

"Upon hearing the attorneys, &c., I do order, that all further proceedings in the four last-mentioned actions be stayed until after the trial of the first-mentioned action; the defendants in such four last-mentioned actions hereby consenting to be bound and concluded by such verdict as shall be given in the first-mentioned action; provided the same shall be to the satisfaction of the judge before whom the same shall be tried. The plaintiff to be at liberty, when the defendant in the first-mentioned action has pleaded, to apply to open this order on the ground that the issue in the first-mentioned action will not decide the merits of the others."

It appeared from the affidavits upon which the order was obtained, that the five actions were brought in respect of five separate guarantees for the amount of 50*l.* each, given by the defendants respectively to insure the payment of the sum of 250*l.* by one Mason to the National Provincial Bank of England (of which the plaintiff was a public registered officer:) that the guarantees were not dated or signed on the same day; and that Mason had become bankrupt, and owed the bank 500*l.*

*38] **Bompas*, Serjt., on behalf of the plaintiff, applied to rescind the learned judge's order, which, he contended, was of a perfectly novel kind. [Erskine, J. Is it not like the ordinary case of consolidating actions brought against different underwriters on a policy of insurance?] (*a*) There the different actions are brought upon the same instrument: here they are all upon different instruments. [ERSKINE, J. Is there no instance of the consolidation of actions brought upon different policies where the risk was the same?] (*b*) But in the present instance, the causes of action are as much separate as if they had arisen upon separate promissory notes.(*c*)

(*a*) Vide post, p 39 (b).

(*b*) The rule is stated in Archbold's Prac. (p. 830, 4th ed.) to apply to cases "where several actions are brought *upon the same policy*."

(*c*) See *Maasenden* v. *O'Hara*, Runnington, Serjt., Tidd's Pr. 614, 9th ed., where three actions having been *necessarily* brought by the same plaintiff against the same defendant, upon three notes of hand, which became due at three different times, the court of K. B. refused to consolidate them. But in *Oldershaw* v. *Tregwell*, 3 C. & P. 58, (37 E. C. L. R.,) where two actions had been brought on two bills of exchange, payable at different times, the action on the first bill having been brought before the second bill was due; Lord Tenterden, C. J., said, "These parties need not in this case have been at the expense of two trials. If an application had been made to a judge at chambers, an order might have been obtained to consolidate the actions." In *Cunnach* v. *Gundry*, 1 Chitt. R. 709, very shortly reported, as *Cormack* v. *Gundry*, 3 B. & Ald. 272, (5 E. C. L. R.,) the court of K. B. refused to consolidate into one count ninety-eight counts in a declaration, upon as many promissory notes of a country banker, for 1*l.* each; but they made a rule (by consent) that all the counts should be struck out except one, and that the ninety-seven other notes might be given in evidence under the account stated. In *Lane* v. *Smith*, W. E. Taunton, Tid. Pr. 617, 9th ed., 3 Smith, 113, where the declaration contained 286 counts on similar notes, the court had refused to

In the books of practice one instance is certainly mentioned where actions brought against different *persons for the same assault were ordered to be consolidated; but that does not appear to have been done a second time.(*a*) In the present case, the fact of Mason having become bankrupt may give rise to great difficulties. [*39

TINDAL, C. J. If these guarantees were on one piece of paper, and the defendants were severally liable for 50*l.* each, there could have been no doubt as to the application of the principle of the usual practice in actions on policies of insurance; in which, where several parties are liable on the same policy, it has been the established practice that a consolidation rule should be granted.(*b*) The courts, to avoid unnecessary expense both to the plaintiff and defendant in these cases, have been in the habit of staying the actions brought against the different underwriters till one of such actions is decided. And this is not only a most equitable rule, but one that is highly beneficial for the plaintiff; inasmuch *as he has the option of selecting the most favourable case to try. [*40

Then the question here is, whether there is any real and substantial difference, because the guarantees are written upon separate pieces of paper. In fact the same question and the same liability arise in each case. The different defendants might have opposed the present order, on the ground that they would possibly have different defences to set up; but it is not easy to see why the plaintiff should do so.

COLTMAN, J. This is in fact an order to stay the proceedings in various actions that have been brought upon the same liability, the object being that all should abide the result of one, the plaintiff having the liberty reserved of selecting any one case. I cannot see why he should object to such an arrangement, as no particular inconvenience can result to him from its being carried into effect. It is objected that Mason has become a bankrupt; but the plaintiff may still prove his debt under the *fiat*, and receive his dividend. The only purpose for which he can object to the course proposed, must be to increase the costs.

ERSKINE, J. There is no doubt as to the rule, that where there are several parties jointly and severally liable on the same instrument, and separate actions are brought against them, the court will consolidate the actions in order to prevent such a vexatious proceeding. And this is not the only case. It appears to me that the same principle applies where there are separate instruments, and a separate liability in respect thereof, but where no difference exists as to such liability. In actions on policies of insurance, where the underwriters are *separately* liable, the same course is adopted,

strike out the counts on the notes. It appears from the reports of that case, that, besides the counts on the notes, the declaration contained counts for money lent and money had and received, but it does not appear whether there was also a count upon an account stated.

(*a*) See *Harper* v. *Woodhouse*, Prac. Reg. C. P. 151, Anon. 1. Chitt. Rep. 709, a, where a rule was made to consolidate two actions of trespass for foxhunting over the plaintiff's premises, situate in the same parish, though committed at different times. In *Jones* v. *Enderup*, Prac. Reg. C. P. 150, however, where the declaration contained thirty counts for assaults, the court, upon an affidavit that the defendant had assaulted the plaintiff sixty several times, refused to strike out any of the counts. And in *Bayley* v. *Raby*, 1 Stra. 420, the court refused an application, that four several declarations in trespass against four different persons might be put into one, upon an affidavit that the trespass, if any, was committed by all jointly; and observed, "We never went so far as the case of different persons, but only where the declarations are between the same parties. *The plaintiff may have the benefit of the others' evidence in his action against either; but this will be to deprive him of that.*" If the rule had been shaped as in the principal case, that objection, it seems, would not have been applicable.

(*b*) As to the origin and establishment of this rule,—introduced by Lord Mansfield, C. J., — see Park on Insurance, Introd. vol. i. pp. xliv. xlv., Tidd Pr. 614, 615, 9th ed.

[*41 not on the ground that the actions were improperly brought *in the first instance, but in order to save useless expense to the parties. In these cases the defendants agree to be concluded by the decision in the action tried. The plaintiff always has it in his power to try whichever case he likes. The learned judge's order, indeed, directs that the other cases shall abide the event of the case of *Sharp* v. *Lethbridge;* but the plaintiff might have selected any of the other cases if a reason had been suggested for his so doing. It appears to me, therefore, that the only object in opposing this application must be to put costs in the pocket of the plaintiff's attorney.

CRESSWELL, J., concurred. Rule refused.(a)

(a) In *The Royal Exchange Company* v. ——, 1 Chitt. Rep, 709, n, this court refused to consolidate two actions brought on two bonds, although they were precisely similar to each other But in *Kay* v. *Hill*, 2 B. & A. 538, (22 E. C. L. R.) the assignee of a bail bond, having brought actions against each of the bail, the court of King's Bench, upon payment of the costs of one action only, stayed the proceedings in all. In *Cecil* v. *Brigges*, 2 T. R. 639, two actions in assumpsit, between the same parties, were consolidated, where the causes of action arose in the same county, and the defendant had been held to bail in each. Consolidation was refused in two actions between the same parties to try a right of way in different parts of the same town; *Mynot* v. *Bridge*, 2 Stra. 1178. In ejectment, where ten separate declarations were delivered for ten separate houses upon the same title, the court refused an application to put them all into one issue. *Smith* v. *Crabb*, Ibid, 1149; but where different causes in ejectment depend on the same title, it is now the practice to consolidate. See 2 Sellon's Prac. 144; *Doe d. Pulteney* v. *Cavan*, Imp. K. B. 931; *Grimstone* v. *Burgers*, Barnes, 176.

*42]

*NORTON v. POWELL.

A plea, that the contract declared upon,—being a contract which, under the statute of frauds, required the defendant's signature,—was entered into with the plaintiff on a Sunday, in the way of the plaintiff's ordinary business, is not supported by evidence that the contract was signed and delivered by the defendant to C. on a Sunday, and delivered by C. to the plaintiff on a subsequent day.

A guarantee given by B., a tradesman, to A., another tradesman, for the faithful services of C., a traveller, to be employed by A., is not an act done in the way of the ordinary business of B., within the meaning of the 29 Car. 2, c. 7.(a)

A declaration by A. against B., upon a guarantee, is supported by proof of a document drawn up in the plural number, and concluding "as witness our hands," but signed by B. alone.

The declaration stated the consideration to be, that A. "would then engage" C as traveller, and averred that A. "did then engage C.:" it was proved that A. had previously employed him in that capacity on one occasion:

Held, that this proof was sufficient.

Quære, whether A. (before 6 & 7 Vict., c. 85) was an admissible witness on behalf of B., to prove that he had paid over money to C. on account of B.

ASSUMPSIT. The declaration stated, that the plaintiff, before, and at the time of the making of the promise, &c., was, and from thence had been and still was, a button factor; and that in consideration that the plaintiff, *at the request of the defendant*,(b) *would then engage* one Edward Tarrand as traveller and salesman to the plaintiff, in his business of button factor aforesaid, the defendant then promised the plaintiff to indemnify him for any loss he

(a) The defendant, by his plea, appears to have sought to raise the question whether A.'s *acceptance* of the guarantee was an act in the way of *his* ordinary business as a button maker, or, in other words, whether it was the usual course of business for manufacturers and wholesale dealers, who employ travellers, to take security for the faithful discharge of the travellers' duties. No acceptance of the guarantee being shown to have taken place on a Sunday, it became unnecessary, in fact, to consider whether the act of such acceptance on a Sunday would have been within the statute.

(b) These words, though mere surplusage here, would have been necessary in a declaration on an executed consideration, vide post, 46 (b).

might be called upon to sustain through the immoral or dishonest conduct of the said E. T., whilst the said E. T. *should continue in the plaintiff's employment as such traveller and salesman. Averment: [*43 that the plaintiff confiding, &c., *did then engage* the said E. T. as his traveller and salesman as aforesaid, and that the said E. T., as such traveller and salesman, received of and from divers persons, to wit, John Howell, &c., divers sums of money, and divers goods and chattels of great value, in the whole amounting to a large sum of money, to wit, &c.; which sums, &c., the said several persons owed to the plaintiff, and which money and goods the said E. T., as such traveller and salesman, then, and on the said other days and times, received from the said persons, for and on account of the plaintiff, and in satisfaction and discharge of the money so owing from the said persons to the plaintiff; and the said persons did then, and on the other days and times, pay and deliver unto the said E. T., as such traveller and salesman as aforesaid, the said several sums of money, and goods and chattels, for and on account of the plaintiff, and in such satisfaction and discharge as aforesaid. And, thereupon, it then became and was the duty of the said E. T., as such traveller and salesman as aforesaid, as a moral and honest servant of the plaintiff, well and faithfully to account with the plaintiff for the said sums of money and goods and chattels so received by him as aforesaid, and to pay and deliver to the plaintiff the said sums of money, and the said goods and chattels on request. Yet the said E. T. did not, nor would, although he was, to wit, on, &c., requested by the plaintiff so to do, well and faithfully or otherwise account with the plaintiff for the said sums of money or any part thereof, or pay or deliver to the plaintiff the said sums of money or any part thereof, or the said goods and chattels or any part thereof; but on the contrary thereof, the said E. T. then wholly refused so to do, and did then, immorally and dishonestly, convert the said sums of money and *the said goods and chattels to his own use; of all which several premises the plaintiff afterwards, to wit, [*44 on, &c., duly gave notice to the defendant, and then requested the defendant to indemnify him from the said loss which he had sustained through the said immoral and dishonest conduct of the said E. T. Yet the defendant did not, nor would, when he was so requested, or at any other time, indemnify, &c. The declaration contained also a count upon an account stated.

Pleas: First, non assumpsit. Secondly, (to the first count), that the supposed promise therein mentioned was made by the defendant to the plaintiff on a certain Lord's Day, commonly called Sunday, to wit, on, &c., in the way of the plaintiff's said trade and business, and in his ordinary calling as such button factor, and in the course and exercise thereof, and that the same promise was not a work of necessity or charity, and was and is contrary to the statute in such case made and provided. Verification. Thirdly, (to the same count,) that the said E. T., as servant to the plaintiff, did not receive the said moneys and goods therein in that behalf mentioned, or any of them, from the said persons in the said first count also mentioned, or any, &c., for or on account of the plaintiff, or in satisfaction or discharge of the said money so owing from the said persons to the plaintiff, as in the said first count, &c.; nor did the said persons pay or deliver unto the said E. T., as such traveller and salesman as aforesaid, the said several sums of money, and goods and chattels, or any of them, for or on account of the plaintiff, or in such satisfaction and discharge as aforesaid, *modo et*

formâ. The fourth plea (to the same count) traversed the notice, and the request to idemnify the plaintiff.

The replication joined issue upon the first, third, and fourth pleas, and traversed the allegation in the second plea that the promise was made on

*45] the said Sunday, in *that behalf mentioned, *modo et formâ;* upon which issue was joined.

At the trial before Lord ABINGER, C. B., at the last assizes for the county of Derby, the following guarantee was proved.

"Mr. R. J. Norton,

"Sir,—In consideration of your engaging Mr. Edward Tarrand as traveller, we, the undersigned, do hereby agree to indemnify you against any loss or damage you may be called upon to sustain through his immoral or dishonest conduct. As witness our hands.

"(Signed) Thomas W. Powell,
"19 Haymarket.

"Witness, to the signature of Mr. Powell,
"Robert Mereweather."

The guarantee, though drawn up in the plural number, was signed by the defendant only; and it was signed by him on a Sunday, and then delivered to Tarrand, who, on a subsequent day, handed it to the plaintiff.

It appeared also, that Tarrand had been employed on one occasion, as traveller for the plaintiff, before the guarantee was given.

John Howell (one of the debtors mentioned in the declaration) was called as a witness for the plaintiff, and was objected to on behalf of the defendant as being interested in the event of the suit; his evidence was however admitted.(*a*) He proved, that, in the month of August, 1839, Tarrand called upon him and said, that if Howell would do business with the plaintiff, he, Tarrand, would give him an order for clothes; on which Howell ordered some buttons, and Tarrand gave an order for some clothes, which were afterwards delivered to him by Howell. A similar transaction

*46] took place in October. The *amount of the clothes supplied to Tarrand, was 8*l.* 16*s.* It was also proved, that moneys had been paid to Tarrand by debtors of the plaintiff, which had not been paid over to the latter. It was objected for the defendant, that the consideration for the guarantee was not truly stated in the declaration, the engagement being prior, not subsequent, to the promise.(*b*) This objection was overruled by the Lord Chief Báron, who also held, that there was not sufficient evidence to support the second plea, inasmuch as there was no promise, till the delivery of the paper to the plaintiff; the mere signing thereof by the defendant not being sufficient. The plaintiff recovered a verdict for 15*l.* 12*s.* 6*d.*

Goulburn, Serjt., now moved for a new trial on the ground of variance and of misdirection, or to reduce the verdict to the sum of 8*l.* 16*s.*, on the ground that Howell's evidence was inadmissible.

First: there was a variance between the declaration and the contract

(*a*) See *Russell* v. *Blake*, antè, vol. ii. 374, (40 E. C. L. R.) 6 & 7 Vict. c. 85.

(*b*) If the evidence had shown a continuous engagement, subsisting at the time of the promise, a question might have arisen whether the word "engaging," in the guarantee, must not be understood as meaning "having engaged," in which case the guarantee would be void for not showing that such by-gone employment had been at the request of the defendant. The proper mode of raising the defence would appear to be, to plead non-assumpsit, and also that the plaintiff did not engage E. T. *modo et formâ.* Then, upon showing the prior and subsisting engagement, the defendant would be entitled to a verdict upon the former plea, if "engaging" were read as "having engaged," and upon the latter, if "engaging" were understood to refer to a future engagement, and no dissolution of the prior engagement were shown.

proved. In the first place it was alleged to be the promise by the defendant alone, but though signed by him only, it was drawn up in the plural number. [TINDAL, C. J. It is like a joint and several promissory note. A note may be good, if drawn up in the plural number, though signed by one person only. *Besides the point is not raised on the record.](a) [*47
Then, the consideration is not truly stated; it is alleged in the declaration that the consideration was, that the plaintiff "would then engage" Tarrand, whereas in fact he had been previously engaged by him, and the real consideration was, that he would continue him in his service, and should have been so stated, *Wain* v. *Warlters*, 5 East, 10, 1 J. P. Smith, 299. *Saunders* v. *Wakefield*, 4 B. & Ald. 595, (6 E. C. L. R.) [CRESSWELL, J. The plaintiff avers that he did afterwards engage Tarrand in his service; why did not the defendant traverse that allegation if it was incorrect? By not doing so he has admitted it. COLTMAN, J. The defendant is seeking to vary the written contract by parol.]

Secondly, as to the second plea, the evidence sufficiently showed that the contract was in fact made on a Sunday. [CRESSWELL, J. If a man write to his creditor on a Sunday admitting the debt, and promising to pay it, can this be said to be a void contract under the statute of Charles? TINDAL, C. J. I cannot say that I think that this was a contract, which, if made on a Sunday, was in the ordinary way of business. In the case of partnership, there is an implied authority, that one partner may enter into ordinary contracts, and thereby bind the firm; but he cannot bind them by giving guarantees.] (b)

Per curiam.

Rule refused on first and second points.

*Upon the third point, as to the reduction of damages, the court granted a rule nisi; which, on a subsequent day, (8th May,) was made absolute by consent. [*48

(a) If the intended co-promisor had actually signed the guarantee, the non-joinder would have been pleadable only in abatement. It might also be contended, that the words "*we* the undersigned" and "witness *our* hands" showed that the party first signing did not mean to enter into the engagement alone, and that until both had signed, the contract was conditional and incomplete.

(b) See *Duncan* v. *Lowndes*, 3 Campb. 478, antè, 42 (a).

M'LAUGHLIN v. PRYOR.

A party, consisting of the defendant and others, hired for a day's excursion a carriage and post-horses, driven by postilions, who were the servants of the owner of the horses. The defendant rode upon the box. The postilions, in endeavouring to force their way into a line of carriages, overturned a gig, and seriously injured the plaintiff, who was in the gig. The defendant, at the time and afterwards, held himself out as responsible for the accident, and used expressions showing that he had a control over the postilions at the time it happened:

***Held*, that he was liable in trespass.**

TRESPASS. The declaration stated that the defendant heretofore, to wit, on, &c., with force and arms *forced and drove a certain carriage* and certain harness attached thereto, and with which the same was then being drawn, upon and against a certain carriage, to wit, a gig, in which the plaintiff was then riding in and along a certain public and common highway, and thereby pulled over and upset the said gig, and thereby the plaintiff was then cast and thrown with great force and violence from and out of the said gig to and upon the ground there, and was there greatly bruised, hurt, and

wounded, &c., (with special damage in loss of business as a newspaper editor, and in the employment of other persons to publish the same.)

Pleas: first, not guilty; on which issue was joined; secondly, that at the time when, &c., the plaintiff was being driven in the said carriage called a gig, by a person whose name is to the defendant unknown, in and along the said highway, and at the said time when, &c., the same was so carelessly and negligently and improperly driven, stopped and managed by the said person in the said highway, near to the said carriage and harness so forced [*49 and driven by the defendants as in the *declaration mentioned, that by reason thereof the said carriage and harness, without any default or wrong on the part of the defendant, was forced and driven by the defendant upon and against the said carriage called a gig, and thereby pulled over and upset the same, and occasioned the said injuries and damages in the said declaration mentioned; and so the defendant says that if any hurt or damage then happened to the plaintiff, the same was caused and occasioned by the said negligent, careless, and improper driving of the said carriage called a gig, and not by any default of the defendant, which is the said supposed trespass in the said declaration mentioned.

Replication to this plea, *de injuriâ*.

At the trial before TINDAL, C. J., at the sittings in London after last Trinity term, the following facts were given in evidence on the part of the plaintiff.

On the 3d of June, 1840, the plaintiff was proceeding to Epsom races in a pony gig, belonging to and driven by one Mason. The defendant, who, together with a party of friends, had hired a carriage and four post-horses, driven by two postilions in the service of the owner of the horses, was on his way to the same place. The defendant and another person rode on the box of this carriage. At the toll-bar at Sutton a line of carriages had formed, and Mason's gig was in that line. The carriage in which the defendant and his friends were driving came up to the toll-bar about the same time with Mason's gig, but the carriage was out of the line. Mason's gig was advancing at the time slowly in the line, (there being a stoppage for the purpose of taking toll at the gate,) when the postilion on the wheel-horse of the carriage in which the defendant was seated, called out to the postilion on the leader, "go in there." The latter immediately turned his horses' heads before Mason's gig. Mason endeavoured to keep his pony *50] in *the line, when the man on the wheel-horse of the carriage again called out, "Go on, you are all right there." The postilion on the leader again pushed his horses forward, and the trace of the wheel-horse caught the wheel of Mason's gig and pulled it over, and both the plaintiff and Mason fell out. Some one in the carriage called out, "Go on, go on!" but Mason got up, and laying hold of the horses' heads, stopped them; telling the party in the carriage that they should not move on; for he was determined to take the horses back to the Cock at Sutton, until he knew to whom they belonged. Several of the parties then got out of the carriage, and the defendant said to Mason, "If you do that, in what an awkward predicament you will place us—we can neither get to the races nor get home." After some further discussion, he added, "I will settle it with you here now; I will give you money to any amount; tell me what you want, you shall have it." Mason refused to settle the matter then, and at last the defendant gave his card to him, saying that he would be answerable for all that had occurred, if he would allow him to proceed. The carriage then drove on Some days afterwards Mason called on the de-

fendant at his chambers, and told him he came about the damage done to the chaise. The plaintiff said it should be repaired; he was in duty bound to repair it, and that he would send a man to look at it. He did not do so, however, and Mason, having got it repaired, called again upon the defendant with the account, who said he would pay it, and was about to do so, when he added, "I shall not pay it now, for if I pay you this amount, Mr. M'Laughlin will expect me to pay whatever demand he may make upon me; you shall be paid it, but I shall not pay it now; I will settle Mr. M'Laughlin's affair before I settle yours." Some dispute then arose between the parties as to the accident, and the *defendant said, "If you had quietly gone out of the line, it would not have happened; if you had done that, I had intended to have pulled up and let you in again, in the front." He added, that the general way of going to races was to cut out and cut in, and get on in the best way one could. Mason then said to the defendant, "If you will give me up the proprietor of the horses and carriage, I will exonerate you from the repair of the chaise altogether;" but the defendant said he should give up no names,—he had made himself liable for the damage that had occurred. The plaintiff was very seriously injured by the upsetting of the gig, and had become permanently lame. [*51

It was contended on the part of the defendant, on the authority of *Laugher* v. *Pointer*, 5 B. & C. 547, 8 D. & R. 556, and *Quarman* v. *Burnett*, 6 M & W. 499, that, not being the owner of the carriage and horses, he was not liable to the action. The Lord Chief Justice, however, ruled that those cases did not apply to an action of trespass, but reserved leave to the defendant to move to enter a nonsuit.

Evidence was called, on the part of the defendant, to show that the defendant had called out to the post-boys to let Mason's gig drive on before them; and that the gig had been driven against the horses of the carriage. The post-boy who rode the leaders on the occasion, (the other one being absent from the country,) stated that they had no orders to break into the line, that "nobody said any thing to them."

The Lord Chief Justice told the jury, that in order to find a verdict for the plaintiff, they must be satisfied that the accident arose from the carriage driving against the gig, and not from the gig driving against the carriage. The jury found a verdict for the plaintiff, damages 600*l*.

**Channell*, Serjt., having in Michaelmas term last, obtained a rule *nisi* to enter a nonsuit, pursuant to the leave reserved; [*52

Talfourd, Serjt., now showed cause. It is submitted that the defendant is responsible for the injury done to the plaintiff. The defendant being on the box of the carriage, and having the opportunity of seeing what was passing, and possessing the power of controlling the postilions, must be held to have sanctioned them in their attempt to break the line of carriages; and if so, such sanction made him a trespasser. In point of fact, the evidence at the trial showed that the parties on the box were exercising a control over the post-boys, and giving them directions. In *Gregory* v. *Piper*, 9 B. & C. 591, 4 Mann. & Ryl. 500, a master ordered a servant to lay down rubbish near his neighbour's wall, but so as not to touch it. The servant used ordinary care in executing the orders of his master, but some of the rubbish naturally ran against the wall. It was held that trespass might be maintained against the master, he being liable in that action for any act done by his servant in the course of executing his orders.(a) So

(a) Vide tamen *Reynolds* v. *Clarke*, 1 Stra. 634, Fortescue, 212, 8 Mod. 272, 4 M. & R. 502, (a).

here, assuming that the defendant sanctioned the act of the postilions in attempting to break the line of carriages, the upsetting of the gig containing the plaintiff was the natural consequence of such attempt, and the defendant is responsible to the plaintiff for the accident which occurred.

The case of *Chandler* v. *Broughton*, 3 Tyrwh. 220, 1 C. & M. 29, shows that a party may be liable in trespass, although he may have taken no direct part in the act which is complained of. There, the defendant was sitting
*53] by the side of his servant, and the latter was driving. That case *is in substance the same as the present. In considering the question of liability, the defendant's conduct must not be overlooked. After what passed subsequently to the accident, the defendant cannot say that he did not sanction the post-boys in what they did. When an individual comes forward and gives his card, and screens other parties, the court has a right to infer that what took place was with his sanction, if the facts of the case will bear that construction. The defendant, both from the control he was evidently exercising over the postilions at the time of the accident and from his subsequent conduct, is clearly liable in the present action.

Channell, Serjt., in support of the rule. The plaintiff here charges the defendant as an actor in driving the carriage against the gig; and the question raised by the plea of not guilty is, whether he was so. The defendant has also pleaded that there was negligence on the part of the plaintiff, and if that were so the defendant is not liable in trespass.(*a*) It is not disputed that the carriage was hired; that the horses were post-horses; and that the plaintiff was not actually driving though he was sitting on the box. The case, therefore, falls within the principle of *Laugher* v. *Pointer*, 5 B. & C. 547, 8 D. & R. 556, and *Quarman* v. *Burnett*, 6 M. & W. 499. It is true that those actions were in *case;* but the main point for consideration is the degree of responsibility which attaches to the hirer of a carriage or horses under circumstances like the present; and as to that, it can make no difference whether the form of the action be trespass or case. The facts in *Quarman* v. *Burnett* were peculiarly strong to raise the inference, that
*54] the coachman, by whose negligence the accident *happened, was the servant of the defendants; he was the party regularly employed; he was paid a regular sum for each drive, according to express agreement; he was sometimes taken by the defendants into the country for weeks together, and was then paid a regular sum per week; and he wore a livery of theirs, for which he had been measured; but he was held not to be their servant so as to render them liable for his negligence. The facts in the present case are not nearly so strong to show that the postilions were in this defendant's service. In *Stables* v. *Eley*, 1 C. & P. 614, the defendant had been in partnership with the person who was the actual owner of the cart at the time the accident happened, and he allowed his name still to remain on the cart; and Abbott, C. J., ruled that by reason of his then holding himself out to the world as the owner of the cart, and the master of the driver of it, he was responsible for the negligence of such driver. It may be doubted, perhaps, whether that case is quite reconcilable with *Quarman* v. *Burnett;* but at any rate it is very distinguishable from the present case; for there was nothing done here which held out to the world that the postilions were the servants of the party in the carriage any more than in any other case of persons hiring post-horses. In *Chandler* v. *Broughton*, 1 C. & M. 29, 3 Tyrwh. 220, the horse and gig were the defendant's own property, and the driver is expressly stated to have been his servant. That

(*a*) Vide *Marriott* v. *Stanley*, antè, vol. i. p. 568.

case therefore stands upon a very different footing from the present, and is quite consistent with *Quarman* v. *Burnett*.

A trespass may either be wilful in fact, as where a party enters upon the land of another after notice, or wilful in law. In the former case it is easy to ascertain who are co-trespassers, being aiders and abettors of the principal. But in a case where the trespass arises from *negligence it is different. [*55 What is there here to make the acts of the postilions (which it is admitted must be taken as wilful in point of law, though merely negligent in point of fact) the acts of the defendant? The evidence of the post-boy, who was called, was most material,—that he acted without orders. It is true the defendant was on the box at the time, but that is not sufficient: mere non-interference will not make him responsible.

Then as to the declarations used by the defendant at and after the accident, they do not carry the case any further, so as to make him a trespasser, unless they show that at the time of the accident, he directed, or at least assented to, the act by which the collision occurred; but they cannot have that effect. They amount at most to a willingness on his part to repair the injuries that had been sustained by the plaintiff and his friend. Suppose the plaintiff had been killed by the accident, would this evidence have supported an indictment for manslaughter? In *Wilson* v. *Barker*, 4 B. & Ad. 614, 1 Nev. & Man. 409, it was held that a person who knowingly receives from another a chattel which the latter has wrongfully seized, and afterwards, on demand, refuses to give it back to the owner, does not thereby become a trespasser, unless the chattel was seized for his use. That is a strong authority to show that a party cannot be a trespasser by relation.

TINDAL, C. J. The leave to move to enter a nonsuit was reserved, for the purpose of examining whether the authorities that were cited at the trial were applicable to the present case, and whether the principles which regulate an action on the case could be applied to an action of trespass.

At the trial, I was desirous that the merits of the case should be inquired into, and I reserved, for the *opinion of the court, the question, [*56 whether the doctrine laid down in *Quarman* v. *Burnett*, 6 M. & W. 499, where the principle of exemption was carried to a considerable extent, would apply to the circumstances of this case. It was intended that it should be determined upon the evidence, whether the defendant could properly be considered as a trespasser.

It appears to me, that the cases in which it has been decided that the hirer of a carriage and horses is exempted from responsibility for the acts of the driver—not being his servant—rest upon a very different ground from the present. In those cases, the party hiring had no power of selection as to the person employed in driving; and therefore it was held, that he was not responsible for the want of skill of the driver, who could not be considered as his servant; that the person who was really the master of the driver, was bound to select a proper person to be employed as driver.

But in this case the question is, whether the defendant was a joint trespasser with the post-boys, and this question obviously rests upon a very different ground.

The general rule is, that all persons acting together at the time of the commission of a wrongful act, are presumed to assent thereto, and are considered in law as equally trespassers, and are all looked upon as principals. The inquiry is, not whether the act was wilful, but whether it was wrongful, and an immediate injury resulted from it; any inquiry into the intention

of the party is quite unnecessary. That was decided in *Leame* v. *Bray*, 3 East, 593, 5 Esp. N. P. C. 18, which was an action against the defendant, who had driven his carriage against another's, not wilfully, but by
*57] accident; and it was held that *the proper remedy was trespass and the distinction laid down was, that where the injury was immediate from an act of force done by the defendant, the remedy was in trespass; but where the injury was only consequential to an act before done by the defendant, then an action on the case lay. Lord ELLENBOROUGH, in giving judgment, says, "The true criterion seems to be, according to what Lord Chief Justice DE GREY says in *Scott* v. *Shephard*, 3 Wils. 403, 411, 2 W. Bla. 892, 899,(a) whether the plaintiff received an injury, *by force*, from the defendant. If the injurious act be the immediate result of the force originally applied by the defendant, and the plaintiff be injured by it, it is the subject of an action of trespass, *vi et armis*, by all the cases both ancient and modern. It is immaterial whether the injury be wilful or not." GROSE, J., in giving his opinion, 3 East, 600, says, "Looking into all the cases, from the Year-book in the T. 21 H. 7,(b) down to the latest decision on the subject, I find the principle to be, that if the injury be done by the act of the party himself at the time, or he be the immediate cause of it, though it happen accidentally or by misfortune, yet he is answerable in trespass." And LAWRENCE and LE BLANC, JJ., express the same opinions. Now in this case there can be no doubt, upon the finding of the
*58] jury, that the post-boys, by reason of their *wrongful act, were trespassers. Then the question is, whether the defendant was jointly a trespasser with them; whether the part which he took in the proceeding was sufficient to make him equally liable with them; and whether there were circumstances in the case which would justify the jury in coming to that conclusion. It appears that he was riding on the box of the carriage when the accident occurred, and saw what was going on; that there was a line of carriages, into which the post-boys were endeavouring to force themselves; and he must have known the object of the post-boys in doing what they did. If he had remonstrated or expostulated with them at the time, I do not think he could have been held liable in this action, even upon the supposition that the post-boys were his servants; for no servant can make his master a trespasser against his will; *Morley* v. *Gaisford*, 2 H. Bl. 442; *M'Manus* v. *Crickett*, 1 East, 106. Or if he had been inside the carriage, and had not seen what was going on, and the post-boys, of their own will had done the injury, I do not think the defendant would have been liable. But the fact of his being outside the carriage, with a full view of all that was taking place and not interfering, though I do not say it is strong evidence, is some evidence, to go to the jury that he assented to the act of the post-boys. But the case does not stop there; for his subsequent conduct is to be taken into consideration. There is nothing to show that he repudiated the act of the post-boys: on the contrary, he professed throughout to hold himself responsible; he told the witness Mason, who was driving the gig in which the plaintiff was seated at the time the

(a) And see antè, vol. iii. 520.

(b) T. 21 H. 7, fo. 28, pl. 5, where Rede, C. J., says, "Although the intent of the defendant was good, (in carrying the plaintiff's tithes from the defendant's field, where they were secured, to the plaintiff's house,) here, the intent cannot be construed; but it can be in felony; as, if a man shoots at the butts, and kills a man, it shall not be felony, because he had not the intention to kill; and so of a tiler from a house, who, without knowing it, kills a man with a stone, it is not a felony; but where one shoots at the butts, and wounds a man, although it were against his will, he shall be said to be a trespasser, against his intention."

accident happened, that if he had succeeded in getting into the line, he should *have allowed Mason to return to his former position in the line. All this shows that he had a control over the post-boys, and that he assented to their acts. [*59

I think, therefore, that this is a case in which the defendant may be considered as the master, the *dominus pro tempore*, of the carriage and horses: he being present at the time when the accident happened, and assenting to the act by which it was caused; and that the present case falls within the principle of *Chandler* v. *Broughton*, 1 Crompt. & M. 29, 3 Tyrwh. 220, and *Gregory* v. *Piper*, 9 B. & C. 591, 4 Mann. & R. 500. It seems to me on the whole, that the jury justly came to the conclusion that the defendant was a co-trespasser with the postboys; and that the verdict ought not to be disturbed.

COLTMAN, J. It seems to be agreed in this case that the court is to be considered in the situation of a jury; and the question for our determination is, whether at the time that the accident happened the defendant assented to the acts of the postilions. This fact depends in a great measure upon Mason's evidence; and I see no reason why credit should not be given to it. (His lordship recapitulated the facts of the case.)

It appears, then, that the defendant throughout said that he would be responsible for the damage. This certainly will not make him liable as a trespasser, unless he were so from the beginning; but I think it is evidence to show his previous assent to the act that was done by the postilions. He never repudiates their act; he never says it was not his own act; and I think if the case had been left to the jury on the mere question of assent, they would have found in the affirmative.

*ERSKINE, J. I am of the same opinion. The cases in which it has been decided that *case* will not lie against the hirer of a carriage and horses for the misconduct of the driver, not being his servant, do not apply here; for this is an action treating the defendant as a co-trespasser, and is not brought against him as a master for the misconduct of his servant. [*60

The mere fact of the defendant being one of the persons who hired the carriage and horses, would not make him liable in this action; but it must be shown that he was assenting to the act from which the injury occurred to the plaintiff. It is not necessary to show that the defendant contemplated the injury that happened; for if the act of the post-boys in driving into the line was wrongful, and the defendant assented to it, or gave encouragement to its being done, he will be liable in this action. That the act was done wilfully by the postboys there can be no doubt. Now the defendant was on the box at the time, and it is in evidence that one of the post-boys called out to the other, "Go in there," which was an intimation, clearly given to those on the box, of what was intended to be done; the defendant, therefore, must have been conscious of what the postboys intended to do.

But the evidence does not stop there. After the misfortune, the defendant never suggests that it was the fault of the post-boys; neither on the spot immediately after the accident, nor afterwards in his interviews with Mason, does he intimate that it was not his own fault. On the contrary, he makes a statement that shows he was aware of what the post-boys intended to do, and that he had a control over them. Under all the circumstances, therefore, I think the defendant is civilly responsible in this form of action; and that the rule must be discharged.

*CRESSWELL, J. I am also of opinion that this rule must be discharged. Some of the matters in the cause may be considered as [*61

finally disposed of by the jury; namely, that a trespass was committed; that the plaintiff received an injury therefrom, and not by any fault of his own. The plea, I may observe, is rather of a singular character in this form of action, but it is not material to dwell upon that.

It has been reserved to the court to say whether the defendant is liable in this action, not as a dry question of law, but as a mixed question of law and fact, under all the circumstances of the case. The present case is not, I think, affected by the cases of *Laugher* v. *Pointer* and *Quarman* v. *Burnett*, which turned on the liability of a party hiring a carriage or horses for the day, for the conduct of the driver. The great struggle in those cases was, whether the driver was to be considered as the servant of the party charged; and it was not sought, as here, to make the defendant liable as sharing in the act by which the accident occurred, but as a master for the negligence of his servant. The principle of those cases, therefore, has no bearing on an action of trespass; in which a party may be liable as a co-trespasser for the immediate act of another, though that other be not his servant. (His lordship stated the facts of the case.) Under all these circumstances, it seems impossible to suppose that the defendant did not know that the post-boys were going to break into the line; he had time enough to reflect on what was going on, and he might, if he had thought fit, have stopped the proceeding. This view is confirmed by what the defendant said, not only at the time, but afterwards at his chambers, to Mason, that he had intended to let him into the line again. But in order to do so, it is clear he must have first shut him out. All the facts, therefore, tend to
*62] *show that he sanctioned the act at the time that it was committed

Rule discharged.

COBBOLD *v*. CHILVER.

A warrant of attorney authorised judgment to be signed "as of a term:" *held*, that judgment signed thereon in vacation was irregular.

Semble, that such an irregularity would not entitle the defendant to costs.

The warrant of attorney authorised judgment to be signed for 500*l*. Judgment had been signed, but it did not distinctly appear for what amount: *Held*, that a *fi. fa.* directing the sheriff to cause to be made "269*l*. 9*s*. 4*d*., parcel of a certain debt of 500*l*.," was irregular, as not following the judgment, and that it was such an irregularity as entitled the defendant to costs.

SIR *T. Wilde*, Serjt., in last Michaelmas term, obtained a rule calling upon the plaintiff to show cause why the judgment signed in this cause and the execution issued thereon, should not be set aside for irregularity; and why the plaintiff should not refund to the defendant or his attorney the sum of 269*l*. 9*s*. 4*d* levied under the said execution, with costs; upon the grounds that the judgment was signed in vacation, whereas the warrant of attorney only authorised a judgment "as of a term;" and that the writ of execution did not follow the judgment.(*a*)

The following facts appeared from the affidavits upon which the rule was obtained. The defendant had executed a warrant of attorney, dated the 15th of February, 1840, whereby he authorised three attornies by name, or any other attorney of the court of Common Pleas, to appear for him "as of last Hilary term, next Easter term, or any subsequent term;" and to suffer judgment to be entered up against him at the suit of the plaintiff for

(*a*) There were other points of objection, which were afterwards abandoned by the defendant.

500*l*.. with a defeasance upon payment of 250*l*. with interest. On the 8th of September, 1841, judgment was *signed upon this warrant of attorney (it was not expressly stated for what sum the judgment was signed.) On the next day a writ of *fieri facias* was issued, commanding the sheriff of Suffolk to "cause to be made as well a certain debt of 269*l*. 9*s*. 4*d*. parcel of a certain debt of 500*l*. which defendant J. C. Cobbold lately, &c., *recovered* against the said R. Chilver; as also 5*l*. 5*s*. which, &c., were awarded to the said J. C. C. for his damages, &c., whereof the said R. C. is convicted as appears to us of record, together with interest upon the said sums of 269*l*. 9*s*. 4*d*. and 5*l*. 5*s*., at the rate of 4*l*. per cent. from the 8th day of September, 1841, &c." The writ was endorsed to "levy 269*l*. 9*s*. 4*d*. with interest as within mentioned, and 6*l*. 6*s*. besides, &c." The sheriff had levied under this writ. [*63

Channell, Serjt., now showed cause. Although the judgment was actually signed in vacation, still the authority given by the warrant of attorney to sign judgment "*as* of a term," has been sufficiently complied with, and the court may consider that it *was* signed as of some term. By the general rules, H. 4 W. 4. s. 3, all judgments are "to be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day(*a*);" but if this were to be construed strictly such a warrant of attorney as the present would be nearly useless, as judgment could, in reality, only be signed upon it actually during term. It is obvious, however, *that it was the intention of the parties that judgment might be signed at any time. [*64

As to the second point, it will be argued that the writ of execution was irregular, having been issued for a different sum than that for which the judgment was signed; and *Webber* v. *Hutchins*, 8 M. & W. 319, will be relied upon, where it was decided such a variance constituted an irregularity. But in that case the sum for which the judgment had been signed distinctly appeared. A defendant, in order to take advantage of such a technical objection, is bound to make the variance clearly out. In this case, although the affidavits state that the judgment was signed on the 8th of September, 1841, the amount for which judgment was signed is not stated. Nor is there any variance on the face of the writ. It directs the sheriff to "cause to be made as well a certain debt of 269*l*. 9*s*. 4*d*., parcel of a certain debt of 500*l*. which J. C. C. lately recovered against R. C.:" the word "which" may be taken as referring, not to the clause immediately antecedent, "a certain debt of 500*l*.," but to the whole paragraph, "a certain debt of 269*l*. 9*s*. 4*d*.," reading the following words, "parcel of a certain debt of 500*l*." as in a parenthesis; and then the writ would properly follow the judgment as recited. The court will not conclude that the judgment must have been for the whole sum of 500*l*., because the plaintiff was *authorised* to sign judgment for that amount. It is clear that the real debt was only for 250*l*. and interest; and the plaintiff was at liberty to enter up judgment for a less sum than that mentioned in the warrant of attorney, as there may have been a remittitur for part.

Bompas, Serjt., in support of the rule. First, the judgment is clearly

(*a*) The same rule provides "that it shall be competent for the court, or a judge, to order a judgment to be entered *nunc pro tunc*;" but it has been decided that this proviso applies only, as formerly, to cases where the judgment is delayed by the act of the court; *Lanman* v. *Lord Audley*, 2 M. & W. 535; *Vaughan* v. *Wilson*, 4 New Ca. 116, 5 Scott, 404, 6 Dowl. P. C 210; *Doe d. Taylor* v. *Crisp*, 7 Dowl. P. C. 584; see also *Blewitt* v. *Tregonning*, 4 A. & E. 1002.

*65] irregular, as being signed and dated *in vacation, the warrant of attorney not authorising such a judgment. The power given by a warrant of attorney must be strictly followed. In *Todd* v. *Gompertz*, 6 Dowl. P. C. 296, an objection was raised, that the warrant of attorney was, to sign judgment of a term generally, and therefore was not in conformity with R. H. 4 Will. 4, s. 3, though the judgment had been in fact entered up in term time. Patteson, J., there says, "The second objection was, that the authority given by the warrant of attorney was to confess a judgment of Hilary term; and it was contended that such a judgment could not be signed now. It was said that, because it ought to be dated of a particular day,—as judgments could not be signed generally of a term,—such a judgment would be irregular, and therefore the warrant was an authority to sign an irregular judgment. I think the utmost limit to which that objection can be carried is, that it would not authorise a judgment to be signed *in vacation*." So that the opinion of that learned judge is clearly in favour of the present objection. The rule of court, which has been referred to, expressly declares that judgments "shall not have relation to any other day" than that on which they are signed; how then can this judgment, signed in vacation, have relation to any day in term, or be said to be signed "as of" any term? It is possible that the plaintiff might have signed judgment expressly "as of" some term, upon the maxim, *conventio vincit legem*(a); but it is enough to say that he has not done so.

Tindal, C. J. I think there is sufficient in this first point to entitle the *66] defendant to have the rule made *absolute. The judgment was signed in vacation; but the authority given by the warrant of attorney was expressly to sign judgment as of some term, and not in vacation. If the plaintiff had followed the warrant of attorney, and signed the judgment as of a term, the court might perhaps have said, that it was sufficient; being within the terms of the agreement between the parties. The rule of court says, that a judgment shall be entered of record of the day when signed, and shall not have relation to any other day; but as this judgment was signed on the 8th of September, in vacation, we cannot give it relation to any term. There is no provision in the agreement to sign judgment in vacation; and as the plaintiff has not availed himself of the provision as to signing it *as* of a term, I think the rule must be made absolute. But as the objection is one *inter apices juris*, and rather against good faith, I think it must be without costs.

Bompas, Serjt., pressing for costs, the court heard him upon the second objection.

In *Webber* v. *Hutchins*, 8 M. & W. 319, 1 Dowl. N. S. 95, Parke, B., says, "The writ must agree, in the mandatory part of it, with the judgment. If the plaintiff sues out execution for (i. e. intending to levy) a part only of the sum recovered by the judgment, he may direct the sheriff accordingly by a private memorandum; but if the judgment and writ do not agree, the reason of the variance ought to appear on the face of the writ," 8 M. & W. 320. If the writ in this case is read without the forced construction sought to be put upon it by the other side, it clearly imports that the judgment was signed for 500*l*., which was the sum for which the plaintiff was authorized to sign judgment by the warrant of attorney. The proper course to have *67] *been pursued by the plaintiff is suggested in the rule H. 3 Vict., 6 New Ca. 330, 11 A. & E. 602, containing forms of writs framed

(a) As to this maxim, vide Co. Litt. 180; *Colt* v. *Bishop of Coventry and Litchfield*, Hob. 140, 160; *Bonham* v. *Newcomb*, 1 Vern. 214, 215; *Berryman* v. *Bowden*, Hetley, 59; Watson's Complete Incumbent, 275, 276.

by all the judges, (pursuant to the stat. 1 & 2 Vict. c. 110, s. 20;) which says, "that in all cases in which the judgment is for a penalty, and the plaintiff seeks to obtain interest, there shall be a memorandum on the back or at the foot of the writ, directing the sheriff to levy the amount of the sum of money really due and secured by the penalty, and of the damages and costs recovered, and interest thereon at the rate of 4*l.* per cent. per annum, from the time when the judgment was entered up; and that in the cases in which the amount for which the judgment has been given is less than the amount of the sum of money really due and secured by the penalty, and the damages and costs recovered, and the interest thereon calculated as aforesaid, it shall be stated in the body of the writ that the sheriff is to levy interest at the rate of 4*l.* per cent. per annum from the —— day of ——; and on the back or at the foot of the writ there shall be a memorandum as above directed."(*a*)

The judgment in this case must, therefore, be taken to have been for the sum for which it was authorized to be signed by the warrant of attorney; and if that be so, then the writ does not follow the judgment.

TINDAL, C. J. I think that this is such an irregularity as entitles the defendant to costs.

The other judges concurring,(*b*) Rule absolute, with costs.

(*a*) The forms of writs appended to the rule apply to writs of *capias* only; and the directions in the rule appear to have reference merely to cases where a plaintiff seeks to enforce a *penalty*, and the statute, under which the new rules are framed, deals with cases of *arrest* alone.

(*b*) Coltman, Erskine, and Cresswell, JJ.

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*CALLANDAR v. DITTRICH. [*68

Assumpsit. The first count was upon a contract to sell and deliver sound tares; breach, that the tares delivered were unsound. The second count was upon a promise properly to ship the tares; breach, that they were improperly shipped, and thereby damaged. Plea to these two counts, that the plaintiff had impleaded the defendant in a foreign court for not performing the identical promises in the first and second counts mentioned, and that the said court had adjudged that the plaintiff had no cause of action in respect of the non-performance of the said promises; and that such judgment was final and conclusive.

In support of this plea a judgment of the foreign court was produced, "that the plaintiff be barred of his claim against defendant, on account of a cargo of tares, received by the ship M. S." From a statement of "reasons" appended to this judgment, and which was in fact a statement of the case, it appeared that part of the tares contracted for had reached the plaintiff; that he refused to accept them by reason of their unsound condition; that he had sold them under protest; and that he had instituted that suit to rescind the contract, and recover back the money from the defendant; but that he was barred by lapse of time, having brought the suit too late by the law of the country (Prussia) in which the court sat, and in which the goods were shipped, and in which the defendant resided.

Held: first, that the judgment did not support the plea, inasmuch as it clearly was not applicable to the cause of action contained in the second count.

Secondly, that the plea could not be taken divisibly, so as to be considered as applicable to the first count only.

Thirdly, that under the circumstances, the court, having the powers of a judge at nisi prius, ought not to amend the plea by stating that the judgment was in respect of the promise in the first count only.

Quære, whether the judgment was applicable even to the cause of action contained in the first count.

ASSUMPSIT. First count, that on, &c., it was agreed between the plaintiff, then residing in London, and the defendant, then residing in parts beyond the seas, to wit, at Kœnigsberg, in the kingdom of Prussia, that the plaintiff should purchase of the defendant, and that the defendant should sell and deliver to the plaintiff, for the purpose of being shipped and con

veyed to London aforesaid, a certain large quantity, to wit, 100 lasts of seeds, to wit, tares, at a certain price then agreed upon between them, to wit, the price of 18s. per imperial quarter, free on board in the spring, the said tares to be large, sound, good Kœnigsberg, seed tares, of the growth
*69] of the year 1836, and of the *best quality. (The remainder of the agreement as set out in the declaration relative to the mode of payment, was not material to the point decided.)

Averment: that 100 lasts of tares are equal to a certain large quantity, to wit, 1050 imperial quarters, or thereabouts. Mutual promises. Averment of payment by the plaintiff in the manner stipulated, and performance of the agreement on his part, and that although the defendant did afterwards, to wit, on, &c., in part performance of the said agreement, ship and deliver on board a certain vessel provided by the defendant for the plaintiff, to wit, the "Mary Swan," at a certain port, to wit, at Kœnigsberg, in the kingdom of Prussia aforesaid, a certain large quantity, to wit, 917 quarters of tares, for the plaintiff; and although the tares so shipped as aforesaid, did afterwards, to wit, on, &c., arrive at London aforesaid; yet the defendant, disregarding his said promise, did not nor would ship the said tares free on board the last-mentioned vessel, and did not nor would sell and deliver to the plaintiff sound good seed tares of the growth of 1836, and of the best quality; but on the contrary thereof, the said tares, at the time of their said delivery and shipment in and on board the said vessel, and on their arrival in London aforesaid, to wit, on, &c., were,—as the defendant at the time of the said shipment and delivery well knew, but which the plaintiff did not discover until the day and year last aforesaid,—very soft, heated, discoloured, mouldy, rotten, decayed, and wholly unfit to be used as and for seed tares, or for any other purpose, and were not of the growth of the year 1836, and thereby, and by means of the premises, the same became and were utterly useless to the plaintiff; contrary to the terms of the said agreement and of the promise of the defendant by him so made as aforesaid.

Averment: that in consequence of the defendant's said breach of his
*70] said agreement, the plaintiff has not *only lost and been deprived of the advantage, profit and gain which he would and ought to have made, if the defendant had performed his said agreement, but hath been deprived of the use and interest of his said moneys, which, in pursuance of his part of the said agreement, he so paid to the defendant as aforesaid, and hath also been put to great charges and expense of his moneys, and been forced and obliged to lay out and expend a large sum of his money, to wit, 1000*l.*, in and about the insurance of the said tares, and in and about shipping the same on board the said vessel at Kœnigsberg aforesaid, and conveying the same to England, and in and about the necessary surveying and ascertaining the state and condition of the said tares on their said arrival in London as aforesaid, and in landing and selling the same under protest, to wit, on, &c. Of all which premises the defendant, has, at all times, had due notice.

Second count, that on, &c., in consideration that the plaintiff, at the request of the defendant,(*a*) had agreed to become the purchaser of the said tares, as in the preceding count mentioned, he, the defendant, promised the plaintiff, that he, the defendant, would superintend the shipping and loading of the said tares, to wit, at Kœnigsberg aforesaid, and would take and use

(*a*) The request appears to be immaterial, as an agreement to purchase contains in itself sufficient consideration.

every reasonable and proper precaution in seeing that the same were properly shipped and stowed in and on board a fit and proper vessel, or fit and proper vessels, in that behalf, for the conveyance of the said tares to London aforesaid; yet the plaintiff in fact saith, that although he, the plaintiff, in all things duly performed his said agreement as in the preceding count mentioned, and although a large quantity, to wit, 917 quarters of *the said tares, was afterwards, to wit, on the day and year aforesaid, [*71 under the several agreements in the preceding count mentioned, and with the privity, knowledge and sanction of the defendant, and at his instance, shipped and loaded for conveyance thereof to London, in and on board a certain vessel bound to London, which afterwards, to wit, on, &c., there arrived with the said quantity of tares on board thereof; yet the plaintiff in fact saith, that the defendant disregarded his last-mentioned promise in this, to wit, that he, the defendant, did not, in any manner, according to his said promise, superintend the shipping of the same tares, or take or use any precaution whatever in or towards seeing that the same were properly shipped or stowed in or on board a fit or proper vessel, or fit and proper vessels, in that behalf, but wholly neglected and failed so to do, and on the contrary thereof, the same vessel, in and on board of which the same 917 quarters of the said tares were so shipped and loaded as aforesaid, at the instance of the defendant, to wit, by reason of her having on board too great a cargo, and by reason of the state, size, condition and circumstances of the same vessel, was on the occasion aforesaid a very unfit and improper vessel wherein to ship or stow the same tares, as the defendant at the time well knew; and the plaintiff further saith, that the said 917 quarters of tares were, with the privity and at the instance of the defendant, shipped and stowed in and on board the same vessel in a very careless, negligent, improvident, unusual and unmerchantlike manner, and by means of the premises, the said 917 quarters of the said tares became and were so heated, mouldy, soft, rotten, discoloured and decayed, that the same and every part thereof became, were and was wholly useless and lost to the plaintiff; whereby the plaintiff not only has lost and been deprived of great gains and profits which he otherwise *might and would have derived and acquired by a resale of the same tares at high and advanced prices, [*72 but hath been deprived of the use and interest of the said purchase-money thereof, and hath been also put to great charges and expenses of his moneys, altogether amounting to a large sum of money, to wit, 1000*l.*, in and about the shipping of the said tares, and in insuring the same against perils of the sea, and in and about the conveying of the same to England, and in and about the necessary surveying and ascertaining the state and condition of the same tares on their arrival at London aforesaid, and in landing and disposing of the same.

There were also counts for money paid, for money received; and on an account stated.

Pleas: first, non assumpsit.

Secondly, (to the first count,) traversing the bad condition of the tares.

Thirdly, (to the second count,) traversing the shipment in an improper vessel.

Fourthly, (to the first and second counts,) that before the commencement of this suit, and before the commencement of the proceedings next hereinafter mentioned, the defendant was resident in parts beyond the seas, to wit, at Kœnigsberg, in the kingdom of Prussia, within the allegiance of the King of Prussia, and within the jurisdiction of a certain court of judicature

called the Royal Prussian Court of Commerce and Admiralty of Kœnigsberg; and that afterwards and whilst the defendant was resident at Kœnigsberg aforesaid, and before the commencement of this suit, to wit, on, &c., *the plaintiff impleaded the defendant in the said court of judicature for not performing the very same identical promises*, and each and every of them, *as are in the first and second counts of the declaration in this action mentioned*, and for the damages alleged to have been sustained by the plaintiff
*73] thereby; the same court having jurisdiction *in the premises; and such proceedings were thereupon had in the said court, that afterwards and before the commencement of this suit, to wit, on the 31st of May, 1839, a judgment or decree was pronounced by the said court, whereby it was adjudged and declared *that the plaintiff had no cause of action against the defendant in respect of the damages alleged to have been sustained by him, the plaintiff, through the non-performance of the said promises*; and it was further ordered and decreed, by the said judgment or decree, that the plaintiff should pay the costs and expenses of the proceedings so had in the same court in that behalf: which judgment or decree was not in any way reversed or made void. And the defendant says that the said judgment or decree was and is final and conclusive between the parties to such suit, as to the said supposed cause of action, in the country where the same was pronounced, to wit, in the kingdom of Prussia aforesaid; and that the plaintiff is precluded from all further litigation in respect of the same, and ought not further to importune or molest him, the defendant, in respect of such supposed cause of action so adjudicated upon by the said judgment or decree as aforesaid. Verification.

The plaintiff after joining issue upon the first three pleas, replied to the fourth plea, that no such judgment or decree final and conclusive between the parties to the suit in that plea mentioned, in manner and form as therein alleged, ever was pronounced by the said court of judicature in that plea also mentioned, *modo et formâ*; whereupon issue was joined.

At the trial before TINDAL, C. J., at the sittings in London, after last Trinity term, the following document, translated from the German, was given in evidence in support of the fourth plea.(a)

"Sentence.

*74] *"In the matter of *Alexander Burn Callander*, of London, merchant and corn-factor, plaintiff, versus *R. M. Dittrich*, of Kœnigsberg, merchant, defendant.

"The Royal College of Commerce and Admiralty at Kœnigsberg, in Prussia, have, in their session of the 31st of May, 1839,—at which were present the Director, Mr. Privy-Councillor-of-Justice Stellter, and Becker, Henke, Burdach, Schrötter, Bittrich, Councillors of Commerce and of Admiralty, and Von Hippel, Referendary of the Supreme Court, deputed as Commissary,—conformably to the proceedings in the cause, declared as follows.

"(1) That the plaintiff's claim of 780*l.* 10*s.* 1*d.* sterling, with interest thereon, from the 6th day of April, 1838, which he formed against defendant *on account of* (*bezüglich auf*, relating to) a cargo of 917 quarters of tares received in the year 1837 by the ship 'Mary Swan,' commanded by 'G. Wright,' master, be registered.

"(2) That the agreement between the parties, that the plaintiff should abstain from recovering the 133 quarters of tares, which, according to the

(a) The translation has been compared with the original; but no correction has been made in anything which could affect the judgment of the court.

defendant's statement, were still lying here for the plaintiff, and that the defendant should be content to accept them, be hereby legally confirmed, and,

"(3) That the plaintiff be condemned in the charges of the law proceedings."

"JUDICIAL REASONS.

"A. B. Callandar, in London, in the beginning of 1837, ordered of R. M. Dittrich of this place, 100 lasts of large round Kœnigsberg seed tares, best quality, which were to be free from any mixture of oats, pease and such objectionable grain and seed, at 18s. sterling per quarter, free on board, to be shipped in spring. Dittrich *in his letter of the 18th of January in that year to Callandar, accepted this offer. Before the shipment took place Callandar recommended to Dittrich to have the tares shipped as early as possible, and in as small vessels as possible, to prevent heating. Next to this he ordered him to resell immediately half the quantity of the purchased tares,—about 500 quarters, if the cost price, clear of expenses, could be obtained; but should they be shipped, to give preference to an English vessel. The firm of Dittrich could not effect the sale, and consequently shipped 913 quarters, to an amount of 837*l.* 6*s.* sterling, on the 29th of April, 1837, per the 'Mary Swan,' 'G. Wright,' master; and upon the 30th idem informed Callandar thereof; observing, moreover, that the remainder consisting of 133 quarters then was warehoused for his account with Dittrich. [*75

"The purchase price for the quantity shipped of 913 quarters tares is paid in that manner, that Dittrich acknowledged to have received by accepted drafts 450*l.*, and that afterwards, on handing bill of lading, Callandar paid to Dittrich's order 375*l.* 6*s.* sterling. As to the payment of 12*l.* for 300 dunnage mats, the parties have not yet agreed.

"The 'Mary Swan' arrived in London on the 5th of June, 1837. Callandar examined the tares, and found they were in so bad a state that he thought himself entitled to refuse receipt thereof, and noted a protest through John Lise Venn, notary public in London, after that two corn factors had previously, as competent judges, or experts, declared the tares to be totally decayed. Immediately, and indeed on the 6th of June, Callandar informs Dittrich of his refusal to receive the tares; then on the 9th of June sent him the report of survey and protest, and again declared, that he declined the receipt of the tares, but had got the same landed and brought into a good and airy granary, *where the greatest care and attention would be taken thereof; and that he would also try in favour of Dittrich to procure an abatement or reduction in the duty. Now when Dittrich declined to indemnify Callandar anywise, and on the contrary, sent him brokers' certificates, trying to prove by them that the tares had been fully worth the price charged at the time of their shipment, and that he had consequently performed his part of the contract, Callandar answered that he would, if Dittrich made no other disposition, sell the tares for Dittrich's account, and would do so in small parcels by retail; which proceeding was proposed as the most beneficial to all parties interested. Callandar did accordingly, as Dittrich continued silent, always informing him of the respective sales, but without that Dittrich ever replied thereto. [*76

"On the 29th of December, 1837, Callandar sent his account-sales and account-current to Dittrich, and demanded payment of his debt, but as Dittrich did not comply with such demand, Callandar on the 10th of June in the year past, brought an action against him, thereby seeking:

"1. To condemn R. M. Dittrich to pay unto him, the plaintiff, instantly, the sum of 780*l.* 10*s.* 1*d.* sterling with running interest thereon, from the 1st April, 1838, under pain of incurring execution.

"2. To pronounce the plaintiff entitled to refuse receipt of those 133 quarters of tares lying still here, according to the defendant's statement, and

"3. To condemn the defendant in the whole of the said charges.

"Defendant has admitted the order having been given precisely as stated by the plaintiff, and has expressly allowed that a contract to furnish and deliver has been entered into; but he has also alleged that he has fulfilled his *77] agreement, and therefore disputed, *in quali et *quanto* the plaintiff's claim; with this qualification only, that he agrees that the plaintiff should not accept that portion of the tares which had not been sent away, whereby the second part of the action is disposed of.

"For the rest the defendant has principally opposed the plaintiff with the objection of prescription, and by reason of the sects. 343(*a*) and 345(*b*), Part. 1, tit. 5, of the Prussian Code, for the dismission of the cause of the plaintiff; the defendant contending, that according to the precept, part 1, tit. 11, sect. 987 of the Prussian Code, after such delivery, all the rules of law which hold between buyers and sellers are to be observed between the contracting parties, and consequently the delivery of tares was fulfilled in the very moment of the shipment on board the vessel, sect. 128 (*c*) *loco citato*, and that at six months after the receipt of the goods, the party who ordered the goods (now to be considered as purchaser) has lost by lapse of time (*d*), his right of action in respect of any defect affecting the thing itself. Not only from the day of the delivery (29th April, 1837,) but also *78] from the day of the *acceptance (5th June, 1837) to the day of the commencement of the action (10th June, 1838), more than a year had elapsed, whereby the plaintiff's right of action was extinguished.

"But eventually the defendant has alleged that the agreement of delivery on his part has been duly performed; as that is a matter which depends upon the state and condition of the tares when put on board, and not upon the state in which they arrived London, and he is able to prove that the tares were shipped on board the vessel in that stipulated condition.

"With respect to this point he has entered upon his proofs, whereupon the *status controversiæ* has proceeded with an express postponement of the inquiry as to the amount of damage. Nevertheless the admittance of evidence respecting the state and condition of the tares at the time of their shipment has been suspended *per decretum*, at the special and concurrent request of both parties, according to which, there should previously, and in conformity with the sects. 68 and 75, tit. 10, part 1, of the General

(*a*) Section 343, of the Allgemeines Landrecht für die Preussischen Staaten, (General, or Universal Code of Laws for the Prussian States,) part 1, tit. 5, runs thus:—"The rights which belong to the purchaser of a thing, on account of natural defects affecting that thing, must be exercised—in respect of real property in the country (*Landgüter*), within three years—in respect of real property in towns (*Städtische Grundstücken*), within one year—in respect of movable property (*Bewegliche Sachen*), within six months, after it has been received."

(*b*) "If the purchaser (*Uebernehmer*) suffer these periods to elapse without a judicial complaint against the vendor (*Geber*), his right is lost."

(*c*) "The possession of a right to rescind or abandon (*eines Untersagungsrechts*) is lost, if the other party has acquired the possession of the opposite right."—"*Wenn der andere sich in den Besitz des entgegenstehenden negativen Rechts,—des Rechts etwas zu thun,—gesetzt hat.*" Part 1, tit. 7, sect. 128.

(*d*) *Verjährung*; as to which see post, pa. 78, (a).

Court Instruction, for the present be decided (be a decision) only upon the preliminary objection of prescription.(*a*)

"The plaintiff endeavours to repel such objection, by alleging that because the transaction between the parties is an agreement of delivery, the objection of prescription(*a*) must fall to the ground. For the contract for delivery is a commercial contract, as to which, in the same manner as with all other commercial contracts, the particular rule prevails:—

*"That if one of the parties does not fulfil or perform his obligation, the other may, without being bound to bring an action for performance, withdraw from the contract or agreement, and claim indemnification. Sect. 878, I. 11,(*b*) sect. 408, I. 5,(*c*) of the Prussian Code. [*79

"From this the plaintiff infers, that he had a right to decline to receive goods which were not delivered in the stipulated state and condition, and by declaring his will and intention, to be disengaged from the contract; and that he has declared, most properly and distinctly, through his protest against the acceptance of the cargo. Now if this was regularly done on his part, and consistently with the Prussian law, there can be no idea of the goods having become his property; and if the defendant alleges the rule of law laid down in tit. 2, sect. 128,(*d*) *loco cit.*, according to which, in contracts, the shipment of goods amounts to a delivery, it must be replied that such is the case only with contracts of purchase, but not with contracts of delivery, the difference from which appears from the different nature of both kinds of agreements. The purchase has respect to a special matter or thing, and the purchaser may express his acquiescence in the quality if he has an opportunity of inspecting it; therefore the assent of both parties, with respect to the thing delivered, does not exist before the receiver has expressed his satisfaction with *the commodity. Such consent is tacitly manifested by acceptance, which assent materially differs from the delivery, as sufficiently appears from the rules on Prescription, tit. 5, ss. 343,(*e*) and 244;(*f*) and therefore, where acceptance never took place, as in this case, there is no ground for contending that the period of limitation has begun to run." [*80

"*Interpreter's Remarks.*

["The narrative of the facts having thus been given, (as usual in the Prussian judgments,) and the quotations and opinions of both mandatories, (called commissary of justice in Prussia, synonymous with, and joining the functions of, solicitor, attorney, lawyer, advocate, notary) stated, the judges now, in their sentence, enter into a special inquiry on the nature of the agreement, merely to ascertain (as they say) where the tares were to be delivered, and when the same have become the property of the plaintiff. For this reason, they have referred to certain extracts of letters, (the dates

(*a*) "*Verjährung*," (which answers the purpose of the "limitation of actions" in English law) is, by the Prussian code, defined to be "an alteration in certain rights resulting, by the provisions of the law, from the non-exercise of those rights for certain fixed periods." Part 1, tit. 9, sect. 500.

(*b*) By sect. 878 of the 11th title of the first part of the Prussian Code, suprà, 77(g), "if one party refuse the promised performance, the other may immediately abandon the contract"— "*von dem Vertrage sofort zurücktreten.*"

(*c*) By the 408th section of the fifth title of the first part of the Prussian Code, (suprà, 78 (a),) "In agreements, the principal subject of which is a commercial transaction, the party who asserts that the other has not fulfilled the contract according to its terms, or that he is unable so to perform the contract, may thenceforth, but at his own risk, (*auf seine Gefahr,*) abandon the contract."

(*d*) Which see, suprà, 78 (b).

(*e*) Suprà, 77.

(*f*) Which section prescribes shorter periods of limitation in respect of *extrinsic* defects

of the letters follow;) and as to the nature of the agreement, they consider this indifferent, both parties having agreed that it should stand as a contract of delivery. Now, as it would be useless to repeat and re-translate into English such extracts and arguments, which would tire and *absent* the English lawyer or judge, the interpreter leaves that, and now enters upon the real grounds whereby the judges justify their sentence or judgment."]

"In the case now lying before us, the agreement (sense of contract) was clearly this, that the defendant had to deliver the commodity here in
*81] *Kœnigsberg into the vessel for account and risk of the plaintiff; such follows, doubtless, from the correspondence between the parties as above referred to, by which the contract was settled.

"The defendant had engaged to deliver a cargo for the plaintiff, free on board here, and the plaintiff in his letters, 31st January and 30th March, left to the defendant the choice of a vessel, thereby, indeed, recommended to him the earliest possible shipment, and dividing of the whole quantity and shipping it in small vessels, that the danger of heating be lessened; and further stated that English vessels should be preferred, without, however, restricting the arrangements to be made as to the shipment, to either of the courses intimated; therefore defendant was fully entitled to make out the invoice as he did, expressing that he had shipped the tares upon order, and for risk of the plaintiff; he left to the latter to procure the insurance, and with respect to the same, only observed that he might mind (consider of) the risk of craft for the cargo between here and Pillau, and the plaintiff, in consequence of such invoice, thought himself bound to pay the balance of the said invoice.

"So, by the shipment of the tares on board the vessel, the delivery was effected, and the contract *in casu* performed on the part of the defendant. Had the vessel miscarried, and the cargo been lost, the loss of the tares would have touched the plaintiff or the underwriters.

"After fulfilled delivery, the rules on the agreement of purchase (s. 987, I. 11, of the Prussian Code(*a*)) are the only ones that may be applied. Therefore the plaintiff was no longer at liberty to recede from the contract,
*82] as from the day of the completed delivery *of the tares into the vessel, the risk as well as the ownership thereof went over upon him; and if he thought the tares defective on their arrival in London, he could then no more refuse the receipt of the same as from the delivery into the vessel. According to contract, the property had become transferred from defendant upon the plaintiff; as to the deficiencies in promise, (complaints in respect of badness of quality,) the plaintiff was now only allowed to refer to the title arising from s. 198, I. 11, and s. 319, *seq*. I. 5,(*b*) *loco cit*. The protest could be of no use to him, as he had become the owner of the commodity, from the moment of shipment on board the vessel here.

"Therefore, it is also without effect or influence when the plaintiff maintains, that if it be impossible to a purchaser on delivery, to ascertain of the quality before the receipt of the commodity, as on the one hand he may have such goods as are to be delivered abroad inspected or examined previous to and on the shipment taking place, and may suffer the goods to be shipped only in case they be found conform to agreement; and, on the other hand, nobody is entitled to form any claim or right to himself, from the neglect of precautionary measures, under the pretext, that it has been

(*a*) Suprà, 77.

(*b*) Which sections contain a variety of provisions relating to defects in articles which have formed the subject of contracts.

impossible to him to express his mind upon the quality of the goods before the delivery of the same.

"The defects in the article which the plaintiff complains of as being contrary to the stipulated quality, he is bound to establish, within the limited periods appointed by sections 343 and 344, part 1, tit. 5, of the Prussian Code, before a competent tribunal, to which the defendant is legally amenable.

"Such prescription commenced, according to s. 343, from the day of receipt; and after s. 344, from that of perceiving the deficiency. [*83

"Indeed, the first day is not to be considered identical either with the day of delivery—if we reflect upon such, as per s. 128, I. 11, *loco cit.*—of that of transmission—in this case, representing the day of delivery, (which has been set forth so striking by Bornemann in his observation or "Commentary on the Prussian Civil Law," par. 2, page 607, s. 99:) on the contrary, it may be assumed from the general principles upon prescription, as doubtless, that the limitation should commence only from that day when the examination through the entitled (by the person entitled to the goods) could possibly take place, and, of course, from that day when the object was really taken possession of by him, (went into his custody;) wherefore, in order to point this out in s. 343, there has intentionally not been fixed upon the day of delivery, but on the day of receipt of the object, as the commencing moment of prescription.

"In consequence hereof, the prescription against the plaintiff in this cause first began from the arrival of the tares in London, when and where the same could be taken possession of by him, and he became enabled to inform himself of the alleged defect in quality.

"But also from this term,—being the 5th of June, 1837, until the day of commencing his action, on the 10th of June, 1838, the limitations for denouncing the claims upon warranty,—at the furthest six months, as prescribed by ss. 343 and 344, *loco cit.*, had long ago elapsed. The plaintiff consequently has lost his right of claim, (s. 345, *loco cit.*)

"As to the 133 quarters which remained behind, the agreement of the parties, that the plaintiff renounces the receipt, and the defendant is consenting thereto, was to be and has been confirmed.

"The decision upon the point of law-charges follows *from s. 2, tit. 23, of the regulations upon law proceedings; which regulations are universally binding. [*84

"Issued under the seal entrusted to us, and the usual signature.

Kœnigsberg, on the 31st day of May, 1839.

(L. S.)

"Royal Prussian College of Commerce and Admiralty.

"Signed, STELLTER."(*a*)

Objections were taken on the part of the plaintiff to this judgment, on the ground that no libel or other proceedings were shown, and that no jurisdiction of the court was proved. All objections to the judgment were

(*a*) There followed a certificate by a "sworn public translator to the royal court of Kœnigsberg in Prussia, that the foregoing translation *thoroughly renders the true sense and meaning of the original judgment, in German*, of the royal court of Kœnigsberg." To this is subjoined the original judgment, under which the English consul certifies that "the above signature (Stellter) is the proper handwriting of Mr. Stellter, Director of the royal Prussian court, called 'College of Commerce and Admiralty;' and that unto all acts and writings so signed by him in that quality, full faith and credit is, and ought to be, given in courts of justice, and elsewhere."

reserved by the Lord Chief Justice for the consideration of the court; and a verdict was found for the plaintiff on all the issues but the third, which applied to the second count.

A rule nisi had been obtained by the defendant in last Michaelmas term, to enter a verdict for him on the fourth issue,(a) (being the issue raised by replication to the fourth plea,) and a cross rule was obtained by the plaintiff, to enter judgment *non obstante veredicto*, for him, in case the defendant's rule should be made absolute.

Channell, Serjt., and *Byles*, on the part of the plaintiff, now showed
*85] cause against the former rule. The onus *lies on the defendant, to show that the foreign judgment is in respect of the same causes of action as those set forth in the first and second counts. It is contended on the part of the plaintiff, that it is certainly limited to the cause of action in the first count, even if it embraces that. There is nothing in the judgment to show, that the plaintiff attempted to enforce a claim in respect of any neglect of duty, or of any breach of contract giving rise to a duty. The suit in the foreign court was for a liquidated sum; here the action is for damages, which is a very different cause of action. The plaintiff was the purchaser, and the defendant the seller of certain tares. In the foreign court, it appears that the plaintiff contended there had been no delivery to him so as to vest the property in him; he received them under protest, and insisted that the property was still in the defendant, and prayed the court to rescind the contract. In the present action the plaintiff in the first count assumes the delivery to him and acceptance by him, and sues the defendant for the damage that has accrued to him, by reason of the tares being inferior to those contracted for. In the second count he states, that the defendant took upon himself a duty, viz. that the goods should be shipped in a proper manner, and there is clearly nothing in the foreign judgment to show that the defendant was relieved from that liability. Besides, if the plea does not import that the judgment in the foreign court was upon the merits, it would be bad as containing no answer to the action. If it is to be taken as importing a judgment on the merits, then it is not supported by the evidence, as the document produced was merely to the effect that the *remedy* was lost by lapse of time, as in the case of our statute of limitations, not that the right of action was destroyed. The mere loss of a remedy in another country will be no bar to a right of action in this; as (even sup-
*86] posing the contract to *have been made in Prussia, which is denied) the *lex loci solutionis* must prevail over the *lex loci contractus*; *The British Linen Company* v. *Drummond*, 10 B. & C. 903; *Huber* v. *Steiner*, 2 New Ca. 202, 2 Scott, 304; Storey, on the Conflict of Laws, p. 839, 2d ed.; *Don* v. *Lippman*, 5 Clark & Fin. 1. The libel and other proceedings would probably have shown what really were the causes of action in the foreign court.(b)

Bompas, Serjt., in support of the rule obtained by the defendant. The question, whether the foreign judgment included both of the causes of action set out in this declaration, was for the jury. The present objection was not raised at the trial; it was there taken for granted that the causes

(a) The rule was drawn up for entering a verdict for the plaintiff on the *third* issue, but this appears to have been an error.

(b) They also argued upon the objections taken at the trial as to the absence of proof of jurisdiction in the foreign court, and the effect of not setting out all the proceedings. The arguments upon these points are omitted, as the judgment of the court was confined to the point reported in the text. The following authorities were cited: *Buchanan* v. *Rucker* 1 Campb. 63, 9 East, 192, and *Obicini* v. *Bligh*, 8 Bingh. 335, 1 Mo. & Scott, 477.

of action were the same in both cases, and the defendant ought not now to be called upon to argue this point. [TINDAL, C. J. It was distinctly understood, that all objections to the judgment were reserved for the consideration of the court.]

The judgment sufficiently shows, that the action abroad had reference to both of the causes of action relied upon in the present action; the whole contract was before the court in Prussia. In order to raise the present objection, the plaintiff ought to have replied, that there was no such judgment as that stated in the plea, as to the cause of action in the second count mentioned. The legal effect of the plea is to refer to the cause of action in each count, and therefore it may be taken distributively. Or, if the court entertain any doubt upon this *point, having the same power as the judge at nisi prius, they may amend the plea by inserting that the judgment applied to the cause of action in the first count only. [*87

The effect of the judgment however is, that the plaintiff's whole right of action is utterly gone. It may be admitted, that the judgment does not say that the plaintiff never had a right of action, but it says that he had lost that right; and decides, therefore, that he had no cause of action at that time.

TINDAL, C. J. I am unable to get over the first difficulty that has been urged against the defendant in this case. The court are to consider themselves in the same situation as the judge at the trial; and on perusing the judgment which was produced, it does not appear to me to be the same judgment, in effect, as that on which the defendant has relied. The plea put upon the record is, "that the plaintiff impleaded the defendant in the Royal Prussian court of Commerce and Admiralty of Kœnigsberg, for not performing the very same identical promises, and each and every of them, as are in the first and second counts of the declaration in this action mentioned, and for the damages alleged to have been maintained by the plaintiff thereby." The plea then proceeds to state, that "a judgment or decree was pronounced by the said court, whereby it was adjudged and declared that the plaintiff had no cause of action against the defendant in respect of the damages alleged to have been sustained by him, the plaintiff, through the non-performance of the said promises;" and that such judgment was final and conclusive. This plea, therefore, professes to be an express answer to each of the specific *gravamina* set forth in the declaration. The issue raised by the replication is, "that no such judgment or decree, final and conclusive between the parties to the suit in *that plea mentioned, in manner and form therein alleged, ever was pronounced by the said court." [*88

The judgment produced in evidence appears to have been given in a cause concerning a claim for a specific sum of money made by the plaintiff against the defendant "on account of a cargo of 917 quarters of tares received in the year 1837, by the ship Mary Swan, commanded by G. Wright, master." Now the first count in the declaration is for the breach of a promise by the defendant, that he would deliver to the plaintiff a certain quantity of tares at a certain fixed price; and that the said tares were to be "large, sound, good Kœnigsberg seed tares, of the growth of the year 1836, and of the best quality;" and the breach alleged is, that the defendant did not deliver to the plaintiff tares of the quality agreed upon, but that the tares delivered were "very soft, heated, discoloured

mouldy, rotten, decayed and wholly unfit to be used as and for seed tares, or for any other purpose, and not of the growth of the year 1836."

Now it is by no means clear that the judgment in the Prussian court relates to the same cause of action as that mentioned in the *first* count. But without considering that point, let us see what is the contract alleged in the *second* count of the declaration. That count states that the "defendant promised the plaintiff that he, the defendant, would superintend the shipping and loading of the said tares at Kœnigsberg aforesaid, and would take and use every reasonable and proper precaution in seeing that the same were properly shipped and stowed in and on board a fit and proper vessel, or fit and proper vessels, in that behalf, for the conveyance of the said tares;" and then alleges, as a breach, that the defendant did not "superintend the shipping and loading of the same tares, or use any precaution whatsoever in or towards seeing that the same were properly shipped or stowed in or on board a fit or proper vessel, or fit or
*89] *proper vessels, in that behalf;" and that "on the contrary thereof, the vessel, in and on board of which the same 917 quarters of the said tares were so shipped and loaded as aforesaid, at the instance of the defendant, by reason of her having on board too great a quantity of cargo, and by reason of the state, size, condition and circumstances of the same vessel, was on the occasion aforesaid, a very unfit and improper vessel wherein to ship or stow the same tares, as the defendant at the time well knew." And the plaintiff then alleges that the tares were damaged by reason of their having been so improperly shipped.

Now, if for a moment it were supposed that this second count contained the sole subject of action in this case, could it be said that the judgment was for the same cause of action as that upon which the plaintiff had declared? Could we have seen our way, without parol evidence to show that the judgment produced applied to the damage alleged to have been sustained by the plaintiff, in consequence of the improper shipping and stowing of the tares? I think it clear we could not; and therefore that, upon this point, there is a variance between the proof and the allegations on the record.

To this, one answer that is attempted to be set up is, that the plea may be severed, and treated as applicable to the first count only; but to this I reply that, though true it is, that some pleas are in their nature severable and distributive,—as, for instance, where there are several counts in assumpsit, the general issue may be distributed and considered applicable to each count, so as to meet the finding of the jury upon the different issues that may be raised;—yet that, where, in answer to the whole action, a document is produced—which, though not indeed a record according to our law, is still a solemn proceeding in a foreign court, evidenced by the
*90] seal of that court—we cannot say that a plea, which sets up *that document as an answer to the whole action, is divisible, and take it as applicable to one part of the action only. Then again, it is said that we might amend the plea in this case. But I do not think we could amend the issue so as to make the plea apply to the first count only, and thereby occasion a different set of issues. Upon the whole, therefore, I think the verdict must be entered for the plaintiff upon this issue, as the defendant has failed to make it out affirmatively.

Coltman, J. The answer set up by this plea is, not that there was no reasonable cause of action in justice or honesty on the part of the plaintiff; it is merely in the nature of a technical answer, and therefore it ought, I

think, to be strictly proved. On the best consideration I have been able to give this case, it appears to me, that the suit in the court of Commerce at Kœnigsberg, was not brought for the same cause of action as the action now before this court. The proceedings in the foreign court appear to be either very imperfect in their nature, or not to be fully before us. The suit in the Prussian court seems to be rather for the rescission of the contract; while the present action is for damages resulting from a breach of that contract. Now it seems clear that a party may not be entitled to rescind a contract, and yet may be entitled to an action for the breach of it. Upon this ground, therefore, I think the plea is no answer to this action.

With respect to the point that has been raised as to the amendment of the plea, I think that no favour or stretch of authority is to be shown, or made on behalf of a party who is seeking to withdraw his case from our jurisdiction; and that if we even had the power to amend, we are not called upon to exercise it in this case, or to make any extraordinary exertion on his account.

*Upon the whole, I think the defendant has failed on this issue, and that the rule for entering the verdict for him thereon must be discharged. [*91

ERSKINE, J. I am of the same opinion. In discussing this question I think we have nothing to do with what the effect of the foreign judgment may be in this country. The issue is, whether such judgment, as stated in the plea, is final and conclusive between the parties, as to the two causes of action mentioned in the two counts in the declaration. If the defendant had made that out, in point of fact, he would undoubtedly have succeeded; and the *onus* lay upon him to show that there had been a final and conclusive judgment such as he alleges. It does not appear upon the record in this action, that the foreign judgment operated as a bar by limitation. It is pleaded as a final and conclusive judgment between the parties. The question then is, whether the defendant has made out the affirmative of this issue. Even assuming that the foreign judgment put in evidence is a final and conclusive judgment, the question still is, whether it is such a judgment as is mentioned in the plea, namely, a judgment as to the identical causes of action mentioned in the first and second counts of this declaration. Now we must look to the judgment and see if it is what it is alleged to be. I confess it does not appear to me a judgment for *either* of these causes of action. The suit in the foreign court appears rather to be founded upon a promise by the defendant to repay the plaintiff a sum of money; which is a very different cause of action from either of those set forth in the first two counts of this declaration. But that is not the ground of objection. The plea states a judgment recovered in respect of two distinct promises; the judgment appears to be in respect of one promise only, and to have no reference *whatever to any agreement or duty on the part of the defendant with regard to the shipment or stowage of the tares. The judgment, therefore, does not in my opinion support the plea, inasmuch as it appears to be for, at any rate, a very different cause of action from that set forth in the second count of this declaration. [*92

The next point is, whether or not we can take this plea distributively, so as to apply it to the first count only. But the defendant was bound, I think, to state the legal effect of the judgment, and he states it as applicable in law to both counts in the declaration. For the reason just given, it

does not however appear to me that the judgment can be considered as a bar to the cause of action mentioned in the second count. There is, therefore, a variance between the statement in the plea, and the legal effect of the document produced to support it.

We are then asked to amend the plea; but I think we ought not to do so. I agree with my brother Coltman that it would be unjust to do so in a case where there is no real answer put forth upon the merits. And even if we did amend, the plaintiff must have the opportunity of raising the question, whether the foreign judgment is conclusive as a bar to an action in this country; and I think, for such a purpose, we ought not to assume a power which it is by no means clear that we possess.

CRESSWELL, J. I quite agree that the present rule for entering a verdict for the defendant on this issue must be discharged.

A distinct question is raised by the issue, whether there has been any final and conclusive judgment between these parties delivered by the court of Commerce in Prussia, on the causes of action in the first and second
*93] counts in this declaration. I cannot myself see *that the judgment was in respect of *either* of those causes of action. With regard to the first count, it may be that there was, or that there was not, such a judgment; all that I say is, that I do not myself see that there was. Looking at that which was properly the *judgment* produced, it speaks of the claim of the plaintiff against the defendant, "*on account* of a cargo of 917 quarters of tares received in the year 1837, by the ship 'Mary Swan;'"(a) but this is so vague and uncertain, that I cannot say what was the nature of that claim, or what the object of that suit; it may have been to rescind the contract, or it may have been for damages in respect of the nonfulfilment of the contract. To my apprehension, it is not clearly applicable to the cause of action in the first count of this declaration. Some years ago it was supposed in our courts, that if an article sold did not correspond with a warranty, the purchaser might either rescind the contract, and sue the vendor for the recovery of the purchase money, in an action for money had and received; or sue for damages occasioned by the breach of the contract.(b) Now, it rather appears, that this suit in the foreign court was something of the former class; for in what is set out in the document produced as an appendage to the judgment, and called the "Reasons" of the court, it is stated that when the "Mary Swan" arrived in London, the plaintiff "examined the tares and found they were in so bad a state, that he thought himself entitled to refuse the receipt thereof;" and immediately afterwards he informed the defendant "of his refusal to receive the tares," "and repeatedly declared that he declined the receipt of the tares;" and then it further appears, that one of the points upon which the plaintiff prays
*94] judgment in the *foreign court, is that he may "be entitled to refuse receipt" of the tares. It seems, therefore, that this suit was to rescind the contract, rather than a suit for damages.

But even supposing that this judgment does apply to the cause of action set forth in the first count, we must then look to the second count; and there is clearly nothing in this judgment, that points to any negligence in shipping the tares, which is the cause of action in the second count. The plea says, the foreign judgment goes to the whole cause of action; but when it is produced, it does not appear to do so; it does not therefore support the allegation in the plea.

(a) Antè, 74. (b) Vide *Street* v. *Blay*, 2 B. & Ad. 456.

But then it is said, that the judge at nisi prius might have amended, and that the court, being considered in the same situation as the judge, may also exercise that power; but we can only amend *as to the variance*, by altering the statement in the plea, that the foreign judgment was for both of the causes of action mentioned in the first and second counts. If we did so, however, we should only make it a bad plea; for it would then be pleaded to both counts, and would, on the face of it, apply only to one.

Rule discharged.

*WHITE v. NICHOLSON, Executor of HARRIET REEVES, deceased. [*95

By an agreement made and dated 31st May, A. let to B. a house at "80*l.* a year, payable quarterly, to commence from the 29th September next." B. agreed to take the fixtures at a valuation. The following memorandum was at the foot of the agreement:—"A. agrees to take the fixtures again at the expiration of the tenancy, provided they are in as good condition then as they *now* are; and B. agrees to leave the premises in the same state as they *now* are." Though not so stated in the agreement, the house was, at the time of the making of that agreement, in the occupation of C.—as tenant to A.,—who quitted on the 26th of September:

Held, first, that notwithstanding the existence of express terms of agreement,(*a*) an implied contract arose on the part of B. to use the premises in a tenant-like manner; and secondly, that the agreement supported the allegation of a promise to deliver up the premises in the same state as they were in *at the commencement of the tenancy*.

ASSUMPSIT. The declaration stated, that, in consideration that Harriet Reeves, at her request,(*b*) then had become and then was tenant, to wit, as tenant from year to year, to the plaintiff, of a certain messuage and premises with the appurtenances, upon and subject to the terms that the said H. R. should use the said messuage and premises during the said tenancy, in a tenant-like and proper manner, and should, at the expiration thereof, leave the said messuage and premises in the same state as the same were in *at the time of the commencement of the said tenancy*, the said H. R. promised the plaintiff to use the said messuage and premises in a tenant-like and proper manner during the said tenancy, and to leave the same, at the expiration thereof, in the same state as the same were in *at the *commencement of the said tenancy*. Averment: that the tenancy continued to the time of the death of H. R. and long afterwards, [*96 and was duly determined by a certain notice from the defendant, as executor, to the plaintiff. Breach: that H. R. in her lifetime did not use the messuage and premises in a tenant-like or a proper manner, but, on the contrary, used them in so untenant-like and improper a manner that they became and were ruinous, &c.; and that the defendant, as executor, after the death of H. R., did not, upon the expiration of the said term, or at any other time, leave the said messuage and premises in the same state as the same were in *at the commencement of the said tenancy*, but, on the contrary thereof, on the said expiration of the said tenancy, to wit, on, &c., left the said messuage and premises in a much worse state than the same were in at the said commencement of the said tenancy, and left the doors, windows, &c. greatly dilapidated, &c.

(*a*) Vide *Shepherd* v. *Pybus*, antè, vol. iii.

(*b*) The allegation of request appears to be unnecessary; as the consideration stated is not a benefit conferred on the defendant, (which, in the absence of an antecedent request, would be taken to have proceeded from the plaintiff spontaneously, as a mere *gratuitous* benefit,) but an agreement for a tenancy, from which both parties, or if not the plaintiff (as in the declaration no rent is mentioned or alluded to,) at least the defendant, would derive advantage.

Pleas: first, non assumpsit.

Secondly, as to the first breach, that H. R. did not use the premises in an untenant-like or improper manner.

Thirdly, to the second breach, that, at the expiration of the said tenancy, the defendant left the premises in the same state as they were in at the commencement of the said tenancy.

At the trial before ERSKINE, J., at the sittings at London, after last Hilary term, the following agreement was given in evidence.

"Memorandum of an agreement, made and entered into, the 31st day of August, 1838, between Nicholas White, of, &c. of the one part, and Harriet Reeves, of, &c. of the other part, as follows: N. W. agrees to let, and H. R. agrees to take a house and premises, No. &c., late in the occupation of S. Seabrook, at the clear net rent of 80*l.* per year, payable
*97] quarterly, to *commence from the 29th day of September next, and the first quarter's rent to become due and payable on the 25th day of December next. The said H. R. to pay all rates, taxes, and assessments assessed upon the premises. The said H. R. also agrees to take the fixtures at a fair valuation in the usual way; and it is hereby agreed by the said parties, that if either of them is desirous of putting an end to the tenancy, a proper notice in writing must be given for that purpose.

"Witness, &c.

"N. White agrees to take the fixtures again at the expiration of Mrs. Reeves's tenancy, and to allow the price at which they may be valued, provided they are in as good condition then *as they now are;* and Mrs. Reeves agrees to leave the premises in the same state *as they now are.*

"(Signed) Nicholas White,
Harriet Reeves."

Another tenant was in possession at the time the agreement was entered into who did not quit till the 26th of September.

It was objected, on behalf of the defendant, first, that the clause at the end of the agreement being in special terms, the implied contract to use the premises in a tenant-like manner did not arise; and, secondly, that the agreement proved did not support the promise as laid in the declaration; inasmuch as the former was, to leave the premises "in the same state as they *now* are," viz. on the 31st of August, the date of the agreement; and the latter was, to leave them "in the same state as they were in *at the commencement of the tenancy,*" viz. the 29th of September. The learned judge offered to amend; but this was declined on the part of the plaintiff. Both points were reserved for the consideration of the court; and it was
*98] agreed that the court might make any *amendment that a judge at nisi prius might have made. The jury returned a verdict for the plaintiff, with nominal damages.

Bompas, Serjt., now moved to enter a nonsuit, and renewed the objections taken at the trial.

Upon the second point the court granted a rule *nisi*, against which

Channell, Serjt., now showed cause. The tenancy, in fact, commenced on the 31st of August, the date of the agreement, inasmuch as it contained words of present demise. The reference to the 29th of September in the agreement related to the payment of rent; and the words "to commence" should be read "to commence to be paid." If the tenancy was not to commence till the 29th of September, the word "now" may be construed to mean "at the commencement of the tenancy," as it would be absurd to suppose the testatrix would have undertaken to leave the premises in the

state they were in on the 31st of August, if she was not to have possession till the 29th of September.

Bompas, Serjt., in support of the rule. As the rent did not commence until the 29th of September, it was equally absurd to suppose that the testatrix was to have the premises from the 31st of August to Michaelmas for nothing. There was no valuation of the fixtures at the time of the agreement. It is therefore clear that the tenancy did not commence then. It might be an improvident agreement on her part; but it was distinctly stipulated that her tenancy was to commence on the 29th of September, and that she would keep the premises in the same state they were in on the 31st of August.

TINDAL, C. J. I cannot help thinking that the good sense of the agreement is, that the parties must have *referred to the state of the premises at the time of the commencement of the term. That would [*99 be an agreement consistent with the tenant's own enjoyment of the premises; and this interpretation would get rid of the difficulty that would otherwise arise as to injuries which might be done to the premises in the mean time by the tenant then in possession. Upon the whole, therefore, I think it is not too much to say that the parties were stipulating as to the commencement of the term, as they were clearly speaking in a very general way. And, looking at the whole of the clause at the end of the agreement, I think the word "now" may fairly be taken to refer to the commencement of the term. The plaintiff thereby "agrees to take the fixtures again at the expiration of Mrs. Reeves's tenancy, and to allow the price at which they may be valued, provided they are in as good condition *then* as they *now* are; and Mrs. Reeves agrees to leave the premises in the same state as they *now* are." The word "then" clearly means the period of the determination of the term, and it is used in opposition to the word "now," which, I think, may mean the commencement of the term. The statement in the declaration therefore appears to be right and proper, and there is no variance.

COLTMAN, J. I am of the same opinion. I think the party agreeing to take the premises must have meant that she would deliver them up in the same state as they were in when she entered upon them: that would be a natural agreement. Otherwise, if the party in possession at the time of the agreement, had pulled down the house before Michaelmas, the testatrix would have been liable. The parties, to be sure, are, to a certain degree, fettered by the use of the word "now," and we could not easily give the proposed meaning to that word, but for its being used in opposition to the word *"then," which clearly indicates the determination of the [*100 term. Upon the whole, therefore, I think the word "now" may fairly mean the time when the party was to commence the enjoyment of the premises.

ERSKINE, J. I own I did not think at the trial that the agreement could bear that interpretation, and I have some difficulty in thinking so now; but I believe justice will be done by adopting it, and it will probably carry out the real meaning of the parties.

CRESSWELL, J. I am inclined to think that the agreement may bear the construction put upon it by the rest of the court. It appears that the fixtures are not to be taken until the commencement of the tenancy; and they, also, at the end of the term, are to be given up in as good condition "then as they *now* are:" that would seem to show that the word "now" must refer to the commencement of the tenancy.

Rule discharged

101*] *STURTEVANT *v.* FORD.

A plea by the acceptor of a bill, to an action by the endorsee, that the bill was accepted before it became due, at the request and for the accommodation of J. S., and without any value or consideration for the acceptance or for the payment; and that the bill was endorsed to the plaintiff after it became due, is bad.

ASSUMPSIT by the endorsee against the acceptor of a bill of exchange drawn by J. Ayres for 243*l.* 7*s.* 8*d.*, dated 17th of August, 1838, payable in London(*a*), for value received in iron.

Fourth plea, that the bill was accepted by the defendant before the same became due or payable, at the request and for the accommodation of Ayres, and without any value or consideration whatever for the acceptance thereof or for the payment thereof; and that the said bill was so endorsed to the plaintiff as in the said declaration mentioned, two years after the same had become due and payable, according to the tenor and effect thereof. Verification.

Special demurrer, assigning for cause, that it is not averred or shown in the said plea that the defendant accepted the said bill upon the terms that the same should not be endorsed or negotiated by Ayres after it became due; that the said plea does not allege that the plaintiff had notice of the premises or any of them in that plea mentioned, before or at the time the said bill was endorsed to him, or that the defendant ever required Ayres not to endorse the bill after it became due.

Joinder in demurrer.

*102] **Channell*, Serjt., in support of the demurrer. The plea does not state that the plaintiff is a holder for value, and it must be therefore taken upon the record that the plaintiff is a holder for value. Neither does the plea state that, before the plaintiff became the endorsee of the bill, he had notice that the bill was drawn for the accommodation of the drawer and without value. It does not show that the drawer was under any restriction as to endorsing a bill after it became due. The question to be decided upon the demurrer is, whether a holder for value taking a bill which is over due, without notice that the instrument is an accommodation acceptance, is not entitled to recover. [CRESSWELL, J. The question is, whether an endorser can give a better title than he himself has.] In *Charles* v. *Marsden*, 1 Taunt. 224, it was held not to be a sufficient defence to plead that the bill was accepted for the accommodation of the drawer without consideration, and endorsed to the plaintiff after it became due. In *Stein* v. *Yglesias*, 5 Tyrwh. 173, 1 C. M. & R. 565, 1 Gale, Exch. Rep. 98, 3 Dowl. P. C. 252, it was pleaded that the bills were accepted for the accommodation of the endorser, and without any consideration for such acceptance. The plea was held to be bad, on the ground that it did not state that the bill had been accepted before it became due, and that there was nothing to show that the defendants intended to limit the negotiation of the bill to the time before it became due. The plaintiff would have his remedy over against the party accommodated. It lay on the defendant to show that the power of endorsing, and thereby raising money, was limited to the period during which the bill was running. The defendant is not

(*a*) As to the effect of the insertion of the words "in London" in the body of the bill, see *Selby* v. *Eden*, 3 Bingh. 611, 11 B. Moore, 511; *Fayle* v. *Bird*, 6 B. & C. 531, 9 Dowl & Ryl. 639, 2 Carr. & P. 303; *Gibb* v. *Mather, in error*, 8 Bingh. 214, 2 Cro. & Jerv. 254, 2 Tyrwh. 189, 1 Mo & Scott, 387, antè, 10, n.

entitled to notice of non-payment. *Tinson* v. *Francis*, 1 Campb. 19, which will be relied on for the defendant, was a case of gross fraud.

**Talfourd*, Serjt., *contrà*. This is a point of considerable importance. In *Tinson* v. *Francis* it was held that an endorser of a promissory note for value, who had received the note after it became due from an endorser who had not given value, could not sue the maker. [*103

In *Brown* v. *Davies*, 3 T. R. 80,(a) where a promissory note was endorsed to the plaintiff after it became due, it was held that the maker was entitled to go into evidence to show that the note was paid, as between him and the payee. In that case BULLER, J., says, "There is this distinction between bills endorsed before and after they become due. If a note endorsed be not due at the time, it carries no suspicion whatever on the face of it, and the party receives it on its own intrinsic credit. But if it is over due, though I do not say that by law it is not negotiable, yet certainly it is out of the common course of dealing, and does give rise to suspicion. Generally when a note is due, the party receiving it takes it on the credit of the person who gives it to him."——"I am speaking of cases where the note has been endorsed after it became due, when I consider it as a note newly drawn by the person endorsing it."

The law as laid down by BULLER, J., is not, it is true, adopted to its full extent by Lord KENYON, who was not prepared to go the same length where the endorsee cannot be fixed with notice of the dishonour of the note or bill. But the contract and the understanding upon the drawing of a bill of exchange is, *primâ facie*, that the party shall have the benefit of the time during which the bill has to run, and not for an indefinite period.

TINDAL, C. J. Upon these pleadings the plaintiff must be taken to be a holder for value, without notice *of any defect in the title of his endorser. Upon the authority of the cases,—without saying what would be my opinion if the question were *res integra*,—I think the plaintiff is entitled to judgment. In *Charles* v. *Marsden* the plea stated, that, at the time of the endorsement, the plaintiffs knew that the bill had been accepted by the defendant for the accommodation of Atkinson, the payee; that, therefore, was a stronger case than the present. I do not see much force in the argument, that the circumstance of the bill being overdue when it is endorsed puts the endorsee in the same position as the endorser, who, in the case of a bill drawn for his accommodation, cannot sue at all. I do not think that the holder is precluded from suing in all cases of accommodation bills endorsed after the time at which they purport to be payable. Nothing *dehors* the bill, as payment, &c. ought, I think, to affect an endorsee for value. In *Stein* v. *Yglesias* it was said, without disapprobation on the part of the court, that the defendant was bound to allege want of consideration for the endorsement. [*104

COLTMAN, J. I am of the same opinion. In *Charles* v. *Marsden*, LAWRENCE, J., says, "Where a party has obtained the bill by fraud, or where there is any prejudice to the drawer, those cases apply; but, unless in instances of this kind, the acceptor is not relieved. This case may fall within some general expressions which have been used by the court in giving judgment, but those expressions are always to be taken with reference to the cases to which they were applied. One was a case of clear fraud, another was a smuggling transaction. In the present case, it is to be supposed that the party persuades a friend to accept a bill for him, because

(a) And see *Berough* v. *Moss*, 5 Mann. & Ryl. 296; *Burrough* v. *Moss*, 10 Barn. & Cresw 558.

he cannot lend him money. Would there be any objection if, with the knowledge of the circumstance that this is an accommodation bill, some
*105] person should *advance money upon it *before* it was due? Then what is the objection to his furnishing the money on it *after* it is due? For there is no reason why a bill may not be negotiated after it is due, unless there was an agreement for the purpose of restraining it. But if there had been such an agreement, it should have been stated in the plea; and it might then have been a defence; but that is not so here. This bill, then, must be presumed to be given in order that the party may raise money on it in the ordinary way. I see nothing in the transaction prejudicial to the acceptor, and the plea is bad in substance."

ERSKINE, J. I am of the same opinion. It must be taken here that the plaintiff was a holder for value. The circumstance that the bill was overdue might have operated as evidence that the bill was an accommodation bill, but it should have been so averred. A jury might infer that the bill was accepted upon an understanding that it was not to be negotiated after it became due. But that would not be an inference of *law;* it should therefore have been made the subject of an averment. In the absence of such an averment, the question is, whether the mere fact of the bill being an accommodation bill prevents it being negotiable after it becomes due. It is said that a bill endorsed after it becomes due, is taken by an endorsee subject to all the equities. The question is, whether the matter of defence set up, is an equity which attaches to the bill. The drawer of this bill could not sue the acceptor. If the plaintiff has given consideration there is no equity to attach to him. Then is this an equity with which the bill is encumbered? It seems to me that no equity attaches to the bill; because it was placed in the hands of the drawer, for the very purpose of raising money. Looking at the cases of *Charles* v. *Marsden* and *Stein* v. *Yglesias*,
*106] I think the *plaintiff's right to recover is not concluded by the facts disclosed in this plea.

CRESSWELL, J. I am of the same opinion. Had this been *res integra*, I am not prepared to say that I should have come to the same conclusion. I should have thought it a case of doubt. By the law merchant, an endorsement may give to the endorsee a better title than the endorser had. It is said that the endorsee of a bill which is overdue, takes it subject to all the equities; perhaps a better expression would be that he takes the bill subject to all *its* equities. That brings it to the question, whether this is an equity which attaches *to the bill*. In *Charles* v. *Marsden* the court said, that there was no reason why a bill should not be negotiated after it became due, unless there was an agreement for the purpose of restraining it. *Attwood* v. *Crowdie*, 1 Stark, N. P. C. 483,(*a*) is consistent with the law as laid down in *Charles* v. *Marsden*.

Judgment for the plaintiff.

(*a*) In that case Lord Ellenborough ruled, that the acceptor of accommodation bills may reclaim them in the hands of the endorsee of the party for whose accommodation they were accepted, if, at the time they fall due, the balance of accounts, as between the endorser and the endorsee, to whom they have been remitted on account, be in favour of the endorser; but that, if not so reclaimed, the endorsee acquires a lien for subsequent advances made by him to the endorser; and the court refused a rule for a new trial.

FRENCH v. MAULE. [*107

Where the master has fixed the amount of security for costs to be given by a plaintiff resident in Ireland, the court refused to interfere to reduce the amount.

IN this action, which was brought on an attorney's bill for 275*l*. 13*s*. 11*d*., it appeared that, as the plaintiff resided in Ireland, a judge's order had been obtained to stay the proceedings in the cause till he should give security for the costs; and it having been sworn on the part of the defendant, that it was necessary for his defence that several witnesses of a superior station in life should be brought over from Ireland, the master, to whom the matter had been referred, fixed the amount of the security at 400*l*.

Shee, Serjt., applied for a rule calling on the defendant to show cause why the amount of security for costs to be given by the plaintiff in this cause should not be reduced. He submitted that requiring security in so large a sum amounted to a denial of justice, and that the defendant might have the witnesses examined on interrogatories, according to the suggestion of PATTESON, J., in *Kent* v. *Poole*, 7 Dowl. P. C. 572.

Per curiam. This is not a case in which we ought to interfere with the discretion of the master, the subject being one so much more within his experience, than within that of the court. There is nothing to show that the view which he has taken of the matter is erroneous.

Rule refused.

*BULMER and Others v. GILMAN and Others. [*108

A parliamentary agent, intrusted with the passing of a local bill through parliament, who puts a construction on an order of the House of Lords which is doubtful in its terms,—such construction being different from that which is adopted by the standing orders committee, and by the House, whereby it becomes necessary to abandon the bill,—is not guilty of such gross negligence as to disentitle him to recover a remuneration for his labour in passing the bill through the House of Commons.

ASSUMPSIT, for work and labour, care and diligence, as attorneys, in and about soliciting and passing a certain bill in and through the Commons' House of Parliament, and in and about other businesses, &c., with counts, for money paid, and on an account stated

Pleas: first, non assumpsit.

Secondly, (to the first count,) that the work and labour, care and diligence by the plaintiffs done, performed, and bestowed for the defendants, as in the said first count mentioned, were by the plaintiffs done, performed, and bestowed in so careless, negligent, and insufficient a manner, that the same, from the time of the doing and performing thereof, and from thence until the time of the commencement of this suit, became and were, and from thence hitherto have been, and still are, wholly useless and unbeneficial to the defendants; and the defendants, by and through such carelessness, negligence, and inefficient conduct of the plaintiffs, as aforesaid, derived no benefit whatsoever from the same. Verification.

Thirdly, (to the second count,) that the sum, so paid by the plaintiffs for the use of the defendants, as in the second count mentioned, was money paid by the plaintiffs, for, in, about, and in respect of, work and labour by the plaintiffs done and performed for the defendants; and that such work and labour were done and performed by the plaintiffs in a careless, &c., (as in last plea;) and from which last-mentioned work and labour, and the

money paid by the plaintiffs, for, in, about, and in respect thereof, by and
*109] through such carelessness, *negligence, and ignorance of the plaintiffs as aforesaid, the defendants had derived no benefit whatever.(a) Verification.

Replication (to the second and third pleas,) *de injuriâ.*

At the trial before TINDAL, C. J., at the Middlesex sittings after last Michaelmas term, the following facts appeared:—

The plaintiffs are parliamentary agents; and the action was brought by them against the defendants, who were attorneys, residing in Norwich, for conducting a bill "for better paving, lighting and improving the city of Norwich and county of the same city," through the House of Commons, in the years 1838 and 1839. There were other acts in existence for similar purposes, but their operation was confined to the *city* of Norwich.

The following are the standing orders of the House of Lords, made in 1838 as to private bills:—

"*Standing orders, the compliance with which must be proved before the Standing orders Committee, in all bills for railways included in the second class, and in any other bill included in any of the three classes, which may be opposed; and before the committee on the bill, in any other case.*

"1. That notices shall be given in all cases where application is intended to be made for a bill included in any of the three classes above mentioned.

"2. That such notices shall be published in three successive weeks in the months of October and November, or either of them; and in the case of such railway bills as are included in the second class, in lieu of
*110] *those months, twice in the month of February, and twice in the month of March, immediately preceding the session of parliament in which application for the bill shall be made, in the London, Edinburgh, or Dublin Gazette, as the case may be, and in some one and the same newspaper of the county in which the city, town, or lands to which such bill relates shall be situate, or if there is no newspaper published therein, then in the newspaper of some county adjoining or near thereto.

"3. That if it be the intention of the parties applying for a bill to levy any tolls, rates or duties, or to alter any existing tolls, rates or duties, the notices shall specify such intention.

"4. That on or before the 31st day of December, immediately preceding the application for a bill, *by which any lands or houses are intended to be taken*, or an extension of the time granted by any former act for that purpose is sought for, *application in writing* (and in cases of bills included in the second class in the form set forth in the appendix marked (A)) *be made to the owners*, or reputed owners, *lessees*, or reputed lessees, *and occupiers*, either by delivering the same personally, or by leaving the same at their usual place of abode, or, in their absence from the United Kingdom, with their agents respectively; *and that separate lists be made of such owners, lessees and occupiers, distinguishing which of them have assented, dissented, or are neuter, in respect thereto.*

* * * * * *

(a) The plaintiff had moved to strike out the first plea or the second and third. On showing cause it was agreed that the pleas should stand, the plaintiff to be at liberty to reply *de injuriâ.* *Quære*, whether the special pleas would not have been bad, on demurrer, as amounting to the general issue. See *Hill* v. *Allen*, 2 M. & W. 283; *Randall* v. *Ikey*, 4 Dowl. P. C. 682; *Cooper* v. *Whitehouse*, 6 C. & P. 545.

The three classes of bills referred to in the above orders, are as follows:—

"1st Class. Bills for inclosing, draining, or improving lands * * * * * * for paving, lighting, watching, cleansing, or improving cities or towns. * * * * * * relating to poor-rates, or the maintenance or employment *of the poor; and bills for altering any act passed for any of the said purposes, except such bills as are included in the third class of bills. [*111

"2d Class. Bills for making, maintaining, varying, extending or enlarging any bridge, turnpike road, cut, canal, reservoir, aqueduct, waterwork, navigation, tunnel, archway, railway, pier, port, harbour, ferry or dock; and bills for altering or amending any act passed for any of the said purposes, except such bills as are included in the third class of bills.

"3d Class. Bills relating to county rates, gaols or houses of correction; * * * * * * and bills to continue or amend any former act passed for any of the purposes included in the two preceding classes, where no further work than such as was authorized by any former act is proposed to be made."

The following notice had been prepared by the plaintiffs:

"Notice is hereby given, that application is intended to be made to Parliament in the next ensuing session, for leave to bring in a bill to alter, amend, enlarge and repeal certain of the powers and provisions of an act passed in the forty-sixth year of the reign of His late Majesty, King George the Third, c. lxvii., intituled 'An Act for better paving, lighting, cleansing, watching and otherwise improving the city of Norwich.' And also of an act passed in the sixth year of His late Majesty, King George the Fourth, c. lxxviii., intituled 'An act for amending and enlarging an act of His late Majesty, for better paving, lighting, cleansing, watching and otherwise improving the city of Norwich.' Dated, this 8th day of November, 1838.

Chas. S. Gilman, Solicitor,
Norwich."

*But in consequence of a letter from one of the defendants, suggesting that this notice was insufficient by reason of its not stating that it was intended to extend the powers of the existing acts to the hamlets, &c., in the county, and to levy rates on the owners and occupiers thereof, the notice was re-settled, and duly published in the following form: [*112

"Notice is hereby given, that application is intended to be made to Parliament in the next ensuing session, for leave to bring in a bill to alter, amend, extend and enlarge the powers and provisions of an act passed in the forty-sixth year of the reign of His late Majesty King George the Third, intituled 'An act for better,' &c., and also of an act passed in the sixth year of the reign of His late Majesty King George the Fourth, intituled 'An act for amending,' &c.

"And notice is hereby also given, that it is intended to insert in the proposed bill a power for enabling the owners and occupiers of houses, lands and hereditaments, in the parishes, hamlets, liberties, precincts and places, within the county of the said city, to extend the powers and provisions of the said bill to the said parishes, hamlets, liberties, precincts and places, or to certain parts thereof.

"And notice is hereby further given, that it is intended, by the said bill

to take powers for raising money, for the purposes thereof, by rates on the owners and occupiers of houses, lands and hereditaments, within the said city and county.

"*Dated*, this 8th day of November, 1838."

On the 9th of March, 1839, the bill was read a first time in the House of Commons.

The preamble stated, that "Whereas an act was passed in the forty-sixth year of the reign of King George the Third, intituled 'An act for better,' &c. And whereas an act was passed in the sixth year of the reign
*113] *of King George the Fourth, intituled 'An act for amending,' &c.: and whereas the said recited acts, so far as relates to the watching of the said city, have ceased, in consequence of a notice, given in conformity with the provisions of the act for regulating municipal corporations in England and Wales, 5 & 6 W. 4, c. 76, s. 88: and whereas since the passing of the hereinbefore-first-recited acts, the inhabitants in the suburbs of the said city, usually called the county of the city of Norwich,—which comprise eight parishes or hamlets, the liberty of the townclose, and parts of certain parishes, the residues whereof are within the said city,—have very greatly increased, and a large number of houses have been erected, and several new streets formed therein; and it would tend much to the comfort and convenience of the inhabitants, were the powers of the hereinbefore-recited acts enlarged, and extended to the said suburbs: and whereas the powers and provisions of the said two several first hereinbefore-recited acts have been found, in many respects, defective, and insufficient for the purposes intended; and it is expedient that the same should be repealed, and that other powers and provisions should be granted and made for better paving, lighting, cleansing and improving the said city and suburbs, and for removing and preventing nuisances and annoyances therein; but the same cannot be effected without the authority of parliament," &c.

By sect. 62, the commissioners were empowered to cause streets, &c., to be lighted with oil or gas; and by sect. 67, they were authorized to recover rents for gas.(*b*)

Sect. 96, was as follows:—"And be it further enacted, that for the purpose of making the narrow parts of the squares, crescents, terraces, roads,
*114] streets, *lanes, ways, passages, and places, safe and commodious for carriages and passengers, and for opening proper communications between the said squares, &c., or any of them, and for stopping up unnecessary communications between the said squares, &c., or any of them, and for altering or widening any road or roads within the said city or county, and for altering, widening, and improving the present communications between the said squares, &c., or any of them, and for otherwise improving the said city and county, it shall be lawful for the said commissioners to *treat and agree* with such person or persons, or body or bodies politic or corporate, spiritual or lay, respectively, as shall be or be deemed to be owner or owners of, or interested in any houses, buildings, erections, projections, encroachments, lands, tenements, or hereditaments, within the said city and county, as the said commissioners shall think right and proper to be taken or used for the purpose of making such improvement, for the absolute purchase thereof respectively, or for any damage to be sustained by the proprietors thereof in effecting such improvement: Provided always, that nothing in this act contained shall authorize and empower the said commis-

(*b*) These sections are not set out at length, as the question arising upon them was not discussed on the motion for a new trial. See post, p. 121.

sioners to take or use any house, building, yard, garden, orchard, lawn, shrubbery, or plantation, without having previously obtained the consent of the owner or proprietor thereof."

By sect. 100, in case the parties were incapable to treat, the amount of satisfaction and compensation was to be settled by a jury.

By sect. 110, damages under 20*l.* might be settled by justices.

Sect. 117, was as follows:—"And be it further enacted, that upon payment, or legal tender, of such money as shall have been agreed upon between the parties, or awarded by a jury or justice, in manner *aforesaid, for the purchase of any lands, or of any estate or interest in [*115 any lands, to the respective proprietors of such lands, or other person entitled, according to the provisions of this act, to receive such money, within three calendar months next after the same shall have been so agreed upon or awarded, or whenever any of the respective cases shall happen, wherein such money, satisfaction, or compensation, is hereinbefore authorized or directed to be paid into the Bank of England, then upon payment into the Bank of England, in manner in such case hereinbefore authorized or directed, it shall be lawful for the said commissioners immediately to enter upon such lands, and thereupon such lands, and the fee simple and inheritance thereof, together with the yearly profits thereof, and all the estate, use, trust, and interest, of all parties therein, paid or compensated for by such payment as aforesaid, shall thenceforth be vested in, and become the sole property of, the said commissioners, to and for the purposes of this act; and the said commissioners shall not be bound to see to the application of any such purchase-money, compensation, or satisfaction; and such payment, or tender and conveyance, as hereinbefore mentioned, or such deposit in the Bank of England as aforesaid, shall not only bar all right, title, interest, claim, and demand, of every such party, but shall also bar all dower and all estates-tail and other estates in reversion and remainder, and all rights, titles, limitations, and trusts whatsoever, of and in the said lands so compensated and paid for as aforesaid: Provided nevertheless, that before such payment, tender, or deposit, in the Bank of England, as aforesaid, shall have been made, it shall not be lawful for the said commissioners, or for any person acting under their authority, to enter upon such lands for any of the purposes of this act, save for the purpose of surveying or valuing the same for the purposes of this act, without *the previous consent of [*116 the owners and occupiers thereof respectively."

The bill having gone through the different stages in the House of Commons, was, on the 24th of June, read there a third time, passed, and sent up to the Lords. In the House of Lords the bill was read a first and second time, and referred to the committee of standing orders; and the following extracts from the journals of the House of Lords were given in evidence:—

"*Die Jovis*, 18° *Julii*, 1839.

"The Earl of Shaftesbury reported from the Lords—committees appointed to consider of the bill, intituled 'An act for better paving, lighting, and improving the city of Norwich and county of the same city,' that the committee had met, and considered the said bill, and, in the first place, proceeded to inquire how far the standing orders of the House, relating to bills for the improvement of cities and towns, have been complied with on this bill; and had found that notices of the bill have been inserted in the county newspapers and in the London Gazette, and have been affixed on the church doors of the several parishes affected by the bill, within the period

limited by the standing orders; but the committee had found that such notices did not contain any mention of the intention of taking power for lighting and improving certain parts of the town of Norwich within the county of the city of Norwich, without the consent of the owners and occupiers of such district; and that powers for that purpose are proposed to be taken by the present bill. The committee further found that *powers for the compulsory purchase of houses and lands are contained in the bill, and that no application has been made to the owners, lessees, and occupiers, of such houses and lands*, as is required by the standing orders. Under these circumstances the committee were of *opinion that it would be necessary *117] to strike out of the bill all the provisions contained therein for the purpose of lighting and improving the parts of the town of Norwich within the county of the city of Norwich, without the consent of the owners and occupiers thereof, and for the compulsory purchase of houses and lands. Upon such opinion being intimated, certain petitions were presented to the House, praying to be heard by counsel against the bill and against the proposed alterations. The committee have, therefore, thought it right to direct the bill to be reported to their Lordships in its present state, and recommend to their Lordships to refer the said bill to the standing-orders committee, as an opposed private bill.

"Which report being read by the clerk,

"Ordered, that the said report do lie on the table.

"Ordered, that the said report, together with the bill intituled 'An act for better paving,' &c., be referred to the committee appointed to consider how far the standing orders of this House relating to certain railway bills and opposed private bills, have been complied with on such bills."

The following extract from the proceedings of the standing-orders committee was also produced:—

"*Die Martis*, 23° *Julii*, 1839.

"The Earl of Shaftesbury in the chair.

* * * * * * * *

"It appearing from the said report that the notices of the bill, though given within the period limited by the standing orders, did not contain any mention, &c., (as in the report, antè, p. 116,)

"After discussion,

"It is moved to resolve

"That the standing orders have not been complied with on this bill, and *118] that the committee do not *recommend to the House that the said orders should in this case be dispensed with.

"The same is, upon the question, agreed to."

And the following extract from the journals of the House:—

"*Die Jovis*, 25° *Julii*, 1839.

"The Earl of Shaftesbury reported from the Lords-committees appointed to consider how far the standing orders of the House relating to certain railway bills and opposed private bills have been complied with on such bills, and to report to the House, and to whom was referred the bill intituled 'An act for better paving,' &c.; and to whom were also referred the report from the committee on the Norwich Improvement bill, and the petition of R. J. Harvey, &c., owners of estates in the county of the city of Norwich, praying to be heard by counsel in support of the said bill, with leave to the petitioners to be heard by their agents in support thereof; that the committee had met and inspected the said bill, and had considered the said report, and also the said petition, and had inquired how far the standing orders of

this House, relating to matters required to be done by parties promoting bills for the improvement of cities or towns previously to the second reading of such bills, have been complied with on this bill, and had found that notices of the bill had been inserted, &c., (as in the report, antè, p. 116:) and the committee do not recommend to the House that the standing orders should in this case be dispensed with.

"Which report, being read by the clerk, was agreed to by the House."

In consequence of this report, the parties interested in the bill, not considering it expedient to proceed with it, abandoned it altogether.

*The defence to the action, in substance, was, that the plaintiffs were chargeable with gross ignorance and negligence in not having prepared the notice as required by the standing orders of the House of Lords. [*119

The Lord Chief Justice, in summing up, directed the jury that the question they had to determine was, whether the failure of the bill arose from a culpable degree of negligence on the part of the plaintiffs, or whether they showed reasonable care and skill in that which they had to perform. His lordship further observed, that the point to be considered was, whether the plaintiffs had comported themselves with due diligence, and with a proper degree of knowledge of those standing orders, which it was peculiarly their duty to carry into execution. For it was to be supposed that in the character in which they held themselves out to do business as parliamentary agents, they were thoroughly conversant with all the particular facts, in carrying a bill through the House, necessary to insure its passing. His lordship then commented on the standing order of the House of Lords, requiring application to be made to the owner or lessee of lands or houses; and said that it was undoubtedly a very proper clause, that if there was any bill which intended taking, by the force of the bill, any property belonging to any individual against his consent, he should have due notice of the bill before it was passed, in order that he might appear and make such opposition to the bill as he thought the justice of the case required. It was obvious that a notice would be necessary when specific property was intended to be taken; for instance, in a bridge bill, where, in order to make the access to the bridge more complete, it was requisite to take either a house or some portion of ground. His lordship then applied similar observations to canal and railway bills, and bills for the alteration of a turnpike road. "In all these cases" (his lordship observed) "the act *may be said to take away property from some *person*, and an omission to apply to that *person*, for his assent or dissent, would be a breach of the standing orders, and would import a gross degree of negligence on the part of the individual whose duty it was to see that such standing orders had been complied with. Therefore, if the intended act has the same degree of reference to the standing orders as those others have, which I have mentioned, I should think it gross negligence on the part of these plaintiffs, who undertake the business of parliamentary agents, if they had not themselves applied, or caused applications to be made by their agents in the country, to ascertain the assent or dissent of the parties whose property was so to be taken. But looking at this bill, I cannot help entertaining a very considerable degree of doubt, whether the fourth standing order can apply to this case. It is one question whether the parties have or have not had notice that parliament may pass a bill which has such a clause in it; it is another and different question whether it lies within that precise standing order. The bill in question does not at all contemplate the taking of any [*120

one's land or property specifically; it only supposes that, in the course of events and of time, it may become necessary to widen some streets, and to alter their direction, for the purpose of improving the city; so that all the powers pointed out by the proposed statute were only given contingently,—if at some future time it should seem fit to exercise them. The question, therefore, is,—there being no specific object in view, and no particular person to whom notice could be given,—whether it was necessary to ask every man in the city, who had property there, for his assent; for every man's property might possibly be affected." His lordship then read the sections of the bill, observing that there appeared to be a mistake in the report of the committee in stating that there was a compulsory clause in the
*121] bill, for taking *houses and lands, inasmuch as there was no compulsory clause for taking houses at all; and his lordship added, "I cannot help thinking that it is so extremely doubtful, whether the fourth standing order could apply to a case of this sort, that, at least, it would be a hard measure to say, that persons were guilty of gross negligence, if they did not understand that order in the way in which the defendants have sought to apply it."

The jury returned a verdict for the plaintiffs for 543*l.*, being the sum they had paid out of pocket.

Channell, Serjt., in Hilary term last, obtained a rule nisi for a new trial, on the ground of misdirection; against which,

Bompas, Serjt., now showed cause. According to the resolutions of the standing-orders committee of the House of Lords, which were afterwards adopted by the House, the plaintiffs were considered not to have complied with the standing orders in two particulars; first, in respect to the notice as to lighting the town; and, secondly, as to application to the owners of property under the clause relative to taking lands, &c. It is understood that no question is now raised upon the first point. [*Channell*, Serjt., assented.] Then the only question is, whether, because the plaintiffs have put a wrong construction upon the standing orders of the House of Lords, or rather a different construction from that which the House has adopted, they have been guilty of such gross negligence as to debar them from all right to recover a remuneration for their work and labour, or at any rate to be repaid the costs out of pocket. The application of the standing orders to such a bill as the present is, to say the least of it, by no means clear. The other side contend that this is a bill falling within the
*122] first of the classes referred to by the standing orders, as *a bill for "paving, lighting, watching, cleansing, or improving cities or towns," and this may be admitted; but then it is argued that as, by the 96th and 117th clauses of the bill, the commissioners are authorised to purchase houses, &c., for widening streets and squares, the fourth standing order will apply; and that an application in writing should have been made "to the owners, lessees, and occupiers, and that lists should have been made of such owners, lessees, and occupiers, distinguishing which of them have assented, dissented, or were neuter, in respect thereto." But to any ordinary understanding, the interpretation that would be put upon this rule, would be, that it applies to bills for railways, canals, &c., or perhaps to paving bills, where *specific* property is to be taken under the powers of the act. It appears that the plaintiffs were of this opinion, and so also was the Lord Chief Justice at the trial; and that alone is sufficient to show that the plaintiffs, though they may have been wrong, were not chargeable with negligence or gross ignorance. The construction put upon the order by

the House of Lords would give rise to insurmountable difficulties. To whom is the application to be made? To every owner of land in a city that may have 70 or 80,000 inhabitants? Or suppose such a bill to be brought in respecting the metropolis, what would have to be done in such a case? The order refers to bills "by which any lands or houses *are intended* to be taken," but, as construed on the other side, it ought to be read "by which any lands or houses *may hereafter be intended* to be taken." Besides, as the bill was lost upon two grounds, it cannot be said that it was so lost on the ground of this objection only; and the other objection has been abandoned.

Channell, Serjt., in support of the rule. The point as to the other objection was left properly to the jury. With regard to both objections there have been three *decisions against the plaintiffs; 1st. that of the committee appointed to consider the bill,(*a*) 2dly, that of the committee of standing orders,(*b*) and, 3dly, that of the House of Lords;(*c*) all showing that the plaintiff had put a wrong construction on the fourth order. The Lord Chief Justice at the trial expressed a strong opinion as to the objection now under consideration, that the order did not apply to the bill in question; and the jury therefore, fettered by this direction, found that there had been no negligence on the part of the plaintiffs. It cannot be argued that the decision of the House of Lords was wrong in their interpretation of their own order; and it was the duty of the plaintiffs, as parliamentary agents, to be acquainted with its meaning. It is not denied that the Lord Chief Justice was bound to give an opinion upon the subject for the guidance of the jury. [CRESSWELL, J. Do you mean to say that there was any negligence imputable to the plaintiffs, beyond the fact of their not knowing that the bill would be affected by the order in question?] No other negligence is imputed to them. [CRESSWELL, J. And you admit that my lord was bound to give an opinion on that point.] It need not have been so strongly expressed. It is submitted that the bill did fall within the fourth standing order. This is not a question about compulsory powers to take land; for it is true that no such powers are given by the bill; as all that is given is a power to *treat* with parties. But it is clear that this is a bill by which land is "*intended to be taken.*" The rule would necessarily apply to all railway bills. [CRESSWELL, J. Not, in case no land was intended to be taken. TINDAL, C. J. Suppose a man made a railway through his own land, and an act were required to enable him to take tolls, could it be said that the rule applied, and *that the party was bound to make an application to himself? ERSKINE, J. The order says, "if lands are intended to be taken;" that condition overrides all the clause.] If there had been any provision in the bill as to taking any particular land, there could be no question but that the rule would apply; but the most unlimited powers were asked for as to taking land generally. There was no notice that any power to take land was given by the bill, and the safeguards required by the standing orders of the House were therefore entirely thrown aside. But the greater the powers sought for, the greater the caution necessary. [COLTMAN, J. What do you consider would have been a perfect compliance with the order in this case? That all the owners of property in the city should have been applied to?] Yes; inasmuch as the promoters of the bill claim the right to take any part of such property. [CRESSWELL, J. What should they have asked them to

[*123

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(*a*) Antè, p. 116. (*b*) Antè, p. 117. (*c*) Antè, p. 118.

assent to?] To the exercise of the general power. At any rate the published notice should have specified what powers were sought to be obtained.

COLTMAN, J. It is true that this case was left by my lord to the jury, accompanied by strong observations; but I think they were necessary from the peculiar circumstances of the case. He was called upon to state his opinion; and to my view he would have been wrong in not telling them, that, looking at this bill, he entertained considerable doubt whether the fourth standing order could apply to it. The observations of his lordship, even assuming that a mistake had been committed by the attorneys, ought, in my opinion, to have been made to the jury; and, if upon the evidence submitted to their consideration they had found gross negligence on the part of the plaintiffs, I think their verdict must have been set aside.

*125] *ERSKINE, J. I am of the same opinion. I think the construction of the standing orders of the House of Lords turned upon a question of law; and, looking at the words of the order in question, it is, to my mind, exceedingly doubtful whether it would apply to this case. In leaving the case to the jury, it was not necessary for my lord to give a decided opinion on the construction of the order: but the construction being doubtful, I think attorneys cannot be said to have been guilty of such gross negligence, in construing it as the plaintiffs did, as to defeat their right of action for business done. It is unnecessary to say whether the order does or does not apply in this case; it is sufficient to remark that the words of the order are by no means clear, or at least so clear as to render the plaintiffs open to the charge of gross negligence; and I agree that if the jury had arrived at such a conclusion—no particular land or property being directly required to be taken for the purposes of the intended act—there would have been grounds for the court to grant a new trial.

CRESSWELL, J. I also think that the rule ought to be discharged. There are two descriptions of negligence: negligence in fact, and, what may be termed, negligence in law. If the plaintiff had neglected to give the notices required by the standing orders, that would have been negligence in fact; if there had been negligence in the form of framing those notices, that might have been negligence in law. But that cannot be considered as gross negligence, concerning which persons of competent skill may entertain a doubt. The construction of a written instrument is a question for the court; it was for the judge, therefore, at the trial, to say whether the construction of these orders of the House of Lords was so doubtful as to exonerate an attorney
*126] from gross negligence, who had put a construction upon *them, which turned out, according to the view taken by the committee of the House, not to be correct. Now I must say, I participate fully in all the doubts entertained by my lord at nisi prius, as to the effect of these orders. Perhaps it might not be safe to say that the committee of the House of Lords were wrong in their conclusion; it might possibly be considered an invasion of the privileges of the House; but I certainly consider the point extremely doubtful, and if I had to try the case at nisi prius, I should direct the jury in the same manner. I think, therefore, that the direction and the verdict are both right.

TINDAL, C. J., was understood to concur. Rule discharged.

FOULKES v. SCARFE, POLLARD, TOESLAND, BROWN, and MASON.

To a declaration in case for breaking and entering rooms in the occupation of the tenant of the plaintiff, and *tearing down the ceiling over the landing of the staircase, the roof over the same, and the chimneys, and demolishing the windows*, the defendants justified under a deed of assignment, in trust for creditors, from C. H., (who was shown to be the lessee of the premises before the accrual of the title of the plaintiff, to whom color was given,) whereby a right of entry was given to take and sell furniture: *Held*, that the plea was bad, as confessing more than it avoided, inasmuch as the right to enter did not give a right to tear down the ceiling, &c., unless entry could be obtained in no other way; which was not averred.

CASE. The declaration stated that certain rooms and apartments, parcel of a certain messuage, together with certain furniture, chattels, and effects, to wit, &c., of the plaintiff, were, on, &c., in the possession and occupation of a certain person, to wit, one Mary Stafford, as tenant thereof to the plaintiff, the reversion thereof then and still belonging to the plaintiff; which *M. S. held and occupied and possessed the said furnished rooms and apartments, and the use of a certain staircase and landings [*127 thereto belonging, with the appurtenances, as monthly tenant thereof to the plaintiff, upon and at a certain rent, to wit, &c., as and for the rent or hire of the said rooms and apartments, together with the said furniture, &c.; yet the defendants, well knowing the premises, but contriving, &c., to injure and aggrieve the plaintiff, and to deprive him of the benefit and advantage which he derived, and the just gains and profits which might, and would, have accrued to him from the letting of the said rooms and apartments, with the said furniture, &c., to the said M. S., and from the continued possession and occupation thereof by her the said M. S. as such tenant thereof to the plaintiff on the terms aforesaid, to wit, on, &c., wrongfully and injuriously broke and entered the said rooms and apartments, and then made a great noise and disturbance there, and then tore down and prostrated the ceiling over the landing of the staircase, and the roof over the same; and then tore down divers, to wit, two chimneys, and broke and demolished divers, to wit, ten glass windows, of and belonging to the said rooms and apartments; and then seized and took the said furniture, &c., from and out of the possession of the said M S.; and carried away, converted, and disposed of the same to their own use; whereby the said rooms and apartments were rendered, and still are, of no use or value to the plaintiff; and the said rooms and apartments were rendered unfit for the residence and habitation of the said M. S., and the said M. S. was compelled and obliged to, and then did, quit and abandon the said rooms and apartments, and give up the same, and surrender the tenancy therein. By means of which several premises the plaintiff hath entirely lost the said several sums of money for the rent of the said rooms and apartments, *with the appurtenances, which would have accrued and have been paid to [*128 him, the plaintiff, if the said M. S. had not been so by the defendants intruded upon, disturbed, and annoyed, and forced and compelled to give up and quit the tenancy and occupation thereof; and during all the time from the day and year first aforesaid, hitherto hath been and still is unable to let the said rooms and apartments with the appurtenances, and is, by means of the committing of the several last-mentioned grievances by the defendants as aforesaid, otherwise greatly injured and aggrieved in his reversionary estate and interest in the said rooms and apartments, and in the said goods, &c. Whereupon, &c

Fourth plea, as to the supposed grievances in the declaration mentioned,—so far as the same relate to, and were occasioned by, the said breaking and entering the said rooms and apartments, and making the said noise and disturbance therein, and tearing down and prostrating the said ceiling and roof, and tearing down the said chimneys, and breaking and demolishing the said glass windows,—the defendants Scarfe, Pollard, Browne, and Mason say that long before the plaintiff or the said M. S. had any thing in the said rooms and apartments, or any of them, to wit, on the 29th day of September, 1834, one Winckworth and Sandys were seised, in their demesne as of fee, of and in the said messuage, and of and in the said rooms and apartments, staircase, and landing, and being so seised, by a certain indenture of lease, then made between the said W. and Sandys of the one part, and one Charles Hallett of the other part, the said W. and Sandys demised the said messuage, and rooms and apartments, staircase and landing, to the said C. H. for twenty-one years, &c.; (Averment of entry by C. H.;) and the defendants, Scarfe, Pollard, Browne, and Mason further say, that the said C. H. after the making of the said indenture, and
*129] whilst *he was possessed of the said messuage, and rooms and apartments, staircase and landing, to wit, on the 29th of June, 1840, was also possessed of divers goods, chattels, furniture, fixtures, and effects, in and upon the said messuage, and in the said rooms and apartments, staircase and landing; and that afterwards, and whilst the said C. H. was so possessed of the said messuage, &c., and of the said goods, &c., and before the times when, &c., to wit, on, &c., by a certain indenture, bearing date the day and year last aforesaid, then made between the said C. H. of the first part, the defendant Scarfe and one J. S. Nettlefold of the second part, and the several other persons, creditors of the said C. H., who had subscribed their names thereto, of the third part; and which indenture, &c., (profert,(*a*)) after reciting that the said C. H. was indebted to the several persons, parties to the said indenture of the second and third parts, in certain sums of money, and was not prepared to satisfy the same, and that several of the creditors of the said C. H. had threatened proceedings against him to recover their claims, of whom the said C. H. had requested a letter of license,—which the said creditors had consented to give upon the said C. H. executing the bill of sale thereinafter contained,—in pursuance of the said agreement, and in consideration of the said debts and of the letter of license thereinafter contained, he the said C. H., at the nomination and request of the several parties thereto of the third part, testified, &c., did by the said indenture assign and transfer unto the said Scarfe and J. S. N., as trustees for themselves and the rest of the said creditors of the said C. H., all and singular the said furniture, fixtures, and effects in and about the
*130] said dwelling-house, and in *the said rooms and apartments, staircase and landing, in which, &c., mentioned and comprised in a certain inventory in the said indenture mentioned, and of which he was so possessed as aforesaid, and all right, title, and interest of him the said C. H. in and to the same and every part thereof, and of which possession had, at the time of the execution of the said indenture, been given and transferred to the defendant Scarfe and the said J. S. N., as the said C. H. did by the said indenture acknowledge: to have, receive, take, and enjoy the same unto the defendant Scarfe and the said J. S. N., their executors, &c., thenceforth, as and for their own goods, &c., but subject to the covenants

(*a*) In the Common Pleas the usual course is to make profert at the *end* of the declaration of all the deeds which have been set out, and of which the defendant is entitled to oyer.

thereinafter contained. And the said C. H. did thereby, for himself, his heirs, &c., amongst other things, covenant with the defendant Scarfe and the said J. S. N. that he the said C. H. would pay to the defendant Scarfe and the said J. S. N., as such trustees as aforesaid, the sum of 120*l.* in part payment of the said several debts mentioned in the schedule thereunder written, on the 26th day of July then next, and the further sum of 93*l.* 6*s.* 8*d.* on every succeeding third month, until the whole of the several amounts due and owing to the parties thereto of the second and third parts should be fully paid, with interest thereon at the rate of 5*l.* per cent. per annum; provided always, and it was thereby further agreed between the several parties thereto, and particularly by the said C. H., that the defendant Scarfe, and the said J. S. N., their executors, &c., should, at any time during the continuance of the said indenture, be at liberty to enter upon the said messuage, and see the state and condition of the said several articles of furniture, fixtures, and effects; and that in case the same or any part thereof should be removed from the said messuage, or in case the rent of the said messuage, or any part thereof should be in arrear for more than six months, or the *rates, taxes, or other outgoings, of the said messuage, or any part thereof, should be in arrear for the space of seven [*131 months after the same respectively should have become due, or in case he the said C. H. should not pay the said instalments, and each and every of them, in manner thereinbefore appointed, or in case the said C. H. should suffer an execution to issue against him for any debt contracted subsequently to the execution of that indenture, and should not, in due time, pay out the same, or should petition to go through the insolvent debtors' court, or should become bankrupt, or should die, then in each or any of the said cases the defendant Scarfe and the said J. S. N., their executors and administrators, should be at liberty to sell and dispose of the said furniture, &c.; and, for that purpose, *to enter* the said messuage, and rooms and apartments, staircase and landing, in which, &c., and remove the same; and out of the produce thereof, after paying the expenses of and incident to such sale, to pay all rent, rates, taxes, and outgoings, if any, which might have accrued due; and, in the next place, to pay the several creditors, parties thereto of the second and third parts, ratably, and in proportion to their several debts, and to pay the surplus, if any, to the said C. H., or his assigns. And further, that afterwards, and before the said times when, &c., to wit, on the 1st day of February, 1841, all the estate and interest, property, term of years then unexpired, of and in the said messuage, and rooms and apartments, staircase and landing, by assignment thereof, then came to and was vested in the plaintiff; and thereby the plaintiff became and was entitled to the said estate in the said declaration mentioned. And further, that after making of the last-mentioned indenture, and before the committing of the said grievances, &c., the said sum of 120*l.* by the said indenture so payable as aforesaid became due and *payable from the said C. H. to the defendant Scarfe and the said J. S. N., but [*132 the said C. H. did not nor would pay the same, and the said C. H. then made default in payment thereof. And further, that at the said times when, &c., the said sum of 120*l.* remained due and unpaid. And because the said goods, &c., so bargained, sold, &c., as aforesaid, before and at the times of the committing of the said grievances, were in and upon the said messuages, rooms, &c., and because the defendant Scarfe and the said J. S. N. were desirous to sell and dispose of the said goods, &c., and seize and take the same for that purpose; and because the said M. S., at the

said times when, &c., refused, upon being requested by the defendant Scarfe so to do, to suffer or permit, and would not suffer or permit him to enter into or upon the said rooms and apartments, or the said staircase or landing, for the purpose of seizing and taking from and out of the same the said goods, &c., so that the defendant Scarfe and the said J. S. N. might sell and dispose of the same, — the defendant Scarfe, in his own right, and the defendants Pollard, Brown and Mason, as his servants, and by his command, at the said time when, &c., for the purpose of seizing, and taking from and out of the said rooms and apartments, and from and out of the said staircase and landing, the said goods, &c., in order that he and the said J. S. N. might sell and dispose of the same, did break and enter into and upon the said rooms and apartments, and into and upon the said staircase and landing, and make a little noise and disturbance therein, and to a little and necessary degree, tear down and prostrate the ceiling over the said staircase and landing, and the roof over the same, and tear down the said chimneys, and break and demolish the said windows, and at the said times when, &c., did seize and take from and out of the said rooms and apart-
*133] ments the said goods, &c., doing and using no *more damage or violence than was necessary in that behalf, for the purpose of seizing and taking away the said goods, &c., for the purposes aforesaid, which are the same alleged grievances in the introductory part of this plea mentioned, &c. Verification.

Special demurrer; assigning for causes, that although the defendants Scarfe, Pollard, Brown, and Mason, profess to justify and answer the grievances in the declaration mentioned, so far as the same relate to and were occasioned by the breaking and entering the said rooms and apartments, and making the said noise and disturbance therein, and tearing down and prostrating the ceiling and roof, and tearing down the chimneys, and breaking and demolishing the glass windows; yet the plea does not show or state any matter that can in law justify the same, or authorize such violence and injury to the said ceiling, roof, chimneys, and glass windows, or any of them, or any part thereof. And also for that the defendants in their said plea do not show or state wherefore it was necessary, for the removal of the said goods and chattels, that they should tear down and prostrate the ceiling over the landing of the said staircase, and the roof over the same, or the said chimneys, or any of them. And also for that the plea attempts to put in issue matter of law, improper for the decision of a jury, by attempting to justify the tearing down and prostrating of the said ceiling, roof, chimneys, and glass windows, under a supposed authority, to wit, the said bill of sale; which is in law no justification of the last mentioned grievances. And also for that the said last plea is double, &c.

Bompas, Serjt., for the plaintiff. The plea sets up an authority under the bill of sale from Hallett to enter upon the premises and seize the goods there. But that is clearly no justification for breaking the ceiling and roof,
*134] and breaking down the chimneys. The plea *confesses the whole wrong alleged, but avoids only part. The defendants say they had a right to take the goods, and therefore they demolished the house. [TINDAL, C. J. Is not that rather matter of new assignment?] In a note to *Greene* v. *Jones*, 1 Wms. Sound. 295 c., 296, n, (1), where the declaration charged an assaulting, beating, and wounding of the plaintiff, and the plea was not guilty as to the wounding, and as to the *residue* a justification by arrest under process, and son assault demesne, the commentator observes, that the plea included "a justification both of the *wounding* and

beating charged in the declaration, because the plaintiff, after he was arrested, assaulted the defendant, and resisted him in the execution of his office; in which case it was lawful for him to wound and beat the plaintiff in his own defence, in order to enforce the process of the law."(a) And he adds, "but unless resistance, or an attempt to rescue himself be shown, the defendant cannot justify the beating, and still less the wounding, of the plaintiff in arresting him under process; but he must plead not guilty to the *wounding* and *beating*, and a justification *as to the assault*, otherwise the plea will be ill upon demurrer."(b) Here, the defendants have attempted to justify that which they show they had in law no justification for doing. The real question in this case is whether, because the party in possession *refused the defendants permission to enter, they were justified in [*135 pulling off the roof; the plea does not go on to say they could not enter in any other way. [TINDAL, C. J. It is something like the case,(c) where, in trespass for throwing the plaintiff off a ladder, the defendant justified in defence of his possession, the plaintiff being on the ladder, nailing a board to the defendant's house, and alleged that he gently shook the ladder, and gently overturned it, and gently threw the plaintiff from it on the ground, doing him as little damage as possible; and the plea was held bad on demurrer.](d)

Channell, Serjt., was then called upon to support the plea. The facts as to breaking the roof and pulling down the chimneys, are matters of *aggravation* and not of substance;(e) the defendants say they had a right to break and enter, and they could not do so without a little breaking the ceiling and so forth; and this is a sufficient justification for all that is alleged.

TINDAL, C. J. It appears to me that the subject-matter of complaint, namely, the breaking down of the ceiling, roof, and chimneys, is so perfectly different in substance from the right claimed of entry into the rooms, that it behoves the defendants to show, much more distinctly than they have done, the impossibility of entry, except by the mode to which they resorted. The plea undoubtedly confesses more than it avoids. The case seems to me to fall within the principle of the one which I have cited.

The other judges concurred.

Judgment for the plaintiff.

(a) Citing M. 21 H. 7, fo. 39, pl. 51, S. C. Bro. Tresp. 218, Fitz. Tresp. 247, Cro. Eliz. 268, 2 Inst. 316, 1 Hawk. P. C. 130, 1 Bac. Abr. 155.

(b) Citing 1 Stra. 1049, S. C. Ca. temp. Hardw. 298, 1 Ld. Raym. 231, 2 Ventris, 193. The learned serjeant adds, however, "But perhaps it is not very material whether the arrest shall be considered as a justification of the battery or not. For if a bailiff, &c., do more than barely arrest a person,—if he beat him or otherwise ill-treat him after the arrest, without any resistance, or attempt made to rescue himself,—he is subject to an action; and if he justify by an arrest under process, the plaintiff may new-assign, which will bring it to much the same thing, 21 H. 7, 21, p. 5, S. C. cited Lutw. 930, *Patrick* v. *Johnson*," 1 Wms. Saund. 296 (1.) But see note(a) in the fifth edition of Saunders.

(c) *Pickering* v. *Rudd*, 1 Stark. N. P. C. 56.

(d) Note in *Collins* v. *Renison*, Say. 138. See also *Gregory et ux.* v. *Hill*, 8 T. R. 299 *Johnson* v. *Northwood*, 7 Taunt. 689; *Oakes* v. *Wood*, 2 M. & W. 791; *Oakes et ux.* v. *Wood*, 3 M. & W. 150.

(e) Vide *Taylor* v. *Cole*, 3 T. R. 292; 1 Wms. Saund. 28 a; antè, vol. ii. 441.

*WATSON and Another v. HALCOMBE. [*136

Where an application to a judge to set aside an execution is ordered to be referred to the master, the cost of the reference to be in his discretion, and the judge's order has been made a rule of court, it is not necessary to apply to the court for leave to issue execution on the master's allocatur as to such costs.

Shee, Serjt., moved for liberty to issue execution against the goods of the defendant, for the sum of 1*l.* 10*s.* with costs (*a*) under the following circumstances:

The defendant gave a cognovit to the plaintiffs for a debt. Judgment having been entered up and an execution issued, the defendant's goods were seized, whereupon the balance due to the plaintiffs was paid. The defendant, however, applied to a judge at chambers to set aside the execution, on the ground that more money than was really due to the plaintiffs had been paid to them. COLTMAN, J., made an order referring it to the master "to see whether the debt, &c., had been overpaid; the costs of and occasioned by the application to be in the discretion of the master;" which order was made a rule of court. The master found that the debt had been paid, but not overpaid, and *allowed* the plaintiffs, for the costs of the application, the sum of 1*l.* 10*s.* Three applications had been made for that sum.

TINDAL, C. J. There was no necessity for applying to the court in this case; it is clear the plaintiff cannot have the costs of this application. The court will make no rule.

COLTMAN and ERSKINE, JJ., concurred.

CRESSWELL, J., was absent.

The learned serjeant Took nothing.

(*a*) Every writ of execution formerly issued, and is still supposed to issue, upon an award of execution by the court, *granted at the prayer of the party. By making
*137] such a prayer, in a case in which the courts now allow the successful party to issue execution for himself, he would submit to delay apparently for the purpose of fixing the adverse party with costs.

CHARLES PALMER *v.* SPARSHOTT.

By an agreement between A. of the one part, and B. and C. of the other part—reciting that B. and C. had assigned certain property to A. for 150*l.* apiece, and that it had been agreed that A. should retain 50*l.* out of each of the purchase moneys—the defendant, in consideration of the two several sums of 50*l.*, and 50*l.* so retained, promised B. and C. to indemnify "them and their and *each* of their estates" from the costs of a certain action. *Held*, that C. might sue A. alone upon this promise without joining B.

ASSUMPSIT. After reciting that John Ewer Poole claimed to be a creditor of, and entitled to receive from, the defendant and the plaintiff, and from divers other persons, the sum of 157*l.* 18*s.* for work done in relation to certain premises at Norwood, wherein the plaintiff, the defendant, and the said other persons were severally and respectively interested, which money, if due at all, was due from the plaintiff, the defendant, and the said other persons jointly; and further, that Poole had brought an action of debt against the now plaintiff for the recovery of the said sum; and further, that it was then agreed by the plaintiff, the defendant, and the said other persons, that they the plaintiff, the defendant, and the said other persons should bear and pay in shares, any debt, and damages, costs, and expenses that might ultimately be recovered by Poole against the plaintiff; and further, that the plaintiff had duly conveyed and assigned to the defendant the part, share, and interest of him the plaintiff, of and in the said premises at N., at and for the consideration of 150*l.*; and further, that at the time of the completion thereof by the defendant and plaintiff, it was arranged that the defendant should retain 50*l.* of the said purchase and consideration money of 150*l.*, and release the plaintiff from any liability in respect of the said debt, &c.,

and expenses of *the said action; the declaration stated, that there- [*138
upon afterwards, in consideration thereof, and that the plaintiff, at the special instance, &c., had permitted and suffered the defendant to retain and keep, and that the defendant had retained and kept, 50*l.* of the said purchase or consideration money of 150*l.*, the defendant undertook, &c., to save harmless, and indemnify, him, the plaintiff, of, from, and against all debt, &c., to be recovered and received by Poole in respect of the said action, or of any suit or proceeding to be instituted or taken by Poole in respect of the same; and further, that in case a sixth part of the whole amount of the damages, &c., to be in any way incurred in and about the said action, suit, or proceeding as aforesaid, or in relation thereto, should not amount to the sum of 50*l.*, then the defendant, his heirs, &c., should pay or hand over to the plaintiff the difference in amount between the said sum of 50*l.*, and the amount of such respective sixth part of the said damages, &c., when the same should be ascertained. Averment—that the defendant did retain the sum of 50*l.*; that Poole by the judgment of the Court of Exchequer recovered against the plaintiff 175*l.* 15*s.* (*prout patet*); that Poole sued out a writ of *testatum fi. fa.* endorsed to levy the said sum, &c.; and that the plaintiff was compelled to pay the sum so recovered, with costs, &c., amounting to 190*l.* 5*s.*; of all which the defendant had notice, &c.

Plea: non-assumpsit.

At the trial before MAULE, J., at the sittings for Westminster during this term, the following document was given in evidence.

"Memorandum of agreement made, &c., between William Sparshott (the defendant) of the one part, and Frederick William Palmer, and Charles Palmer, (the plaintiffs,) of the other part: Whereas an action at law was lately commenced in her majesty's Court *of Exchequer of Pleas by [*139
one Thomas (*a*) Pool against the said C. P., and upon the trial of the said case a verdict was given for the plaintiff for the sum of 82*l.* 10*s.*: And whereas various proceedings have been taken by and on behalf of the said C. P. to obtain a new trial of the said action, and which proceedings are still pending: And whereas it hath been arranged that any damages, costs, and expenses that may ultimately be recovered by the said T. P. shall be borne and paid in equal shares by the said W. S., F. P. and C. P., and three other parties, who are equally interested with them in certain estates and premises situate at, &c.: And whereas by a certain indenture bearing even date with these presents, and made between the said F. P. of the first part, the said C. P. of the second part, and the said W. S. of the third part, in consideration of the sum of 150*l.* apiece, the said F. P. and C. P. duly conveyed and assured their two several undivided sixth parts, shares, and interests of and in the said estates and premises to the said W. S., his heirs, &c.: And whereas at the time of the completion of the said purchase it was arranged that the said W. S. should retain 50*l.* out of each of the said purchase or consideration moneys of 150*l.*, and release the said F. P. and C. P. from any liability in respect of the said damages, costs, and expenses of the said action: Now these presents witness, that for and in consideration of the said two several sums of 50*l.* and 50*l.* so retained by him as aforesaid, the said W. S. doth hereby, for himself, his heirs,(*b*) executors, &c., covenant (*b*) and agree with and to the said F. P. and C. P., their executors, &c., to save harmless and indemnify them the said F. P. and C. P., and each of

(*a*) Sic.
(*b*) The instrument not being under seal, the mention of "heirs" and the insertion of the word "covenant" were of course nugatory.

them, their heirs, executors, and administrators, and their and each and
*140] every of their *estates and effects of and from and against all damages, costs, and expenses to be in any way incurred in and about the said action, suit, or proceedings as aforesaid or in relation thereto, shall not amount to the sum of 50*l.*; that he the said W. S., his heirs, executors, and administrators, shall and will pay or hand over to the said F. P. and C. P., their executors, &c., the difference in amount between the said sums of 50*l.* and the amount of such respective sixth parts of the said damages, &c., when the same shall be ascertained. As witness, &c."

It was suggested, on the part of the defendant, that there was a variance between the declaration and the document put in evidence, inasmuch as the former stated the contract of indemnity to have been made with the plaintiff alone, and the latter showed it was made with the plaintiff jointly with Frederick William Palmer. The learned judge was of that opinion; but he offered to amend the declaration; and the plaintiff recovered a verdict for 186*l.*

Manning, Serjt., now moved in arrest of judgment, or for a new trial, supposing the amendment not to have been actually made, in which case the objection as to the variance would be still open. [TINDAL, C. J. Leave having been given to amend by the learned judge, it must be taken as though the amendment had actually been made.] Then by the amendment the declaration is rendered bad; for it will show the objection on the face of it. [ERSKINE, J. The amendment only goes to the consideration, and not to the promise; a consideration from two will uphold a promise to one.] The declaration, as amended, shows a *joint* cause of action; and it is not the less joint because it is for the benefit of the two Palmers separately.

TINDAL, C. J. It appears to me that this case falls within the principle,
*141] that where a man covenants with *two or more *jointly*, yet if the interest and cause of action of the covenantees be *several* and not joint, the covenant shall be taken to be several, and each of the covenantees may bring an action for his particular damages, notwithstanding the words of the covenant are joint; as established in *Windham's Case*, 5 Co. Rep. 7 a, and others.(*a*) Here the agreement was certainly joint in its terms, but the interest of the parties was distinct and separate. Each party had, in effect, advanced the sum of 50*l.*; each had sustained a separate damage; and each, therefore, might sue without joining his copromisee.

COLTMAN, J. The language of the agreement is, that the defendant shall "save harmless and indemnify the said Frederick William Palmer and Charles Palmer, their heirs, executors, and administrators, and their and *each of their* estates," which are clearly severable words.

ERSKINE and CRESSWELL, JJ., concurred. Rule refused.

(*a*) See *Wotton* v. *Cooke*, Dyer, 337 b; *Wilkinson* v. *Lloyd*, 2 Mod. 82; *Tippet* v. *Hawkey*, 3 Mod. 263; *Withers* v. *Bircham*, 3 B. & C. 254; 5 D. & R. 106; *Place* v. *Delegal*, 4 New Ca. 426, 6 Scott, 249.

*142] *MAY *v.* SELBY.

In an action against a surveyor for negligence in making a valuation, expenses incurred in making a second valuation, for the purpose of ascertaining the correctness of the first, are not to be allowed in costs.

Channell, Serjt., applied for a rule to review the master's taxation in this cause. It appeared that the action was brought against a surveyor

for alleged negligence in making a valuation of certain hop-poles and farming effects; that the defendant had *subpœnaed* thirteen other surveyors as witnesses, who had valued the hop-poles; that at the trial at the Spring Kent assizes the plaintiff was nonsuited; that the defendant's attorney had made out his bill of costs at 325*l.* 2*s.*, including charges for the sums paid to the thirteen surveyors for valuing the hop-poles, amounting to fifty-five guineas, and for their attendance at the trial; but that the master had taxed off 176*l.* 2*s.*, including (*inter alia*) the whole of the sums paid for valuation, and the sums charged for the attendance of five of the surveyors at the trial, and for a brief for a third counsel.

The learned serjeant submitted, that although the general rule was, not to allow the expenses of qualifying a witness to give evidence, yet that where the matter in issue wholly depended upon opinion and not upon facts, it formed an exception.

TINDAL, C. J. I do not see how such expenses as these can be called expenses in and about the suit. In cases where experiments have been necessary, the expenses attendant upon such experiments have been disallowed, as in *Severn* v. *Olive*, 3 Brod. & B. 72, 6 B. Moore, 235.(*a*) To allow such preliminary expenses as the present would be to open much too large a field.

*Upon the other points we cannot lay down any express rule; there must be some discretion left with the master; and I do not think this is a case in which the court ought to interfere. [*143

COLTMAN, J., concurred.

ERSKINE, J. I have always understood the rule to be, that in cases turning upon measure and value, the expenses of surveyors are not allowed.

CRESSWELL, J., concurred. Rule refused.

(*a*) See also, *Bayley* v. *Beaumont*, 11 B. Moore, 497.

CLARIDGE *v.* MACKENZIE.

A. pays rent to B., a termor by whom A. was not originally let into possession, A.'s possession having been derived from C., under a demise from E., a prior owner of the term. After the expiration of the term, A., not knowing that the term had expired, enters into a parol agreement with B., for a tenancy, and, under such agreement, pays rent to B. A. is not estopped from showing that B.'s title had expired.

Such agreement is not equivalent to a fresh letting into possession.

TRESPASS, for breaking and entering the plaintiff's house, situate No. 51, South High street, Marylebone, with an asportation of goods. There was a second count for similar trespasses on another day.

Plea: not guilty—by statute.

At the trial, before TINDAL, C. J., at the sittings for Middlesex after last Michaelmas term, it appeared that the action was brought for two different distresses taken by the defendant, who claimed to be landlady to the plaintiff. The first distress was taken on the 2d of July, 1840, for a year's rent up to the preceding Midsummer; and the second in the October following, for a quarter's rent up to Michaelmas. The rent and *expenses were paid by the plaintiff on both of these occasions under protest.(*a*) [*144

In anticipation of the defendant's case, it was proved, on the part of the plaintiff, that in 1710 the Duke of Newcastle purchased the freehold of a plot of ground in Marylebone, including the *locus in quo;* the property on

(*a*) *Semble*, that no protest was necessary, or could be of any effect.

his death passed to his daughter and heir, afterwards the Countess of Oxford, and was subsequently vested in trustees for her, with powers to them to grant building leases.

In July, 1740, the trustees granted a building lease to John Payne of a piece of land comprising the *locus in quo*, at a ground-rent of 6*l*., for a term of ninety-nine years, commencing at Lady-day, 1740, old style, (6th of April, new style,) which lease therefore expired on the 6th of April, 1839.

The reversion of the estate had vested in the present Duke of Portland by the marriage of one of his ancestors into the Oxford family.

Payne, having mortgaged the premises to John Hatch, bequeathed his interest in them to Jane Saunders, who, together with Mrs. Ann Hatch, the legal representative of the mortgagee, by a lease dated the 23d of June, 1762, underlet a portion, comprising the *locus in quo*, to Thomas Pitts, at a ground-rent of 4*l*., for a term of seventy-six years from Midsummer-day in that year. This lease therefore expired on the 24th of June, 1838.

Jane Saunders, after the underlease to Pitts, paid off the mortgage, and obtained a re-assignment from Ann Hatch, of the original term.

Payne's interest in the original lease, by various mesne assignments, passed from Jane Saunders to different parties; and there was some evidence
*145] to show that it *was vested in one Gledhall at the time of the expiration of such original lease in April, 1839.

Pitts's interest had vested (though it did not appear in what manner) in Daniel Mackenzie, the father of the defendant; and in 1810, D. Mackenzie let the premises to one Tilbury for a term of twenty-eight years from Midsummer in that year; which lease, consequently, expired at the same time with the lease to Pitts, viz. on the 24th of June, 1838.(*a*)

Tilbury built two houses on the premises so leased to him, and let one of them (the *locus in quo*) to the plaintiff, who paid rent (42*l*. per annum) regularly to Mackenzie during his life, (the rent being generally paid to the defendant as his agent,) and after his death to the defendant, who claimed as his representative.

After the expiration of the sublease to Pitts, (24th of June, 1838,) the plaintiff, supposing that the title to the premises was in the defendant, agreed verbally (according to the testimony of a witness of the name of Richards) to continue her tenant at the rent of 35*l*. per annum; but no explanation as to the state of her title was then given; and he paid the rent regularly up to Lady-day, 1839. At Midsummer in that year the defendant demanded a quarter's rent; but the plaintiff, having been made aware of the Duke of Portland's title, refused to pay. The defendant thereupon distrained; the plaintiff replevied, but was nonsuited in the action, which he brought in consequence, by reason of a formal defect of evidence, and the quarter's rent was paid to the defendant. There was some evidence that this payment had been made under protest. No rent was paid to the defendant from that time up to Midsummer, 1840; and it was for that year's rent that
*146] the first distress was made, in respect of which the present action was brought.

All the evidence as to the title of the Duke of Portland was objected to on the part of the defendant, upon the ground that it was incompetent to the plaintiff, as tenant to the defendant, to dispute her title. The evidence was, however, admitted. The Lord Chief Justice left it to the jury to say

(*a*) According to several modern cases, the demise from D. Mackenzie to Tilbury would operate, not as an underlease, but as an assignment. Vide 5 Mann. & Ryl. 157—162

whether, at the time of the two distresses, the plaintiff was in possession, as tenant to the defendant, under an agreement with her after her term had expired; and, secondly, supposing such an agreement to have been made, whether it was made under error or mistake; and his lordship directed the jury, that if they should be of opinion that there was no agreement, or that there being one, it had been made under an error or mistake, they were to find for the plaintiff. The jury returned a general verdict for the plaintiff.

Shee, Serjt., in last Hilary term, (17th January,) moved for a new trial, on the ground that the above evidence had been improperly received, and also that the verdict was against evidence.

The court at first refused the rule; but afterwards, (21st of January,) the Lord Chief Justice intimated that a doubt had occurred to the minds of some of their lordships as to the right of the plaintiff to dispute the defendant's title; and a rule nisi was granted. On a subsequent day, (27th of January,) on the application of *Talfourd*, Serjt., who moved upon an affidavit that the defendant had put in a fresh distress, the cause was fixed for argument on this day, when

Talfourd, Serjt., showed cause against the rule. The question is, whether, under all the circumstances of the *case, the plaintiff is at liberty to dispute the title of the defendant to the premises in question. There [*147 is no doubt that the plaintiff did, by paying rent to her after her title had in fact expired at Midsummer, 1838, *primâ facie* acknowledge her title; but it is obvious that such payment was made under a mistake; for it would be absurd (*a*) to suppose that the plaintiff, knowing that defendant had no title, would voluntarily pay rent to her. It is important to observe that the plaintiff was not let into possession by the defendant, but by Tilbury,(*b*) and that he remained in possession when Tilbury's lease expired.

There are three suppositions upon which the plaintiff was justified in disputing the defendant's title.

First, even supposing that the plaintiff had been let into possession by the defendant, still it would be competent to him to show that her title had since expired. The only payment made subsequently to Lady-day, 1839, when the Duke of Portland's title accrued, was made after the plaintiff had, in consequence of an accident, been nonsuited in replevin, and was made under protest; and assuming, that the defendant had title for the three quarters of a year between Midsummer, 1838, and Lady-day, 1839, there was no acknowledgment of her title after the latter period, and the plaintiff may show that it then expired. In *Burne* v. *Richardson*, 4 Taunt. 720, it was decided that a termor, who had let to an under-tenant, could not, after his term had expired, enforce the continuance of the under-tenancy by distress, if the under-tenant refused to acknowledge him as landlord, or paid him under threat of distress.

Secondly, the plaintiff may have made the new bargain with the defendant for the three quarters of a year only, *on the supposition that she had title for that period. Thirdly, either the alleged agreement with her [*148 after her title had expired, if made at all, was clearly made under a mistake as to the facts, or the defendant must have falsely asserted a title to the premises; and either way the plaintiff is not estopped from disputing her title. In *Fenner* v. *Duplock*, 2 Bingh. 10, 9 B. Moore, 38, payment of rent by a lessee to a lessor after the lessor's title had expired, and after the lessee had

(*a*) Vide infrà, 153, 156.
(*b*) But Tilbury had received the possession from Mackenzie, so that the plaintiff came into possession mediately under Mackenzie. Vide 4 N. & M. 29.

notice of an adverse claim, was held not to amount to an acknowledgment of title in the lessor, or to a virtual attornment,(a) unless, at the time of payment, the lessee knew the precise nature of the adverse claim, or the manner in which the lessor's title had expired. He also relied upon *Gregory* v. *Doidge*, 3 Bingh. 474, 11 B. Moore, 394.(b)

Shee, Serjt., in support of the rule. The fact that the defendant has no title is only shown by the evidence, the admissibility of which was objected to. It is argued that the plaintiff was not let into possession by the defendant; (c) but he was clearly in possession at the time when the defendant's title is shown to have expired; and though there was not a letting into corporeal possession, there was distinct proof, that after that period a new contract of tenancy was entered into between the plaintiff and the defendant, for a different term and at a different rent from the former. This amounted to a new letting into possession by the defendant, and not merely to an attornment on the part of the plaintiff. The payment of the rent for three quarters of a year after Midsummer, 1838, is not disputed, and it was again paid after the nonsuit in the replevin, which was after the Duke of Portland's title had accrued. If this nonsuit had been accidental, as it was contended, a

*149] new trial *might have been obtained. The relation of landlord and tenant, therefore, had clearly been established between the parties; and consequently the rule of law, that the latter cannot dispute the title of the former, applies. The cases of *Gregory* v. *Doidge*, 3 Bingh. 474, 11 B. Moore, 394; *Gravenor* v. *Woodhouse*, 1 Bingh. 38, 7 B. Moore, 289, and *Rogers* v. *Pitcher*, 6 Taunt. 202, 1 Marsh. 541, might assist the plaintiff, if the facts were that he was not let into possession by the defendant, and if there had been a mere attornment by mistake. But the facts are the other way; and therefore it was not competent to the plaintiff, even to show that the defendant's title had expired. In *Bulls* v. *Westwood*, 2 Campb. 11, it was held, in an action for use and occupation, where the defendant had come in under the plaintiff, that he could not show the plaintiff's title had expired, unless he had solemnly renounced the plaintiff's title at the time, and commenced a fresh holding under another person. That course was open to the plaintiff here. In that case Lord ELLENBOROUGH expressed himself in these strong terms: "You may as well attempt to move a mountain. You cannot controvert the continuance of the title of the person under whose demise you continue to hold. The security of landlords would be infinitely endangered if such a proceeding were permitted. Had the defendant, upon the premises being seized by the lord of the manor, disclaimed holding of the plaintiff, and entered afresh under the new landlord, we might now inquire into the validity of the seizure, and consider, who is legally entitled to the premises; but the same tenancy continues which was created by the original demise, and the tenant must still pay rent to the lessor whose title he then recognised." In *Doe dem. Knight* v. *Smythe*, 4 Maule & S. 347, Lord ELLENBOROUGH

*150] again said, *"Who shall be considered as landlord is a consequence to be deduced from the acts of the parties, and is not to be doled away at pleasure." And DAMPIER, J., added, "The tenant in possession paid rent to the lessor, and then disclaimed. But he ought to give back the possession to the lessor, and after that the defendant may have her ejectment. It has been ruled often, that neither the tenant, nor any one claiming by him,(d) can controvert the landlord's title. He cannot put another person in possession, but must deliver up the premises to his own landlord." Suppose

(a) Vide *Doe dem. Linsey* v. *Edwards*, 6 Nev. & Mann. 635 (a), 640 (a), 656 (a).
(b) Vide post, 153 (c) Vide suprà, 147 (b). (d) Vide suprà, 147 (b).

A. were to hold as tenant from year to year of B., the freeholder B. dies, and A. then enters into another contract of tenancy with C., the eldest son of B., believing him to have title, and pays him rent, and afterwards finds out that he is illegitimate, can he dispute C.'s title? [ERSKINE, J. That appears to be this very question.] In *Phipps* v. *Sculthorpe*, 1 B. & Ald. 50, where premises had been let to B., for a term determinable by a notice to quit, and pending such term, C. applied to A., the landlord, for leave to become the tenant instead of B., and upon A. consenting, agreed to stand in B.'s place, and offered to pay rent; it was held that (though B.'s term had not been determined, either by a notice to quit or a surrender in writing) A. might maintain an action for use and occupation against C., and that the latter could not set up B.'s title in defence to that action.

The argument on the other side is, that at the time the plaintiff acknowledged the title of the defendant, he was not aware that she had none in fact; and that when he finds that out he may dispute her title. But that is not so; and the cases cited show he was bound, either formally to disclaim the possession, or to surrender to her. It is not like the cases of a mere *attornment to a party having no title; it is tantamount to being actually let into possession. [*151

TINDAL, C. J. This is an action of trespass brought for two distresses; the first for a year's rent claimed by the defendant to be due from the plaintiff at Midsummer, 1840; the second for a quarter's rent at Michaelmas in the same year. The question in the case is, whether the plaintiff, who now disputes the legality of these distresses, is at liberty to do so, or whether he is not precluded by a rule of law, that a tenant cannot dispute the title of his landlord. There is no doubt, upon the evidence, that the defendant had, in point of fact, no title whatever to the premises in question after Midsummer, 1838. The Duke of Portland's reversionary estate did not accrue till old Lady-day, 1839; the mediate interest being vested in some one else, but in whom it did not very clearly appear,(*a*) nor is it material.

It appears to me that this case does not fall within the rule adverted to; and that upon two grounds.

First, upon the ground that there was no new taking of the premises by the plaintiff, or any letting into possession by the defendant; and secondly, that even assuming there was such a new taking or letting into possession, it was left by me to the jury to say, whether the transaction took place on the part of the plaintiff without a knowledge of the circumstances, and that the jury found such to be the case.

Upon the first point, I think it was competent for the plaintiff to show that the defendant's title had expired. The plaintiff was in possession of the premises; and after the expiration of the defendant's interest he *continued to occupy as tenant by sufferance under the party who was entitled to the intermediate term of three quarters of a year. [*152
The witness, Richards, speaks of a new agreement having been entered into between the plaintiff and the defendant, that the former should continue in possession as tenant to the latter: but there was no new possession given by the defendant; she was in no way prejudiced; she could not have turned the plaintiff out of possession; and before their agreement, if she had brought her ejectment, the plaintiff might have shown that she had no title, and that

(*a*) Probably this small reversionary interest was not worth the liability to which a claimant would have subjected himself in respect of the covenants of the original lease.

the title was in some one else. It is not like the case of a person letting another into possession of vacant premises; it is in fact a remaining in possession of premises which had been formerly occupied by the tenant. It is said, indeed, that this makes no difference, and that the facts of this case amounted, in law, to a new letting into possession; and the case of *Balls* v. *Westwood*, 2 Campb. 11,(*a*) was cited as an authority to show that where a party has come in under another, the former cannot show that the title of the latter has expired without solemnly renouncing such title, and commencing a fresh holding under another person. But though such appears to have been Lord ELLENBOROUGH's opinion in that case, his opinion was subsequently altered; for in *Doe dem. Lowden* v. *Watson*, 2 Stark. N. P. C. 230, that learned judge held that a defendant in ejectment, who had paid rent to the lessor of the plaintiff, might show that his landlord, pending the term, had sold his interest in the premises; that is, in effect, the tenant was allowed to show an alteration in his landlord's title. So, in *England dem. Syburn* v. *Slade*, 4 T. R. 682, which was ejectment by a landlord against a tenant whose term had expired, it was held that the latter was not barred
*153] from showing that his landlord's title had expired. And in *effect all that the plaintiff proposes to do in this case is, to show that the defendant had at one time a good title, which has since expired.

But upon the other point, I cannot distinguish this case from that of *Gregory* v. *Doidge*, 3 Bingh. 474, where the plaintiff in replevin had occupied lands under A., and upon A.'s death had entered into an agreement to pay rent to the defendant, and paid 1*s*. as an acknowledgment of his title, being ignorant that it was disputed. It turning out afterwards that the defendant had no claim to the property, this court was clearly of opinion that the plaintiff, having come into possession under a former owner, and having entered into the agreement in ignorance of the defect in the defendant's title, might, under a plea of *non tenuit*, show that the defendant was not his landlord.(*b*) The tenant's right to dispute the title is there put in the most precise way, being raised by the express plea of *non tenuit;* and that case seems to me to embrace the case now before us. Upon the second ground, therefore, supposing that there had been a new tenancy created after the expiration of the defendant's title, I think it clear that the plaintiff had a right to show what were the circumstances under which he entered into the agreement with the defendant—a right to show the jury that, at that time, he was ignorant of the real facts as to the defendant's title. Now, it is highly improbable that the defendant disclosed to the plaintiff that she had no right to the premises; for, if she had, no man of common sense (*c*) would have taken her as his landlady; but, in fact, she then asserted, and even
*154] now stoutly maintains, her *right* to the premises. *I left it to the jury to say, whether the agreement in question was entered into by the plaintiff with a full knowledge of the facts, or under a misapprehension as to their nature; and they, in effect, found the latter. I see no reason to be dissatisfied with their verdict; and the case of *Gregory* v. *Doidge* is an authority to show that the direction to the jury was correct.

Upon the whole, therefore, I am of opinion that the present rule must be discharged.

(*a*) And see Keilwey, 65.
(*b*) See *Williams* v. *Bartholomew*, 1 B. & P. 326.
(*c*) He would have placed himself in the position of being liable to pay the amount of the rent over again to the Duke of Portland, either in the shape of mesne profits or as a compensation for the use and occupation.

COLTMAN, J. I am of the same opinion. In the case of *Doe dem. Higginbotham* v. *Barton*, 11 A. & E. 307, 3 P. & D. 194, where a mortgagor in possession had demised the premises, and the tenants, having received notice from a party to whom their lessor had executed a second mortgage, had paid rent to him, the question was, whether the tenants could, in ejectment by such second mortgagee, dispute his title. Lord DENMAN, C. J., in giving the judgment of the court, said, "It is clear that the lessor of the plaintiff never had any legal estate; and he must rely on the rule with regard to landlord and tenant. That rule is fully established, viz. that the tenant cannot deny that the person by whom he was let into possession had title at that time: but he may show that such title is determined. With respect to the title of a person to whom the tenant has paid rent, but by whom he was not let into possession, he is not concluded by such payment of rent, if he can show that it was paid under a mistake."

In this case, therefore, if the plaintiff was not let into possession by the defendant, it is clear that he is not precluded from showing that her title is at an end. What, then, is the meaning of being let into possession? The plaintiff, it is admitted, was not let into corporeal possession by the defendant; he had been let in by *Tilbury, quite independently of Mackenzie.(a) But then it is argued that in July, 1838, the plaintiff entered into an agreement to take the premises from the defendant; and I think that such must be considered to be the result of the evidence. And if she had a legal right at that time, and might have turned the plaintiff out of possession, I am not prepared to say but that he must have formally surrendered to the defendant. But the infirmity of the defendant's case consists in this, that at the time of this agreement she had in fact no power to turn the plaintiff out of possession; and I think therefore that he cannot be said to have been let in by her. The question then is, was this agreement made under a mistaken notion as to the facts? This point was properly left to the jury, and they have found in the affirmative. The plaintiff, therefore, was entitled to show that, at the time of making the distresses, the defendant's title had determined. [*155

ERSKINE, J. I am of the same opinion. The facts of the case are all perfectly clear, and indeed are not disputed. After Midsummer, 1838, there was no title in the defendant; but the title of the Duke of Portland did not accrue till the 5th of April following. The plaintiff had been let into possession originally, not by the defendant, but by Tilbury; but after his right had expired, (which was at Midsummer, 1838, when the defendant's title also expired,) the plaintiff had paid rent to the defendant up to Midsummer, 1839, and, as it would seem, not under protest. This was a *primâ facie* acknowledgment of her title; but the cases that have been cited show, that where such a payment has been made in ignorance of the real circumstances, and the tenant has not been let into possession by the party claiming to be *landlord, the former may show the want of title of the latter. The defendant, however, relies upon an agreement proved by the witness Richards to have been made in July, 1838, after the expiration of her term, whereby the plaintiff agreed to hold the premises as her tenant; and if this agreement were made with a full knowledge of the facts, perhaps the plaintiff would not be entitled to deny that he was bound to pay her rent. But it is impossible to suppose that he knew she had no title at the time of the agreement; and the evidence shows that no explanation was at that time entered into. Is the agreement, then, to be taken as [*156

(a) Vide antè, 145 (a).

conclusive? There were two questions left by my lord to the jury. The first was, whether the plaintiff was in possession as tenant to the defendant under the agreement; the second, whether the agreement was made with a full knowledge of all the circumstances. The jury found a general verdict for the plaintiff, and must therefore be taken to have found, either that there was no agreement, as stated by the witness Richards, or that the plaintiff had, at the time, no knowledge of the facts. It is probable they thought the agreement was in fact made, but under a mistake as to the facts. It is said this is not merely the case of an attornment, but is a letting into possession; and the rule of law is relied upon, that, under such circumstances, the tenant cannot deny the landlord's title. Now I agree that this might be so, if in July, 1838, the plaintiff had made the agreement with knowledge of the facts; but it is clear he was in perfect ignorance as to them, or, at any rate, was not fully aware that the defendant had no title to the premises. Then, is there any difference between an express agreement to hold of a party and an attornment to him? They each amount to an admission of such party's right. Unless it could be shown that the defendant had put
*157] the plaintiff into actual possession, I think the agreement *would stand on the same footing as an attornment. If, indeed, at that time, the defendant might have turned the plaintiff out of possession, he could not have denied her title. But that is not so; because if, in July, 1838, the defendant had brought her ejectment, she must have stood on her own title, and she had, in fact, none to prove. I am therefore of opinion that an agreement entered into under these circumstances, does not preclude the plaintiff from disputing the defendant's title to the premises.

CRESSWELL, J. I also am of opinion that the direction of the Lord Chief Justice was right, and that the finding by the jury was so likewise. It is undoubtedly true, that if one person obtain possession of premises by means of another as his landlord, the former is estopped in law from saying that the latter had no right to give such possession. If, therefore, he obtain possession as tenant, he must give up the premises to his landlord,—*rebus sic stantibus*. But if he mean to insist that the landlord's title is at an end, he must show a change of circumstances, such as a sale of the property by the landlord, or an expiration of his title by efflux of time, &c. Now, assuming that the plaintiff in this case took possession from the defendant, I should by no means have been sure that the plaintiff might not have shown that the defendant's title was gone. But the question here is, whether the Lord Chief Justice was right in leaving the questions, as he did, to the jury. (His lordship here recapitulated the facts of the case.) Now the arrangement with the defendant recognises her as the party entitled to the remainder, which in point of fact she was not. Then the question arises, was that arrangement entered into under a mistake or not? The evidence clearly shows that, at the time, she was asserting her right to the property; her title
*158] therefore was recognised by the *plaintiff under a mistake. It seems to me, therefore, that the case was rightly left to the jury, and that there is no ground for disturbing the verdict. Rule discharged.

BEATY and Another *v.* WARREN.

In this court a rule for judgment *non obstante veredicto* ought to be drawn up "upon reading the record;" but *semble*, the omission of these words by the misprision of the officer will not prejudice the party who has obtained the rule. At any rate, the record is

sufficiently before the court if a copy of the pleadings be annexed to the affidavits on which the rule was obtained.

ASSUMPSIT, on a special contract to make bricks; to which the defendant pleaded non-assumpsit, and several special pleas. The cause and all matters in difference were referred. The arbitrator directed a verdict to be entered for the plaintiffs on the first issue, and for the defendant on the other issues, and he found that the plaintiffs were not entitled to any damages for the breaches of the contract alleged.

Channell, Serjt., on behalf of the plaintiffs, on a former day (19th April) of this term, obtained a rule nisi to set aside the award, or for judgment *non obstante veredicto*, upon the ground (*inter alia*) that the second, third, fourth and fifth pleas were bad in law, and that the sixth did not go to the whole cause of action.

Bompas, Serjt., now took a preliminary objection, that, as the pleadings did not appear on the face of the award, and the rule was not drawn up "on reading the record," the record was not before the court, and therefore the plaintiffs could not be heard to object to any thing contained therein. [TINDAL, C. J. When a motion is made for judgment *non obstante veredicto*, is not the record supposed to be before the court?] Still, in this court it is necessary that the rule should be drawn up "on reading the record," although it is not so *in the Queen's Bench; and that court, on an application to set aside an award made pursuant to an order of nisi prius, will look at the record, although the rule is not drawn up on reading it. The difference between the practice of the two courts was pointed out by PATTESON, J., in *Sherry* v. *Oke*, 3 Dowl. P. C. 349, 351. (He was then stopped by the court, after they had consulted with the master (Griffith).) [*159

Channell, Serjt., *contrà*. This objection cannot be sustained. In a recent case in the Court of Exchequer, where there was an application to set aside a verdict in a cause that had been tried before the sheriff, it was necessary to ascertain the form of the second plea. It was objected that it was not before the court, as the rule was not drawn up "on reading the record;" but PARKE, B., said he considered the record was in court. [*Bompas*. The rule in that court is in the same form as in the Queen's Bench.(*a*)] At most this is merely a mistake of the officer in drawing up the rule, for which the party ought not to suffer.(*b*) The terms of the rule are never endorsed by the counsel.

TINDAL, C. J. I think this is a mere misprision of the officer. The record is never really in court; and though it seems that the rule should properly have been drawn up "upon reading the record," still the record may be considered as being virtually and potentially in court.(*c*) It is, after all, but a technical objection.

(*a*) See Chitty's Pract. Forms, 707.

(*b*) He adopts the mistake when he serves the rule.

(*c*) In Tidd's Practice, (9th ed. p. 928,) it is said, "The motion in arrest of judgment or for judgment *non obstante veredicto*, &c., may be made, in the King's Bench, at any time before the judgment is given, though a new trial has been previously moved for But it is against the ancient course of the court, to make a rule to stay judgment, unless the postea be brought in; and therefore it is said, that if one move in arrest of judgment, he ought to give notice to the clerk in court on the other side; but the better way is to give a rule upon the postea for bringing it into court, and that is notice of itself.

"In the Common Pleas, the motion in arrest of judgment must be made before or on the appearance day of the return of the *habeas corpora juratorum*: and it cannot be made, without notice, on the last day of term. On moving in arrest of judgment after verdict, the roll should be brought into court, if it be entered on record; if not, the record of nisi prius should be produced by the associate."

*160] *It then appearing that a copy of the pleadings was annexed to the affidavits upon which the rule nisi had been obtained, the argument in the cause proceeded: but terms were afterwards agreed upon.

GIBSON and MARTIN, Assignees of F. HARRIS, v. MUSKETT.

A., a trader, being in embarrassed circumstances, offered his creditors a composition of 7s. 6d. in the pound, which was refused by a majority of them, and by B. among the number. *B. filed an affidavit in the court of bankruptcy, and, on the 13th of March, served on A. a copy thereof and a notice, demanding payment pursuant to sect. 8 of 1 & 2 Vict. c. 110, and he also served a notice on an auctioneer, who had advertised the sale of A.'s goods, not to proceed with the sale. The goods were sold, and out of the proceeds a payment was made, on the 5th of April, to the defendant, (a creditor,) of the amount of the composition of his debt. *Held* that this was a fraudulent preference.

Quære whether, under the act in question, the twenty days after the service of the notice are to be reckoned inclusively of the day of service.

The question, whether a fraudulent preference was given, appears to be one of law rather than of fact. (Per Coltman, J.)

"A payment really and *bonâ fide* made," within the eighty-second section of 4 G. 4, c. 16, is a payment made without any intention of its being reclaimed. (Per Tindal, C. J.)

The court, being greatly dissatisfied with two successive verdicts, ordered a third trial.

ASSUMPSIT, for money had and received to the use of the plaintiffs, as assignees, and upon an account stated with them as assignees. Plea: non *161] *assumpsit. At the trial, before Lord ABINGER, C. B., at the Hertford summer assizes, 1840, a question arose, whether a payment made by Harris, the bankrupt, under the circumstances hereinafter stated, was void, as being a fraudulent preference.

Harris had been a trader at St. Albans, and a customer of the defendant, who was a banker there. In February, 1839, Harris being largely indebted to various persons, including the plaintiff Martin and the defendant, a composition with his creditors of 7s. 6d. in the pound was suggested; and it was on three different occasions proposed to the plaintiff Martin to come into this composition, which he declined to do. On the 13th of March, Martin filed, in the Court of Bankruptcy, an affidavit of the amount due to him from Harris, pursuant to the stat. 1 & 2 Vict. c. 110, s. 8,(a) and a copy thereof, with a notice requiring immediate payment of the debt, was served on J. *162] Harris on the 15th of March. Harris's goods were *advertised for sale by one Crawley, an auctioneer, on the 21st. An hour before the sale, notice was served upon him by the solicitors of Martin, that proceedings had been instituted for the purpose of making Harris a bankrupt. The sale, however, took place; and, out of the proceeds, Crawley paid to

(a) Which enacts that "if any single creditor, (or creditors, being partners,) whose debt shall amount to 100*l.*, or any two creditors whose debts shall amount to 150*l.*, or any three or more creditors whose debts shall amount to 200*l.*, of any trader within the meaning of the laws respecting bankrupts, shall file an affidavit in her majesty's Court of Bankruptcy, that such debt is due, and that such debtor is such trader, and shall cause him to be served personally with a copy of such affidavit, and with a notice in writing, requiring immediate payment of such debt, and if such trader shall not, within twenty-one days after the personal service of such affidavit and notice, pay such debt, or secure or compound for the same to the satisfaction of such creditor, or enter into a bond in such sum, with two sufficient sureties, as a commissioner of the Court of Bankruptcy shall approve of, to pay such sum as shall be recovered in any action which shall have been brought, or shall thereafter be brought, for the recovery of the same, together with costs, or to render himself, &c., after judgment recovered, every such trader shall be deemed to have committed an act of bankruptcy on the twenty-second day after the service of such affidavit and notice, provided a fiat shall issue within two calendar months from the filing of such affidavit."

various creditors of Harris (including the defendant) the composition of 7*s.* 6*d.* in the pound on their respective debts. The payment to the defendant was made on the 5th of April. Harris not having complied with the requisites pointed out by the act above referred to, a fiat was issued against him on the 9th of April, 1839, under which the plaintiffs, on the 2d of May, were appointed assignees. Of thirty-three creditors only fourteen had come into the composition. The sum received by the defendant amounted to 121*l.* 10*s.*, to recover which the present action was brought.

The Lord Chief Baron told the jury that if they were satisfied that Harris, at the time the payment was made, believed Martin would proceed to make him a bankrupt, or knew he could not prevent Martin from doing so,—if he thought that bankruptcy was *inevitable*,—the payment would amount to a fraudulent preference, and they should find a verdict for the plaintiffs; but if they thought that Harris did not intend to commit an act of bankruptcy, and did not conceive that Martin would proceed to make him a bankrupt, they ought to find for the defendant. The jury returned a verdict for the defendant.

Sir *Thomas Wilde*, Serjt., in Michaelmas term, 1841, obtained a rule *nisi* for a new trial, upon two grounds; first, upon the ground of misdirection, as to whether the money had been paid in contemplation of bankruptcy; and secondly, that the verdict was against evidence.

**Channell*, Serjt., in Trinity term, 1841,(a) showed cause against the rule, and Sir *Thomas Wilde* was heard in support of it. The court delivered their judgment as follows:— [*163

TINDAL, C. J. It seems to me, the jury have come to an improper conclusion, and that the case ought to be sent to a new trial. The money, it appears, was paid by Harris to Muskett on the 5th of April, that sum being the amount of 7*s.* 6*d.* in the pound on a debt due from Harris to Muskett, and it is important to consider what was Harris's situation with respect to Martin, another of his creditors, at this time.

Before this payment was made, Harris had received a notice given to him by Martin, which notice, following the language of the act of the 1 & 2 Vict. c. 110, required immediate payment of the debt; and the act specifies that if the party do not, within twenty-one days after personal service of the affidavit, pay the debt, or secure, or compound for, the same, to the satisfaction of the creditor, or enter into a bond for such sum, with two sufficient sureties, as a commissioner of the Court of Bankruptcy shall approve of, to pay the same, then that there shall be an act of bankruptcy deemed to have been committed on the twenty-second day after the service of the affidavit, provided a fiat be sued out within a certain time.

Therefore, on the 5th of April, when Harris made this payment, he knew that, at any rate, on the 6th, he would be in a situation that Martin might, at any time within two months afterwards, sue out a fiat against him unless he performed one of the three conditions, none of which was he able to fulfil. Harris could not pay the debt, for he had exhausted all his money; he could not secure or compound for the same to the satisfaction of the particular creditor, for he knew that Martin, in *giving the notice, had shown that he was unwilling to accept, and had determined not to accept, the composition which had been previously offered; he could not enter into a bond with two sufficient sureties such as the Court of Bankruptcy should approve, because there was not time to perform that condition. [*164

(a) Before Tindal, C. J., Coltman, Erskine, Maule, JJ.

That being the state of the case, it further appears, that on the 21st of March, a notice had been given to the auctioneer, not to go on with the sale. It is impossible, under these circumstances, that Harris should not know that it was the intention of Martin to proceed adversely to him, and to issue the fiat.

Then the question is, whether this was not money paid in contemplation of bankruptcy; that is, under such circumstances that any prudent man taking a reasonable view of his situation, and the surrounding circumstances at the time, might fairly expect bankruptcy would follow; and I think we must say, that here there was such a contemplation of bankruptcy, and therefore that the case should be submitted to the consideration of another jury to exercise their judgment on that point.

I am not, however, prepared to say that the direction is of that description, that we can make any distinction between this and the ordinary case, where a cause is sent down again by reason of the verdict being against evidence. The learned judge indeed told the jury, that in order to find this a payment made in contemplation of bankruptcy, they must be satisfied that bankruptcy was *inevitable;* but I do not think that the word "inevitable" was there used *simpliciter*, but rather *secundum subjectam materiam*, that is, with respect to this act of bankruptcy, which depended not on the act of himself, but on an act by a third person, *in invitum*.

I think what was passing in the mind of the judge, and what the jury might reasonably understand the substance of the whole direction taken
*165] together to be, is this, "if you think there is evidence that he had *bankruptcy *in his view*, then you must find for the assignees. But supposing you do not think that, yet, if you are satisfied he thought that bankruptcy was *inevitable*, still you must find for the assignees." Although taking particular parts of the summing up, the point of inevitable expectation of bankruptcy is perhaps put rather strongly, yet, looking at the whole together, I cannot call it a misdirection.

Coltman, J. I am of the same opinion. I think the jury have come to an erroneous decision on the matter of fact, and though strong observations appear to have been made on those facts by the Lord Chief Baron, I am not prepared to say he did not, on the whole, make the jury understand correctly the nature of the point they had to decide; for he closes his summing up by saying, "If you think on the other hand he did not intend to commit bankruptcy at the time, and did not conceive that Mr. Martin would proceed to make him a bankrupt, then you ought to find for the defendant." That is his closing sentence; and that is correct. One can easily understand what may have led the jury to the conclusion they drew; viz., they imagined that Mr. Martin had dealt harshly; and they probably thought that the offer which Harris had originally made of 7*s*. 6*d*. in the pound to each of the creditors was a fair offer. That is a ground on which a jury might naturally act, yet it is not one that can be supported in point of law; for though Harris pays no more than 7*s*. 6*d*. in the pound to Mr. Muskett, which is the composition he is willing to pay to every one, yet, under the circumstances of the case, this payment cannot be exempted from falling within the consideration of the law as a fraudulent preference.

Erskine, J., concurred.

*166] *Maule, J. I am of the same opinion. I think that the direction of the judge was not erroneous. The specific act of bankruptcy proved is one of a peculiar nature, depending, not on what had been done or omitted by the bankrupt alone, but on what, if done at all, would be

done by some one else. The learned judge, in effect, puts this to the jury. "If you are of opinion that Harris thought he could not help Mr. Martin making that an act of bankruptcy, which it would be at the option of Mr. Martin to make an act of bankruptcy or not, then the payment was in contemplation of bankruptcy." That appears to me to be quite correct. He used, indeed, the term "inevitable." That has been put as if that were meant by the judge, and understood by the jury, as a statement that unless an act of bankruptcy must absolutely and necessarily happen, and unless the bankrupt knew that, this was no payment in contemplation of bankruptcy. I do not think that is the fair meaning of the expression. It means, if he intended to do something himself which would amount to an act of bankruptcy, or if he knew he could not prevent another person from taking a step which would make him a bankrupt, then he must be held to have contemplated bankruptcy; that in either of these circumstances there was a fraudulent preference in contemplation of bankruptcy. I think that is explained by the passage my brother COLTMAN has read from the judge's summing up. He used the phrase, "if he knew he could not prevent Mr. Martin from proceeding to make him a bankrupt," and it cannot be said, I think, that he did not know that; and therefore it cannot be said the judge was incorrect. Probably if his lordship had pressed the fact to the jury in the way it has been pressed to this court, the jury might have come to a different conclusion. All that he has done, or rather has omitted to do, is, that he has not given an opinion on the matter of fact to the jury; but that is no misdirection; that is an *error which may be rectified when the case goes before another jury. [*167

Rule absolute, on payment of costs.

The cause was tried a second time before TINDAL, C. J., at the summer assizes for 1841, when the jury again found a verdict for the defendant.

Sir *T. Wilde*, Serjt., in Michaelmas term, 1841, obtained a rule for a second trial upon the ground, that by 1 & 2 Vict. c. 110, s. 8, the twenty-one days, at the expiration of which the trader, not having complied with the requisites of the act, is to be taken to have committed an act of bankruptcy, are to be calculated inclusively of the day on which the notice is given; and that, consequently, the payment was made after an act of bankruptcy; and, secondly, that the verdict was against the evidence which clearly established a fraudulent preference.

Channell, Serjt., now showed cause. First, the verdict was sufficiently supported by the evidence. The composition was perfectly fair. The only question is, whether the payment was made by Harris in contemplation of bankruptcy; and two juries having found that it was not, the court will not send the case to a third trial. There was nothing to show that Harris *must* have contemplated bankruptcy at the time. It is true the plaintiff Martin, as a creditor, had filed his affidavit under the act, and served a copy, with notice, upon Harris; and if the latter did not do certain acts within the twenty-one days prescribed by the act, it was competent to the creditor to make his debtor a bankrupt, by issuing a fiat at any time within two months. But it does not follow that the creditor would take this step, and that the fiat would issue. The debtor might or might *not be aware that he had exposed himself to peril; but at any rate he could not know whether the creditor would take advantage of his situation. The right to obtain a fiat seems to be confined to the creditor who makes the affidavit. [*168 [TINDAL, C. J. That may be doubtful. The section says, that if the trader does not do certain things, he "shall be deemed to have committed *an act*

of bankruptcy on the twenty-second day after service of such affidavit and notice, provided a fiat shall issue within two months;" so that if there is an act of bankruptcy, it would seem that any party might obtain the fiat.] Still the question would be, whether the bankrupt must necessarily have contemplated bankruptcy, as he could not know whether any creditor would obtain a fiat. [TINDAL, C. J. It increases the field against him at any rate.] The mere possibility, or even the probability, that a fiat would issue, would not be sufficient.

The argument upon the other point, viz., whether the twenty-one days mentioned in the 1 & 2 Vict. c. 110, s. 8, were to be reckoned inclusively or exclusively of the day on which the notice was given, is omitted, as the judgment of the court did not turn upon it. The learned serjt.,—who contended that the day of the notice was not to be reckoned in the twenty-one days,—cited *Webb* v. *Fairmanor*, 3 M. & W. 473; *Blunt* v. *Heslop*, 8 A. & E. 577, 3 N. & P. 553; *Young* v. *Higon*, 6 M. & W. 49; and *In re Higham*, 9 D. P. C. 203; and distinguished *Glassington* v. *Rawlins*, 6 East, 407; *Ex parte Rose*, 4 Deac. 125; and *Ex parte Whitby*, Id. 139, 1 Mont. & Chit. 671.

Talfourd, Serjt., in support of the rule. The payment in this case, if made voluntarily and in contemplation of bankruptcy, was clearly a fraudulent
*169] preference in law. *The fairness of the composition is not the test, as to whether a payment amounts to a fraudulent preference. The principles of the rule upon which the doctrine of fraudulent preference is based, are laid down by Lord MANSFIELD, C. J., in *Alderson* v. *Temple*, 4 Burr. 2235, S. C. 1 W. Bl. 660, and also in *Harman* v. *Fisher*, 1 Cowp. 117, S. C. Lofft. 472. Although the question of fraudulent preference may be one for the jury, yet it is one on the very verge of the law, and may properly be reviewed by a judicial tribunal; and the court will not scruple to send down a case to a third trial, where they clearly see that the verdict is against law.(*a*) It is clear that, under the circumstances of this case, Harris must have contemplated bankruptcy at the time the payment was made; and such was the decided opinion of this court in granting the former new trial in this case. The rule as to what shall constitute a sufficient contemplation of bankruptcy to make a voluntary payment amount to a fraudulent preference, is laid down in *Poland* v. *Glyn*, 4 Bingh. 22, n., 12 B. Moore, 109, n.;(*b*) *Gibbins* v. *Phillips*, 7 B. & C. 529, 2 Mann. and Ry. 238; *Belcher* v. *Prittie*, 10 Bingh. 408, 4 Moore & Sc. 295. In the latter case, although the payment was confirmed under the circumstances, the question was very fully discussed. In *Gibson* v. *Bouts*, 3 Scott, 229, TINDAL, C. J., says, "contemplation of bankruptcy I take to mean, where the party believes bankruptcy to be the necessary result of his condition, and such belief is operating upon his mind at the time of making the payment." And BOSANQUET, J., adds, "If a man, believing himself to be in danger of bankruptcy, voluntarily hands over money for the purpose of securing a favoured creditor, that, in my
*170] opinion, *is a payment made in contemplation of bankruptcy, within the meaning of the law as laid down upon the subject of fraudulent preference."

Upon the second point he was proceeding to argue that the day on which the notice was given was to be included in the twenty-one days, under the 1 & 2 Vict. c. 110, and consequently that they had expired on the 5th of

(*a*) See *Goodwin* v. *Gibbons*, 4 Burr. 2108.

(*b*) S. C. 2 D. & R. 311; but as to this latter report, see the observations of Best, C J., 12 B. Moore, 109, and Park, J., Ib. 112.

April, the day on which the payment to the defendant was made, and that, therefore, such payment was made after an act of bankruptcy. [*Channell*, Serjt. Even in that case the payment would be protected by the 6 G. 4, c. 16, s. 82,(*a*) being, if not a fraudulent preference, a payment *bonâ fide* made by the bankrupt before the issuing of the fiat, without notice to the creditor of any prior act of bankruptcy.] It may perhaps be put, that the payment in this case was made during the very progress of the act of bankruptcy. [ERSKINE, J. I think the act of bankruptcy must be taken to have been committed, either wholly before or wholly after the payment.] The argument on this point certainly is, that the act was committed before the payment, but even in that case there may be a payment which may well be said not to be made *bonâ fide;* though it may not amount to a fraudulent preference.

TINDAL, C. J. I think the expression "payments really and *bonâ fide* made" in the eighty-second section *of 6 G. 4, c. 16, must mean payments of money not intended to be reclaimed by the party; and it was clear there was no such intention in this case. [*171

I must confess I have great reluctance in sending down any cause to a third trial; but cases may occur in which we cannot help feeling that justice has not been done. In the present instance there certainly appears to have been a struggle on the part of the jury against the bankrupt laws. But, without saying more to prejudice the case, I think it ought to go down again to trial, on payment of costs.

COLTMAN, J. The question of fraudulent preference may really be considered as hardly other than a question of law. The jury were, perhaps, misled by what they may have thought the honesty of the case; but, being substantially a point of law, I agree there ought to be a new trial.

ERSKINE, J., concurred. Rule absolute, on payment of costs.

(*a*) Which enacts, "That all payments really and *bonâ fide* made, or which shall hereafter be made, by any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt, (such payment not being a fraudulent preference of such creditor,) shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and such creditor shall not be liable to refund the same to the assignees of such bankrupt, provided the person so dealing with the said bankrupt had not, at the time of such payment by such bankrupt, notice of any act of bankruptcy by such bankrupt committed."

*HARTLEY v. MANSON. [*172

By the stamp act, (55 G. 3, c. 184, sched. part 1,) a warrant of attorney is required to have an *ad valorem* stamp, except where it is given for securing a sum of money for which the party giving it is in custody, when a one pound stamp is sufficient. Where a warrant of attorney was given under such circumstances: *Held*, not necessary that it should appear on the face of it that the party was in custody.

Held also, that an interlineation in the instrument, made by consent of both parties, after execution, stating the party to be "now a prisoner in the custody of the sheriff of K.," was not an alteration in a material part of the instrument, so as to render a new stamp necessary.(*a*)

(*a*) As to this latter point, vide *Markham* v. *Gonaston*, Cro. El. 626, which was an action on the case for destroying the effect of a bond by filling up blanks; S. C. 2 Roll. Abr. 29, 30; 13 Vin. Abr. 40. It appears from the report of the same case in Sir F. Moore, 547, pl. 730, that though the plaintiff recovered in the action on the case,—having been nonsuited in the action on the bond, upon *non est factum* pleaded, by reason of the alterations,—he brought a second action on the bond, in which action, to a plea of *issint non est factum*, he replied that the blanks were filled up by the consent of obligors and obligee, and recovered. And see *Anon.*, Select Cases in Chancery in Lord King's Time, 21; 13 Vin. Abr. 103, pl. 12.

That the defence should be *specially* pleaded, see *Anon.*, Sir F. Moore, 66, pl. 179.

Semble, that if, by reason of the insufficiency of the stamp, the warrant of attorney had been invalid, the court would not have granted a rule nisi to set it aside, inasmuch as the plaintiff might remove the objection before he would be required to show cause against such rule.(a)

Atcherley, Serjt., applied for a rule to set aside the warrant of attorney, judgment, and execution, in this case, and to discharge the defendant out of custody. The following facts were stated from the affidavits. On the 13th of November, 1839, the defendant being in the custody of a sheriff's officer, for 370*l*. at the suit of the plaintiff, executed a warrant of attorney, duly attested, for securing to the plaintiff that sum and costs; the defendant was therein described as "of the Grove, Woolwich, in the county of Kent;" the warrant of attorney was stamped with a 1*l*. stamp. The defendant was

*173] then *discharged. On the following day the defendant received a note from the plaintiff, stating that the warrant of attorney required "a little formal addition;" and the plaintiff's clerk together with the attesting attorney called upon the defendant in the afternoon of the same day with the warrant of attorney, and the former said it was necessary to insert the words, "but now a prisoner in the custody of the sheriff of the said county of Kent," after the word "Kent" in the description of the defendant in the warrant of attorney. The attesting attorney said he thought the alteration would invalidate the warrant of attorney, but the suggested alteration was made by the plaintiff's clerk. The defendant and the attesting attorney traced over their respective signatures with a dry pen, and the warrant of attorney was re-delivered by the defendant, no alteration having been made in the date. The attesting attorney had not been required by the defendant to attend or act for him on this occasion. Judgment had been entered up on the warrant of attorney, and the defendant, on the 15th of April, 1841, was charged in execution under it, and had been in custody ever since.

The learned serjeant contended:—First, the warrant of attorney was invalid in its original condition, for not stating, upon the face of it, that the defendant was then in custody. By the stamp act, (55 G. 3, c. 184,) sched. part I. tit. *Warrant of Attorney*, the same duty is imposed on a warrant of attorney as on a bond for the security of money, which is an *ad valorem* duty; but there is an exception "where the warrant of attorney shall be given for securing any sum or sums of money, for which the person giving the same shall be in custody under an arrest;" in which case a 1*l*. stamp is sufficient. But, as it does not appear on the instrument, that the defendant was in custody, an *ad valorem* stamp was necessary; and, without it, the warrant of attorney was void.

*174] *Secondly, at the time of the re-execution of the warrant of attorney on the 14th, the defendant was not in custody, and therefore an *ad valorem* stamp was then clearly necessary. [Tindal, C. J. These are merely objections as to the amount of the stamp; but of what use would it be to grant a rule? the plaintiff would go to the stamp office and set it right, pending the rule. In *Burton* v. *Kirby*, 7 Taunt. 174, where a judgment had been entered up on a warrant of attorney given on an insufficient stamp, this court held that the objection was cured by procuring the instrument to be stamped, although the defendant had applied to the court to set aside the judgment.]

Thirdly, the warrant of attorney was not duly attested under the stat. 1 & 2 Vict. c. 110, s. 9, on the 14th of November,—the attesting attorney not

(a) Vide tamen post, 178 (b).

having been required to act by the defendant. In *Bailey* v. *Bellamy*, 9 Dowl. P. C. 507, a warrant of attorney to confess judgment for 1000*l.* was executed by the defendant, and duly attested by an attorney on his behalf; an alteration was afterwards made, by consent, in the sum, by substituting 2000*l.*, and the defendant retraced his signature with a dry pen, and re-delivered the instrument. The attorney who was present wrote his initials opposite to the alterations, and drew a dry pen over the alteration, and over each letter of his own signature, and the court held that the warrant of attorney was not duly attested.

Fourthly, assuming the warrant of attorney to be valid on the 13th, the alteration made in it afterwards would render it void, being made in a material part. As it stood at first, parol evidence would have been requisite to show that the defendant was in custody when the warrant of attorney was originally executed.

*TINDAL, C. J. I see no sufficient ground of objection against this warrant of attorney to induce the court to grant the rule prayed for. [*175

I am disposed to think that the warrant of attorney was good on the 13th of November; the only objection against it in its original shape being that it had an improper stamp, not indeed with reference to the actual situation of the defendant at that time, but on the ground that his situation did not appear, as it is contended it ought to have done, on the face of the warrant of attorney. But admitting that to be an objection, it is a sufficient answer to say the court would not be inclined to grant a rule to set aside a warrant of attorney merely on the ground of its bearing an imperfect stamp, because, while the rule was pending, the parties might set the matter right by going to the stamp office and paying the penalty. But, as I have before stated, I think that—*rebus sic stantibus*—in the state of affairs on the 13th of November, this was a good warrant of attorney.

Then the question arises whether a material alteration has been made in the instrument since that time, so as to vitiate it. The authorities are strong to show that if a deed be altered in an immaterial part, by a stranger,(*a*) or in a material part by the consent of the parties,(*b*) it is not thereby vitiated: they are collected *in Com. Dig. tit. *Fait* (F. 1.) Now the alteration in this instrument was not material in my opinion; it was moreover made with the consent of both parties, and was merely intended to correct a mistake and carry out their original intention. It falls within that [*176

(*a*) For this position Comyns cites 11 Co. 27 a, (*Henry Pijot's Case*,) where, in a bail-bond, the words "sheriff of the county of Oxford" were added after the execution. The defendant pleaded *non est factum, without demanding oyer of the bond or condition.* The court gave judgment for the plaintiff upon a special verdict, on the ground that, for any thing which appeared to the court, the alteration may have been made in a point not material. Had oyer been demanded, it would have appeared that the bond, as originally drawn, was void, as being a bail-bond made to the sheriff otherwise than by his name of office; *Guybon* v. *Whitetost*, Cro. El. 800; *Noel* v. *Cooper*, Palmer, 378; *Kirkebridge* v. *Wilson*, 2 Lev. 123.

(*b*) For this Comyns cites 2 Lev. 35, (*Zouch* v. *Claye*,) where, after a bond had been executed by A. and B., the two obligors named therein, the name and addition of C., a third obligor, were interlined, with the consent of all parties, and C. executed the bond, which was held to be the joint bond of A., B., and C. He also refers to a dictum of Popham, in Cro. El. 627, (*Markham* v. *Gonaston*,) in which, according to the statement in Comyns, it would appear that Popham had said that a material alteration made by consent, upon an agreement that an addition should be made after the deed is sealed, does not vitiate the deed. But upon referring to Cro. El., it will appear that the dictum is of a more qualified character: "But if it had been appointed by the obligor before *the ensealing and delivery thereof*, that it should be afterwards filled up, it might then, *peradventure*, have been good enough, and it should not have made the deed to be void." Vide antè 172 (*a*).

numerous class of cases upon bills of exchange, where, after a bill has been drawn and delivered, an alteration, made in pursuance of the original intention of the parties, has been held not to vitiate the bill; as where the words "or order" were introduced after the bill had been endorsed.(a)

The utmost that can be said is, that the introduction of the words in this warrant of attorney (b) might save the parties some trouble and expense in proving that the defendant was in custody at the time the warrant of attorney was given; as it does not appear in any way to interfere with the object of the instrument. In *Walmesley* v. *Bryant*, 1 Moo. & Rob. 529, where a
*177] bond was conditioned *for the payment of money, which was declared to be the same money as that secured to be paid by an indenture of even date, but it did not appear, by any recital, that the indenture required an *ad valorem* stamp, PARKE, B., held, that in order to dispense with an *ad valorem* stamp on the bond, it was necessary to produce the indenture, to show that it was properly stamped with an *ad valorem* stamp. This, however, was not done for the purpose of negativing the obligation of the bond, but the party was put to this extra trouble from not having recited the fact in the deed.

On these grounds, therefore, I think the rule must be refused.

COLTMAN, J. I am of opinion that the original warrant of attorney was valid Objections on the stamp laws—though the revenue certainly ought to be protected—are not to be stretched against the subject. I think extrinsic evidence would have been sufficient to support this warrant of attorney so as to show that it was good on the 13th of November.

The alteration did not vary the liability of the parties, for it was not in a material part, and, consequently, would not vitiate what was good before.

ERSKINE, J. I also am of opinion that the warrant of attorney after the execution on the 13th of November was valid; and that the subsequent alteration did not deprive it of its validity. No case has been cited to show that a 1*l.* stamp was not sufficient on the 13th, as the instrument then stood; and I think it was not necessary to show on the face of the warrant of attorney that the defendant was then in custody. In the schedule to 55 G. 3, c. 184, under the title *Warrant of Attorney*, the exception to the general duty is confined to the two cases where the payment of money shall be
*178] already secured *by a bond, mortgage, or other security which shall have paid the *ad valorem* duty, and where the warrant of attorney shall be given to secure any sum of money for which the person giving the same shall be in custody under an arrest. In these cases a duty of 1*l.* is imposed, the two cases being put on the same footing; and the same construction must be given to both exceptions. The present case, therefore, which falls within the latter class of exceptions, would be governed by *Walmesley* v. *Bryant*, 1 Moo. & Rob. 529, which came within the former class.

Then I think if the stamp was sufficient as the instrument originally stood, without the recital of the fact of the defendant being in custody, the subsequent alteration, by the introduction of the recital of that fact, was not material. If it were material, the only effect would be to make a new stamp necessary; but even then, for the reasons already given, I think the court

(a) See *Kershaw* v. *Cox*, 3 Esp. N. P. C. 246, 10 East, 437; *Jacobs* v. *Hart*, 2 Stark. N. P. C. 45; *Byrom* v. *Thompson*, 11 A. & E. 31, 3 P. & D. 71. See also *Brett* v. *Picard*, 1 R. & M. 37; *Attwood* v. *Griffin*, Ib. 425.

(b) As to the consequences of such an alteration, see *Markham* v. *Gonaston*, antè, 172 (a), 175 (a).

ought not to grant a rule to set aside the warrant of attorney. But independently of that, the words introduced were in accordance with the original intention of the parties, and, therefore, according to decided cases, even supposing the alteration were material, a new stamp could not be necessary.

CRESSWELL, J., concurred. Rule refused.(a)

(a) The objection that a warrant of attorney has an insufficient stamp, or none at all, can be taken advantage of only by a motion to set the warrant of attorney aside. If it is a ground for refusing such an application that the defect may be cured, there seems to be no motive for incurring the expense of a stamp in any case.

The revenue would appear to be better protected, by granting the rule, and afterwards discharging it upon payment of costs by the party whose contravention of the law had occasioned the application.

*GIBSON and Another v. BRAND. [*179

In case, for infringing a patent for a new and improved process or manufacture of silk, the infringement alleged in the declaration was that the defendant had, directly and indirectly, made, used, and put in practice the said invention, and counterfeited the same: *Held*, that this allegation was supported by proof that the defendant had ordered silk to be manufactured by certain parties by the plaintiff's process, and had afterwards received and sold the same.

A plea in an action on the case for infringing a patent, set out the specification *in hæc verba*, and alleged that the plaintiffs did not enrol any instrument other than that set out, and that such instrument did not particularly describe the nature of the invention. The jury having found a verdict for the plaintiffs upon their traverse of this plea: *Held*, (*hæsitante* Coltman, J.,) that judgment could not be arrested upon the ground of the specification being otherwise defective.

The third and fourth issues raised the question whether the alleged invention was a new invention; the jury found specially that it was not a new invention, or a new combination, but that it was an improved process: *Held* that, upon these issues, the verdict should be entered for the defendant.

CASE, for the infringement of a patent, granted to the plaintiffs for a new and improved process or manufacture of silk, and silk in combination with certain other fibrous substances. The declaration stated that the patent contained the usual provisoes, as to the invention being new, and as to the enrolment of a specification; and that the plaintiffs were the true and first inventors of the process described, and did enrol a certain instrument in writing containing a proper specification. Breach: that the defendant had directly and indirectly made, used, and put in practice the said invention and every part thereof, and counterfeited, imitated, and resembled the same.

Pleas: first, not guilty; secondly, a traverse of the allegation that the plaintiffs were the inventors; thirdly, that the invention in the letters patent and in the specification mentioned, was not a new invention; concluding with a verification; fourthly, that the said alleged invention and improvement were of no benefit or advantage to the public; concluding with a verification; fifthly, that the said instrument in writing in the declaration mentioned, was as follows:—

"To all to whom, &c. (It then recited *the grant of the letters patent to the plaintiffs, their executors, &c., with the provisoes for enrolling a specification, and then proceeded thus:) Now know ye, that in compliance with the said proviso, I, the said J. Gibson, on behalf of myself, and also of the said J. G. Campbell, do hereby declare that the nature of our said invention consists: first, in a part of our process by which we discharge the gum from that peculiar kind of silk denominated silk-waste, when the same is in the state of sliver or rove; secondly, in a part of our process by which we dye silk-waste, when in the state of sliver or rove; thirdly, in [*180

a part of our process by which we spin yarn from dressed or heckled silk-waste of long fibres, either in the gum or discharged; fourthly, in a part of our process by which yarn from silk-waste with long fibres may be spun in combination with flax of a similar length of fibre; fifthly, in a part of our process by which yarn from silk-waste with long fibre is spun in combination with wool; sixthly, in the application of our improved process to the throstle-machine on the principle of the long ratch for the new and useful purpose of spinning silk-waste; seventhly, in certain improvements effected by us in the throstle-machine by which its utility in spinning silk-waste is greatly augmented; eighthly, in the application of water to silk-waste with long fibres in the process of spinning with the long ratch.

"Having thus explained the nature or leading characteristics of our invention, it is desirable before we enter into the practical details of them to give a brief outline of the methods, heretofore adopted, for spinning yarn from silk-waste.

"Silk-wastes differ considerably with respect to quality and cleanliness, and they are generally in a ravelled state. To free them from naps and other refuse matters, and to clear the ravellings, they are first submitted to
*181] the action of a machine called a breaker, for the purpose *of breaking or clearing out the more stubborn or knotty ravellings. The waste is next put under the operation of the dressing machines to be farther unravelled and cleared from naps and other impurities, which process also straightens the filaments and causes them to lie evenly together, resembling in this respect heckled flax, although the fibres of the latter usually possess more uniformity as to length. This process of dressing is applicable to silk-waste, either in the gum or discharged. The former, however, is more easily dressed, contains less refuse, and is generally of a better quality. The third process upon the ordinary plan is, to take the dressed silk to the cutting-machine, where it is cut into lengths of about two inches, a little more or less, according to circumstances. If the silk-waste that has been thus cut be in the gum, it is next discharged and afterwards dried. The silk having become matted in the discharging process, the fibres of it are next opened up by a scutching-machine, or other similar apparatus, before it undergoes the process of carding. When carded, the roving is prepared by a similar engine to that used for cotton, and it is spun on the mule-jenny, which is on a similar principle to that of the cotton-jenny. Having thus explained the old ordinary process of converting silk-waste into yarn, I will proceed to describe our novel process, by which we produce our new or improved manufacture of yarn or thread.

"The silk-waste having been dressed in the usual way, or in any other manner that may be found more advantageous, (such as heckling or otherwise,) either discharged or in the gum, we submit it to the drawing, roving, and spinning machinery, thereby entirely obviating the supposed necessity of cutting or shortening the filaments of silk-waste, a destructive process, which has heretofore been considered as an indispensable sacrifice in order
*182] to convert it into yarn or thread. The kind of *machinery we have found to answer best for the drawings and rovings of dressed heckled or carded silk-waste of long fibres, is the same as that used by flax-spinners; and we adopt the same methods as are practised by them with long or cut-line flax. The silk is first submitted to the spreading or first drawing-machine, the slivers obtained from which are doubled and applied to the second drawing, and in like manner to the third drawing-machine, and finally to the roving-machine. The number of doublings and drawings re-

quisite will depend upon the kind of silk used, which every competent manufacturer will know how to determine and arrange.

"It may be proper to observe, that there are several kinds of flax-drawing and roving machines, and as they are in common use for flax and tow, no description of them is necessary, and it will therefore be sufficient to distinguish them by their names of circular, spiral, and sheet or chain. Cut-line flax and tow drawing and roving machines are made either on the circular, or spiral plans. The sheet or chain is also made for cut-line flax, but not for tow. The drawing and roving machines that we have found to answer best, are those which are made on the spiral plan, as the gills or heckles of these come closer to the nip of the drawing-roller than in either of the other plans; and thereby enables the short filaments of the silk to be drawn and distributed more uniformly with the long fibres than if the said heckles or gills were remote from the drawing-roller. For the longest fibres of dressed or heckled silk-waste, we employ what is designated by flax-spinners long-line preparation; for the medium lengths of fibres of dressed, heckled or carded silk, cut-line; and for the shorter lengths, tow preparations.

"We have already noticed, that the roving from silk-waste may be made, either when in the gum or *discharged, and that the said rovings may [*183
be spun to suit the particular kind of goods to which yarn or thread is to be applied; but as there is a much greater demand for silk yarn discharged than in the gum, we usually discharge the gum from the sliver obtained by the first drawing or spreading-machine. For this purpose the sliver is put into hanks of about half a pound each, then each of these hanks is put into a little bag made of an open fabric, such as thin canvas; a quantity of these are collected, (according to the dimensions of the boiler,) put into the vessel, and discharged or 'boiled off' in the usual manner. After this, the hanks, still contained in the bags, are to be well washed, to free them from the deposition of the glutinous matter, or the presence of soap, alkali, or other impurities. The silk is now to be taken out of the bags with care, and, after being thoroughly dried, the hanks are to be put upon swifts, and after finding the end of the sliver, it is to be coiled into cans, or may be wound on bobbins, or otherwise disposed of, as may be convenient. The next operation upon these slivers consists in submitting them to the drawing-machines, whereby the required number of drawings and doublings are to be given, and finally the roving is formed as already mentioned. The process of boiling or discharging gum-silk, we sometimes apply after it has been formed into roving. In this case the roving is to be reeled from the bobbins into hanks of about half a pound weight each; these are to be put into bags, and the discharging conducted by the same process as that described with respect to the sliver. The discharged roving is next to be wound on bobbins preparatory to spinning; but we give the preference to the roving made from silk which has been discharged in the sliver.

"Another improvement in our process or manufacture consists in dyeing the silk before it is spun into yarn or thread; and we find that this operation is best *performed after it has been discharged and washed, and in [*184
the form of the sliver as already described. After dyeing, the silk undergoes repeated doublings and drawings, and is finally made into roving, in the same manner, and by the same mechanism as are employed with the undyed silk. The process of dyeing is also applied by us to silk which has been discharged, previously to its being dressed or heckled; and we usually dye it in the hanks obtained from the sliver of the first drawing. The process of dyeing may also be applied to the rove, which is to be reeled

from the bobbins into hanks, of a size and weight the most convenient to the dyer. After dyeing, it is to be wound upon bobbins previously to being spun; but we prefer the roving which has been made from silk dyed in the sliver. Care must be taken that the silk, whether dyed or undyed, be properly dried prior to its being submitted to any of the processes of drawing, roving, and spinning. The advantages obtained in this part of our invention, of dyeing the silk previously to its being spun into yarn or thread, consist in the certainty that the colouring matter will reach every fibre, and consequently produce a more uniform and perfect dyeing. We also find that a superior lustre is obtained by our mode over that wherein the silk is dyed subsequently to being spun; which effect we consider to be caused by the violent action upon the silk by the dyer's process, by which many of the fibres are broken and started from their parallel positions with respect to each other, thereby destroying the wiry and lustrous appearance of the yarn or thread.

"For making rove from silk-waste of long fibres and flax combined, and from silk-waste of long fibres and wool combined, we employ the same machinery throughout as we do for making rove from silk-waste alone. The proportions of silk-waste to that of flax, and of silk-waste to that of wool,
*185] are varied according to the *particular manufacture to which the yarns are to be applied. The method we have adopted is, to obtain slivers of flax, or of wool, from the spreading or first drawing-machine. The number of slivers of flax or of wool to that of silk slivers obtained from the first drawings, is regulated in the second drawings, in proportions suitable for the peculiar description of yarn required.

"Having now explained the nature of the drawing and roving machinery which we have found to answer best, and the several processes of drawing and roving silk-waste alone, and of silk-waste in combination with wool and with flax, I will proceed to describe the spinning-machine, by which the rove is drawn or elongated into strands, to be spun into yarn or thread. The annexed drawings, for the most part, represent the well-known spinning frame called a throstle, on the principle of the long ratch, as employed in the spinning of flax, which machine, combined with the improvements we have applied to it, we apply to the new and useful purpose of spinning silk-waste of long fibres into yarn or thread, from rove, either in the gum, or discharged or dyed as before mentioned, and also from rove made from silk-waste of long fibres, in combination with flax or with wool."

(The document then contained explanations of the machine, with references to letters and figures which would not be intelligible without a drawing, and which are not material for the understanding of the case.)

"Our application of the brass bosses to the drawing-roller, together with the application of water, we have found to be an important improvement in the spinning of silk-waste, whether dyed or undyed, as the brass preserves the silk from stains which occur when iron is used. Neither the brass bosses nor the pressing rollers are fluted, which fluting we have found to be
*186] unnecessary in spinning silk-waste of long fibres with the ratch *corresponding in lengths thereto. Great advantages also result from employing the throstle-frame, instead of the mule-jenny, for spinning silk-waste. In the first place, a great saving is made in the cost of production, by obviating the necessity of operatives at high wages. In the second place, by using a long ratch corresponding to the length of fibres to be spun, not only yarn or thread is obtained of very superior strength, but it can be spun to very fine numbers, even as high as No. 200, or upwards, on the cotton

scale, a result quite unprecedented in spinning by the throstle. The application of water to the silk, communicated by means of the pressing-roller, not only toughens the fibres, but gives them a greater tenacity or adhesiveness to each other, enabling them to sustain the action of being spun, besides communicating a greater degree of flexibility, which facilitates or induces the ends of the fibres to adhere or incorporate more readily with the yarn. Likewise, owing to the short distance between the top of the spindle and the nip of the bosses of the drawing or delivering roller, the yarn is subjected to less vibration, and can be spun to finer numbers than with the spindles at a greater distance. The silk yarn thus produced has a smooth wiry appearance, and when spun with but little twist, the natural lustre of the silk fibres is preserved, and it approximates in appearance to tram or organzine silk.

"The spinning frame just described is also applicable to the spinning of silk and flax, combined as well as to the spinning of a combination of silk and wool, in each case varying the sliding ratch to suit the lengths of the fibres to be spun.

"Having now given the necessary details of the manner in which our invention is to be performed, we desire it to be understood that we disclaim those parts of the process or mechanism, which were, or may have been, *previously to the granting of our patent, well known or in use for [*187 the same purposes; but we restrict our claims to the eight several heads of invention mentioned in the early part of this specification, all of which we believe to be new, and of great public utility. In witness whereof," &c. The plea then proceeded to state, that the plaintiffs did not, nor did either of them, within six calendar months, &c., enrol, &c., any instrument, &c., other than and except the instrument in that plea mentioned and set forth; and that that instrument did not particularly describe and ascertain the nature of the said supposed invention, and in what manner the same was to be performed. Verification.

The replication joined issue on the first and second pleas; and traversed the third and fourth, upon which issue was joined: and to the fifth plea alleged that the plaintiffs did, within six calendar months, &c., enrol, &c., an instrument in writing under the hand and seal of John Gibson, one of the plaintiffs, particularly describing and ascertaining the nature of the said invention, and in what manner the same is to be performed, (to wit,) the said instrument in the said fifth plea above mentioned and set forth; and that that instrument does particularly describe and ascertain the nature of the said invention, and in what manner the same was and is to be performed; concluding to the country; upon which issue was joined.

At the trial before TINDAL, C. J., at the sittings for Middlesex after Trinity term, 1841, the specification set out in the fifth plea was read. It was proved on the part of the plaintiffs, that the defendant had ordered silk-waste to be spun by certain parties in England, by a process similar to that described by the plaintiff, and had received and sold the silk so spun. Evidence was also given to show, that the ordinary method of spinning silk-waste, previously to the plaintiffs' *patent, was that stated in the [*188 specification; namely, by the use of machinery similar to that used in cotton spinning; and it was proved, that the silk produced by the plaintiffs' process was very superior in beauty and value. On the part of the defendant, evidence was given to show that long before the plaintiffs' patent, silk-waste in the long uncut fibre had been spun by the common machine for spinning flax, and sold in large quantities; that any workman might

vary the distance of the spindle from the roller, as described in the specification, at pleasure, and that this had often been done; and that the brass bosses and water-trough had long been in general use in the same manner as described in the specification. Notice of objections had been delivered under the 5 & 6 W. 4, c. 83, s. 5, but nothing turned upon the objections. An application was made for a nonsuit, on the ground that there was no evidence, that the defendant had made, used, or put in practice the invention, or had counterfeited, imitated, or resembled it. The Lord Chief Justice refused to nonsuit, but reserved leave to the defendant to move to enter a nonsuit; and the jury returned a verdict for the plaintiff upon all the issues except the second and third, and as to these, they found that the invention was not new, but was an improved process, and not a new combination.

Channell, Serjt., in last Michaelmas term, obtained a rule nisi to enter the verdict on the second and third issues for the defendant; or to set the verdict aside and enter a nonsuit; or to arrest the judgment; and

Bompas, Serjt., on the next day, obtained a cross rule to enter judgment for the plaintiffs on the special finding; or, in the event of the court being of opinion that the verdict was incongruous, for a new trial.

*189] **Bompas*, Serjt., now showed cause against the rule obtained on behalf of the defendant.

First, as to entering a nonsuit. This applies to the first issue. The evidence clearly showed an infringement of the patent by the defendant, supposing the patent to be valid. It appeared that parties had been employed by the defendant to make silk by the plaintiffs' process, and that the silk so made had been sold by the defendant; this was, in effect, a making by him. [TINDAL, C. J. Upon the principle *qui facit per alium, facit per se*.(a)]

Secondly, as to arresting the judgment. This is applied for on the ground that the specification, as set out in the fifth plea, is not sufficient. Two objections, it is understood, are raised to the specification; first, that the processes, by which the improvement is carried into effect, are not described; and, secondly, that no distinction is made between the old and new parts of the invention. As to the first point, it is submitted that the description of the process is sufficiently intelligible. No doubt, any one might use the machine in question for the purpose of spinning flax, notwithstanding the plaintiffs' patent, but it is new, as applied to the spinning of waste silk; and the jury have found that it is an improved process for that purpose; it is therefore the subject of a patent. Even the *omission* of part of a former process, if it give rise to an improvement, may be a good ground for a patent; as in *Russell* v. *Cowley*, 1 C. M. & R. 864, where the plaintiff had obtained a patent for manufacturing metal tubes, by drawing them through pierced dies or holes; and it appeared that a former patent had been obtained

*190] for a similar method of *manufacturing tubes by drawing them through rollers, with the additional use of a maundril or stamp. The maundril was not used in the plaintiff's process, and the patent was held valid, as being a great improvement on the former process. As to the second objection: it is sufficient to support a patent for an improvement, if, from reading the specification, an ordinary workman can distinguish the old parts from the new; as in *Harmer* v. *Playne*, 11 East, 101, S. C. in Chanc. 14 Ves. 130, where the plaintiff, having obtained a patent for a certain manufacturing machine, of which he duly enrolled a specification, afterwards obtained another patent for certain *improvements in the said machine*, in a

(a) As to the application of this maxim, see 20 Vin. Abr. 466; 21 Vin. Abr. 75.

latter grant by the former patent was recited; and it was held, that a specification containing a full description of *the whole machine* so improved, but not distinguishing the new improved parts from the old parts, or referring to the former specification, otherwise than as the second patent recited the first, was sufficient. But, independently of these objections, the plea contains an averment, that the specification did not particularly describe the invention. This averment is traversed, issue is joined thereon, and the jury have found that the specification was sufficient. The defendant, therefore, cannot avail himself of the other parts of his plea, which are not in the issue, in order to arrest the judgment.

Thirdly, as to entering the verdict on the second and third issues. It is to be observed, that the present patent is not for any article of *manufacture*, but for a *process*. The distinction is pointed out in *Rex* v. *Wheeler*, 2 B. & Ald. 345. The process here consists of eight several heads or parts, all of which form but one whole; and the patent is taken out, not for any of the separate parts, but for the whole. It appears from the evidence that, *before the plaintiffs' patent, the spinning of silk-waste was performed by the machinery used for cotton spinning. The plaintiffs have applied the machinery for flax spinning to the spinning of silk-waste, and the jury have found it to be an improved process; and, consequently, a great improvement upon the old method of spinning silk-waste. It is said that some parts of the process have been used before for the same purpose; but that will not vitiate the patent if there be novelty in the whole. And, indeed, it may be very doubtful upon the evidence, whether there was any publicity in the previous use of those parts of the process. It is probable that the jury took an incorrect view of the meaning of the words "new invention;" and that as the *thing manufactured* was not new, and the *machine* for the purpose was not new, they fancied there was nothing to countenance a claim of a new invention. But that is not so. It was a new or an improved *process;* and that is a new invention. Or if it be only an improvement, as the jury have in fact found it to be, it is an invention so far as the improvements go, and the subject of a patent. Taking the whole together, it is new as regards the manufacture of silk-waste; it is a new mode of spinning it, and it is for that the patent is taken out. [CRESSWELL, J. It appears that the plaintiffs do not claim the machine, or any part of it, as theirs. It is just as if the old machine for flax-spinning were used in their process.] [*191

Channell, Serjt., in support of the rule, obtained on behalf of the defendant.

First, as to entering the verdict upon the second and the third issues. The declaration alleges that this was a new invention; this allegation is traversed by the second plea; and the jury have found that it was not a new invention, or a new combination, but an improved process. Upon this issue, therefore, the *defendant is clearly entitled to the verdict. What is found for the plaintiffs does not give them a right to the patent; and what is found for the defendant wholly destroys it. It is possible that an improved process may be a new invention; but it cannot be so considered in this case, as the jury had expressly found, that, though the plaintiffs' *was* an improved process, it was *not* a new invention. [*192

The plaintiffs' patent is taken out for the invention of a new process, &c., consisting of improvements; but in fact whatever novelty there is in the process consists merely in the application of a known process for the purpose of spinning silk; and that will not support the patent. In *Hill* v. *Thompson*,

3 Mer. 622, 629; S. C. in C. P., 8 Taunt. 375, 3 B. Moore, 424, Lord ELDON, C., said, "there may be a valid patent for a new combination of materials, previously in use for the same purpose, or for a new method of applying such materials; but in order to its being effectual, the specification must clearly express that it is in respect of such *new combination and application*, and of that only, and not lay claim to the merit of original invention in the use of the materials." In *Brunton* v. *Hawkes*, 4 B. & Ald. 541, a patent for improvements in the construction of ship's anchors, windlasses, and chain cables, was held not to be supported unless there were novelty in *each* invention; and therefore as it turned out that there was no novelty in the construction of the anchors, it was held that the patent was wholly void. In the present case the invention of certain improvements is made part and parcel of the patent; but it is found there was no new invention in the process. In *Kay* v. *Marshall*, 4 New Ca. 492, 7 Scott, 548, a patent was taken out in respect of new machinery for preparing flax, and improved
*193] machinery for spinning *flax: the improvement as to spinning consisted in spinning at a shorter reach than had before been practised; but the contraction of the reach was rendered practicable by the maceration of the flax in the new machinery for preparing it; for spinning machines, varying in the distance of the reach, had been in use before: and this court held that the patent was void, though the machinery for preparing the flax was new and useful. That case went afterwards to the House of Lords, and
*194] the decision of this court was supported.(a) From *these cases it is clear, therefore, that if a patent is taken out for an invention consist-

(a) In that cass (*Kay* v. *Marshall*) the plaintiff filed a bill in Chancery for an injunction in H. T. 1835; but he did not apply for the injunction pursuant to the prayer of the bill. The defendants, after the usual time for demurring had elapsed, made a special application for leave to demur, which was refused by Shadwell, V. C., but granted, upon appeal, by Lord Lyndhurst, C. The demurrer was filed, and came on to be argued before the Vice-Chancellor on the 2d of June, 1835; and on the 9th, his Honour ordered the demurrer to stand over for twelve months, and that in the mean time the plaintiff should be at liberty to bring an action. Upon an appeal to Lord Cottenham, C. (first of February, 1836,) this order was discharged, and the demurrer was overruled, (see 1 Mylne & Craig, 373.) The defendants then applied to Lord Langdale, M. R., for leave to file a double plea to the plaintiff's bill, which was granted, (see 1 Keene, 190,) and the pleas were filed accordingly; first, denying that the plaintiff had invented any new and improved machinery; secondly, that the alleged invention was not of any public benefit and utility. Upon the case coming on to be argued before the Master of the Rolls on the 19th of March, 1836, the plaintiff proposed to waive all objections in point of form, on condition that the defendants would consent to proceed at once to a trial at law of the pleas, without first going into evidence in equity; and this having been agreed to by the defendants, a replication was filed, and a decree made, by the Master of the Rolls, on the 2d of June, 1836, directing a trial at law upon issues in the terms of the two pleas; and liberty was given to the judge who should try the cause, to endorse special matters on the postea. The issues were tried at the Yorkshire summer assizes for 1836, before Parke, B., when his lordship expressed an opinion that it was not the intention of the Master of the Rolls in directing the issues, that the question of the legal validity of the plaintiff's patent should be inquired into upon the trial, but only that the facts of the case should be ascertained, leaving the question of law to be afterwards disposed of by the court; whereupon the jury, under his lordship's direction, found a verdict for the plaintiff on both the issues, and the special facts were endorsed on the postea (see 5 New Ca. 495.) The defendants applied to the Master of the Rolls for a new trial or a special case, on the ground that the learned baron had taken an erroneous view of the nature of the inquiry intended to be submitted to him by the Master of the Rolls, and that the trial ought to have proceeded in the same manner as if an action had been brought at law upon the patent, and the same pleas pleaded in defence to such action, whereby the whole question of the validity of the patent in point of law, in respect of the two grounds taken by the pleas, would have been tried and disposed of. The motion came on for hearing on the 28th, and again on the 31st, of January, 1837, when, at the suggestion of the Master of the Rolls, and with the acquiescence of both parties, an order was made

ing of several parts, any one of which is not new, the whole is void. The jury have negatived what is claimed by the plaintiffs, namely, invention; and the finding that the plaintiffs have introduced an improved process, can only mean that old machinery, and previously known principles, have been more skilfully applied by them: but this will not support the patent. The patent consists of eight heads or parts; the fourth and fifth it is not material to consider; the *seventh and eighth may also be omitted; for they relate to the question whether there has been any combination; which the jury have negatived; the sixth, the plaintiffs say, consists, "in the application of their improved process to the throstle-machine, on the principle of the long ratch for the new and useful purpose of spinning silk-waste." This must mean the process as described in the first three heads; the first of these relates to the discharge of the gum from the silk-waste; the second, to dyeing the silk-waste. It is necessary, therefore, to refer to that part of the specification where the processes of discharging and dyeing are described; and it appears that no new mode of performing either operation is claimed; the only difference being as to the time when the operation is to be performed. These, therefore, are no subject for a patent; and all the eight heads being essential to its validity, and expressly made so by the concluding paragraph of the specification, the destruction of any of them destroys the whole patent. [*195

As to entering a nonsuit, the declaration does not charge, nor was any proof given, that the defendant sold any article for which the plaintiffs had a patent. If the silk, then, is to be considered as made by the defendants, (and that point, after what has fallen from the court, is not insisted upon,) still the sale of it does not support the charge in the declaration. [CRESSWELL, J. How could the plaintiffs charge a vending? They do not claim any articles of sale; but a mere process; and that may raise another question, whether there can be a patent for any thing that is not vendible.]

As to arresting the judgment, if the specification, as set out by the defendant in his plea, does not disclose the subject-matter of a patent, the action must fail. The construction of the specification is for the court; *Neilson v. Harford*, 8 M. & W. 806. In that case it was said by the court, (p. 824,)(a) that if a specification contained an untrue statement in a material circumstance, of such a nature that, if literally acted upon by a competent workman, it would mislead him, and cause the experiment to fail, the specification would be bad, and the patent invalidated, although the jury, on the trial of an action for the infringement of the patent, found that a competent workman acquainted with the subject would not be misled by the error, but would correct it in practice. In the present case, there is an uncertainty as to the subject-matter of the patent; and it is not sufficiently pointed out which are the new parts and which are the old. *Har-* [*196

that a case should be stated for the opinion of this court. After some further discussion the case was agreed upon between the parties, argued in this court, and a certificate returned, that the patent was not valid in law, (see 5 New Ca. 492; 5 Scott, 501.) The cause came on to be heard again for further directions before Lord Langdale, M. R., on the 27th and 28th of May, and the 3d of June, 1839, when the question as to the validity of the patent was again argued, and on the 16th of July his lordship ordered that the plaintiff's bill should be dismissed with costs (see 1 Beav. 535). The plaintiff appealed to the House of Lords against the two orders of the 31st of Jan., 1837, and the 16th of July 1839;* which appeal was dismissed on the 18th of June, 1841.

(a) The point was not *decided* in that case, as the patent there was held valid.

* The above statement of the principal facts and proceedings is compiled from the printed cases of the appellant and the respondents in the House of Lords.

mar v. *Playne* will not assist the plaintiffs upon this point, for in that case a former patent had been granted to the same patentee, which was recited in the later patent; so that there was a reference from one to the other; but in the present specification there is nothing which refers to any previous information.

TINDAL, C. J. This is a rule obtained by the defendant calling upon the plaintiffs to show cause why the verdict found on the second and third issues should not be entered for the defendant, or why the verdict should not be set aside and a nonsuit be entered, or why there should not be an arrest of judgment.

I will endeavour to answer the two latter points first, which do not involve the main question in the cause.

As to the first of these, a sufficient answer has, in fact, been already given in the course of the argument. The breach alleged in the declaration is, that the defendant had "directly and indirectly made, used, and put in practice the said invention, and every part thereof, and counterfeited, imitated, *197] and resembled the same." *The proof in support of this breach was, that an order had been given by the defendant, in England, for the making of silk by the same process as the plaintiffs'; which order had been executed in England; and that is enough to satisfy the allegation in the declaration,—that the defendant made, used, and put in practice the plaintiffs' invention,—though the silk was, in fact, made by the agency of others.

With respect to the last objection, which is taken on arrest of the judgment upon the issue raised by the fifth plea, I think no sufficient ground has been established for that purpose. The plea contains the following allegation as to the specification; that it "did not particularly describe and ascertain the nature of the supposed invention, and in what manner the same were to be performed." The jury have, in effect, found that the specification was sufficient, so that a workman of ordinary skill might understand the process and pursue the plan pointed out, so as to produce the proper result. This plea goes to the whole declaration, and the issue has been found against the defendant. No authority has been cited to show that, where a plea has been found to be false in fact, and the verdict has been against the defendant on that part of the plea which is put in issue, he can avail himself of another part, which is not in issue, in order to arrest the judgment. If the defendant had intended to avail himself of the insufficiency of the specification, he might have stated that the patent was void in law, and the question might have been raised on the record, and determined on demurrer. But, after having put in a plea which contains a confession of the whole right of action—which plea is found to be false in fact on the point in issue,—the defendant now seeks to use the other portion of the plea, which is not put in issue, not merely as an admission, on the part of the plaintiffs, for the *198] purposes of the plea, but as an *answer to the right of the plaintiffs to recover. The plea contains two allegations; first, that the plaintiffs did not enrol any other instrument than the one previously set out in the plea; and, secondly, that such instrument is not sufficiently particular. The issue is taken on the latter of these allegations; and this admits only that no other specification than the one stated had been enrolled; but the defendant has no right to say that the specification is not only defective as to its particularity, but is also bad for other reasons. I think, therefore, that he is not in a situation to call upon us to arrest the judgment.

We come, then, to the main question in the case, namely, whether the

defendant has a right to have the verdict entered for him on the second and third issues. These issues are, first, whether the plaintiffs were the true and first inventors of the process described; secondly, whether the alleged invention was a new invention; and the special finding of the jury upon them is, that the invention was not new, but an improved process, and not a new combination. Now, according to the plain meaning of these words, the jury appear to have found that there was no novelty in the plaintiffs' alleged invention; that it contained no new combination, but that it was only an improvement in an old process; and the question is, whether, if this finding is supported by the evidence, the issue is found for the plaintiffs or the defendant; and it appears to me that it is found for the defendant, and that the verdict ought to be so entered accordingly.

In order to ascertain this point, let us see what it is the patent is taken out for, and what the specification declares to be the nature of the discovery. The invention is said to be "a new or improved process or manufacture of silk, and silk in combination with certain other fibrous substances;" and the nature of the invention *is said to consist in eight different branches or parts of the process of spinning the silk. It appears, therefore, that the patent is taken out strictly and entirely for a process. [*199

It is not necessary, on this occasion, to go into the question, whether or not a patent can be supported for a *process* only. If the specification were properly prepared, it probably might be considered a fit subject for a patent. Lord C. J. EYRE seems to be of that opinion in *Boulton* v. *Bull*, 2 H. Bla. 463, where his lordship, in giving judgment, says, "When the effect produced is some new substance or composition of things, it should seem that the privilege of the sole working or making ought to be for such new substance or composition, without regard to the mechanism or process by which it has been produced, which, though perhaps also new, will be only useful as producing the new substance." Ib. 492. And he adds, "When the effect produced is no substance or composition of things, the patent can only be for the mechanism, if new mechanism is used, or for the process, if it be a new method of operating, with or without old mechanism, by which the effect is produced." Ib. 493. And there are other passages in the judgment to the same effect. Such also seems to have been the opinion of the court, pronounced by ABBOTT, C. J., in *Rex* v. *Wheeler*, 2 B. & Ald. 345, where this language, carefully guarding against an abuse of the doctrine, is used: "the word 'manufactures' has been generally understood to denote either a thing made, which is useful for its own sake, and vendible as such, as a medicine, a stove, a telescope, and many others, or to mean an engine or instrument, or some part of an engine or instrument to be employed, either in the making of some previously known article, or in some other useful purpose, as a *stocking frame, or a steam engine for raising water from mines. Or it may perhaps extend also to a new process to be carried on by known implements, or elements acting upon known substances, and ultimately producing some other known substance, but producing it in a cheaper or more expeditious manner, or of a better and more useful kind. But no merely philosophical or abstract principle can answer to the word manufactures. Something of a corporeal and substantial nature, something that can be made by man from the matters subjected to his art and skill, or at the least some new mode of employing practically his art and skill, is requisite to satisfy this word." And in a subsequent part of the same judgment it is said, "Supposing a new process to be the lawful subject of a patent, he may represent himself to be the inventor of a new process, in [*200

which case it would seem that the word 'method' may be properly used as synonymous with process. The language of the patent may be explained and reduced to certainty by the specification; but the patent must not represent the party to be the inventor of one thing, and the specification show him to be the inventor of another; because perhaps if he had represented himself as the inventor of that other, it might have been well known that the thing was of no use, or was in common use, and he might not have obtained a grant as the inventor of it." Now looking at the specification in this case, it appears to me that the patent cannot be supported in law; because the plaintiffs have claimed more than they are in fact entitled to. One cannot read the description of the invention, and the purposes for which it is intended, without understanding it to be a claim of an improvement of certain machinery to produce a certain desired effect. The specification contains eight different parts or heads. (His lordship read them (*a*) over.)

*201] Now, dismissing *all of the eight from our consideration, but Nos. 6 and 7, I confess I cannot understand those two, except as claiming an improvement of, or a new combination in, the throstle-machine. That the patentees meant to claim all the eight parts as forming one whole, is abundantly clear from the latter part of the specification, where they expressly say, "we disclaim those parts of the process or mechanism which were, or may have been, previously to the granting of our patent, well known or in use for the same purposes; but we restrict our claims to the eight several heads of invention mentioned in the early part of this specification, all of which we believe to be new and of great public utility." Therefore the patentees are bound to show that each of the eight parts is new and of public utility. They describe the old method of spinning silk-waste, and then say "Having thus explained the old or ordinary process of converting silk-waste into yarn, we will proceed to describe our novel process, by which we produce a new or improved manufacture of yarn or thread." The claim therefore is clearly in respect of a novelty; and it must be a novelty, either in the process or in the machinery. Now the jury have found that the subject of the patent is not a new invention, or a new combination; but that it is an improved process; and if the specification had stopped at this point, it might perhaps have been a hard measure to deal to the party, to say this was a claim of new machinery, though I am inclined to think it would be so considered. But they then go on, and, after describing the improvements in the method of obviating the supposed necessity of cutting or shortening the filaments of silk-waste, in discharging the gum and dyeing the silk, they say, "Having now explained the nature of the drawing and roving machinery which we have found to answer best, and the several processes of drawing and roving silk-waste alone, and of silk-waste in combination with

*202] wool and with *flax, we will proceed to describe the spinning machine by which the rove is drawn or elongated into strands to be spun into yarn or thread. The annexed drawings, for the most part, represent the well known spinning-frame called a throstle, on the principle of the long ratch as employed in the spinning of flax, which machine, combined with the improvements we have applied to it, we apply to the new and useful purpose of spinning silk-waste of long fibres into yarn or thread from rove, either in the gum or discharged or dyed, as before mentioned; and also of rove made from silk-waste of long fibres in combination with flax or with wool." They profess therefore to describe the machine to be used for this purpose by drawings; and the expression that these drawings "*for*

(*a*) Suprà, 179—187.

the most part represent the well known spinning-frame called a throstle," implies that some new part in the machine represented has been discovered by them. They then go on to explain the meaning of the drawings, and the use of the brass bosses, the throstle-frame, and the application of water. (His lordship here read that portion (*a*) of the specification.)

I confess I feel it impossible to apply all this language otherwise than to a substantive claim to an invention of a new machine, or a new combination of the parts of an old machine: the jury, however, have by their special finding negatived both; and, unless we could see from the evidence that they were decidedly wrong, the matter must rest there. I think, upon the finding of the jury, there is sufficient to entitle the defendant to have the verdict entered for him on both the second and the third issues; and, upon the evidence, I see no reason to be dissatisfied with that finding.

COLTMAN, J. I also think that the verdict must be entered for the defendant on the second and third pleas.

*The verdict specially found by the jury is clearly not in favour of the plaintiffs; as it, in terms, negatives the allegation in the declaration that the alleged invention was a new invention. And I think that unless each of the eight points in the specification is new, the plaintiffs are not entitled to have the verdict entered for them. [*203

It is not necessary to consider what the verdict should have been, but what, in fact, it is. The jury have found that the invention was not new; that there was no new combination; but that there was an improved process. Now I am not prepared to say that an improved process may not be considered a manufacture within the meaning of the statute (21 Jac. 1, c. 3); and if the jury had only found that the patentees had discovered an improved process, I should have been under some difficulty as to the effect of their finding; but they have negatived both novelty in invention and in combination.

Then, looking at the verdict as being in favour of the defendant on the third plea, we may still examine the evidence to see whether there was such proof of novelty as would, in fact, amount to a new invention; as that might have been a ground for a new trial. But looking at the evidence, I cannot find any novelty in the process so as to satisfy my mind that the jury ought to have found that there was a new process. It seems, in fact, to have been the application of an old machine to a new process, without any material variation in the combination, or any new combination of the parts of the old machine.

It appears from the specification itself that the processes of dyeing and of discharging the gum were performed, in a different stage, it is true, but altogether in the same mode that was formerly known—the only alteration being in point of time.

Looking then at the evidence and the finding of the jury, I think they meant that a better article was *produced by the patentees; but that there was no novelty of combination and no invention employed in bringing about this result. [*204

This, then, disposes of the third issue. As to the point arising on the first issue, it has already been disposed of during the argument.

With regard to the point urged in arrest of judgment, I have not fully made up my mind upon the subject; but after the decision upon the two other points, it does not seem material to consider it.

ERSKINE, J. The jury in this case have found on the first, second, fourth, and fifth issues for the plaintiffs. On the second and third issues there has

(*a*) Suprà, 185.

been a special finding, on an understanding between the parties that the court should decide for whom the verdict should be entered.

As to the first issue, on which there was an application for a nonsuit, the point was given up by counsel, in consequence of an intimation by my lord in the course of the argument.

The second and third issues raise the question, whether the process for which the patent was taken out was a new invention. The jury have, in distinct terms, negatived both these issues in the first branch of their special finding; but they have added something upon which the plaintiffs rely, as being, in substance, in their favour. It is contended, on their part, that the meaning of the special finding is, that the patentees had invented a new process, which, in point of law, would amount to a new invention; and that, looking at the whole of the evidence, and comparing it with the special finding of the jury, it is, in substance, found that there was a new and improved process, and, consequently, that the plaintiffs were entitled to the verdict on these issues. But it appears that the plaintiffs have not made out
*205] *such a case of an improved process as would entitle them, as inventors, to sustain their patent. I think there was no evidence to warrant a different finding from that at which the jury have arrived; and even though there may be a new patent for a new process, as being a new invention, or rather a "new manufacture," within the terms of the statute, yet I think, upon the evidence, there was clearly no such novelty here.

The alleged invention is divided into eight heads; the fourth and fifth of which it is not necessary to consider. The patent is claimed in respect of all these eight points; they are all branches of one process; the plaintiffs must therefore show that the whole process was new in all these parts. Now, undoubtedly, an argument may be raised that there was, at least, some degree of novelty as to the change of the process in which the discharge of the gum, or the dyeing, was effected, as mentioned in the first two heads; but if the substantial parts of the process were not new, then, I think, the plaintiffs must fail.

The third head is said to consist "in a part of our process by which we spin yarn from dressed or heckled silk-waste of long fibres, either in the grain or discharged;" and this clearly does not include either of the first two heads. But what novelty of process is there under this third head? It appears that the process of spinning silk-waste with an uncut fibre had been before practised. It is said, indeed, that this was done in secret, and that it had not been made public; and undoubtedly if that fact were made out, I should agree with the plaintiffs that this would be no objection to the patent; inasmuch as there must be publicity of a previous invention in order to avoid a patent subsequently taken out for the same thing. But I think there was abundant evidence to show that to some extent—and, indeed, to
*206] a considerable extent—*this process had been publicly practised before the patent was taken out, although it had not been carried to such a state of perfection as it was under the plaintiffs' patent.

I come therefore to the conclusion, on this point, that there was nothing new in the process, or in the machinery, by which the silk-waste was spun; and the whole of the plaintiffs' claim amounts to this, that they have applied the old machine and process more skilfully than others have done before them. The result of such application may be useful to the public; and, indeed, the jury have found that it is so; but that is not what the plaintiffs have claimed. They have claimed the particular use of a machine, which had been, in fact, used in a similar manner before.

As to the other heads of the specification, they are not proved, on the evidence, to be new; on the contrary, they are shown to have been previously known and practised by others.

Upon the whole, therefore, I am of opinion that the verdict should be entered for the defendant on the second and third issues.

CRESSWELL, J. I also am of opinion that the verdict should be entered for the defendant, on the second and third issues.

The patent right claimed in this case is undoubtedly of rather a singular character. It is not a claim in respect of any article produced—it is not a claim for any machine for the production of an article—it is not a claim for any particular ingredient—but it is a claim for a mere process.

There are dicta, but there is no distinct decision to be found in the books, that the omission of part of a previously known process may be the subject of a patent; that is a point to which I shall be prepared to *give my consideration when it arises, but it is not the present case. [*207

I do not consider it necessary to go into the evidence in this case; no fault is found with the verdict; but each party claims to have the verdict entered for them upon the special finding of the jury. Now they have found that the subject of the patent is not a new invention, and that it is not a new combination, but that it is an improved process. Then the question is, have the plaintiffs claimed a new invention, or a new combination? For if they have, the jury has found that there was neither. The specification states that the subject of the patent is an "invention of a new and improved process or manufacture of silk, and silk in combination with certain other fibrous substances;" and the patentees then declare that the nature of their said invention consists in eight parts or heads, which are then set forth. And if there could be any doubt as to the intention of the patentees to claim all the eight parts, such doubt would be removed by the concluding passage of the specification, where they say "we restrict our claims to the eight several heads of invention mentioned in the early part of this specification, *all* of which we believe to be new, and of great public utility."

Then does it appear that the patentees claim any novelty of mechanism? I think it clear that they do. I have considerable doubt, whether, under the sixth head mentioned in the specification, they mean to claim the throstle-machine on the principle of the long ratch as an invention, or merely the improved use of it: and if there were any question on the ambiguity of the specification, I should be disposed to think this difficult for the plaintiffs to get over. Under the seventh head the plaintiffs clearly claim certain improvements in the throstle-machine, as their own; but the jury have said there was no new invention; and this is equally fatal to *the plaintiffs, whether they claim a part only of the machine or the whole of it, as a new invention. If they mean to claim a new combination, the jury have found there was none. [*208

But I think it clear that the plaintiffs intended to claim a novelty of mechanism. It is immaterial, therefore, to inquire what may be meant by the term "improved process;" for, whatever it may mean, it does not relieve the plaintiffs from the difficulty they labour under,—of having claimed a new invention, which claim, in fact, is distinctly found against them.

Rule absolute, to enter the verdict for the defendant, on the second and third issues.

Bompas, Serjt., then proposed to argue the cross rule that had been obtained by the plaintiffs for a new trial; but

The court said, that the former part of that rule (to enter the verdict for the plaintiffs on the second and third issues) had been disposed of by the judgment just pronounced; and that the latter part (to grant a new trial) was only conditional—upon the court being of opinion, that the verdict was incongruous and could not be entered for either party.

Rule for a new trial discharged.

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*209] *SANDERSON and Others v. COLLMAN and Another.

Matter of estoppel *in pais* may be pleaded.

The acceptor of a bill cannot, in an action against him by an endorsee, dispute the handwriting of the drawer; and if he do so by plea, the plaintiff may reply the acceptance by way of estoppel.

In a declaration upon a foreign bill drawn by A. upon the defendants, payable sixty days after sight, it was alleged that the defendants, "more than sixty-three days before the commencement of the suit, to wit, on, &c., *had sight* of the said bill, and then accepted the same." Plea, that A. did not make the bill; replication (by way of estoppel) that at the time the defendants accepted the said bill, as in the declaration mentioned, the same purported to have been made by A., and to have been signed by A. as drawer; and that the plaintiffs, at the time the bill was so endorsed as in the declaration mentioned, had no notice or knowledge that it was not made by A., and that they gave value for the same upon the faith and credit of the defendants' acceptance:

Held, coupling the replication with the declaration, that it sufficiently appeared that the defendants had sight of the bill before acceptance, and, therefore, that the estoppel was pleaded with sufficient particularity.

Per Coltman, J. That it was not material to allege that the acceptors had sight of the bill.

Per Cresswell, J. That the plea contained no answer to the declaration.

ASSUMPSIT. The first count of the declaration stated, that whereas certain persons using the name, style, and firm of Dæniker and Wegmann, on, &c., in parts beyond the seas, to wit, at Rio de Janeiro, made their bill of exchange in writing, and directed the same to the defendants, and thereby required the defendants to pay that their first of exchange, second and third not paid, to the order of a certain person, therein named and described as A. V. Bahlsen, Esq., 600*l.* sterling, sixty days after the sight thereof; that the defendants, more than sixty-three days before the commencement of the suit, to wit, on, &c., had sight of the said bill, and then accepted the same, payable at Messrs. Jones, Loyd, and Co.; that the said person, so named and described in the said bill as A. V. Bahlsen, Esq., then endorsed the said bill, by and in the name of A. V. Bahlsen, to the plaintiffs; of which the defendants then had notice, and then promised the plaintiffs to pay them the amount of the said bill, according to the tenor and effect of the bill, and of the said acceptance. Breach, non-payment.

*210] *The second count was upon a similar bill for 1000*l.*, drawn by the same parties, in the same manner, upon, and accepted by, the defendants.

First plea, that the said D. and W. did not make the said bills of exchange in the said first and second counts of the said declaration respectively mentioned, or either of them, *modo et formâ*.(a)

Replication to the first plea, so far as it related to the first count, that the defendants ought not to be allowed to plead or say, that the said D. and W. did not make the said bill in the said first count of the declaration mentioned, because the plaintiffs say that, at the time when the defendants

(a) There were other pleas traversing the acceptance and endorsement of the bills, upon which issue was joined.

accepted the said bill of exchange as in the said first count mentioned, the same bill purported to have been made and drawn by the said D. and W., and to have been signed by them as the drawers thereof; and that the plaintiffs, at the time when the last-mentioned bill was so endorsed to them as in the said first count mentioned, had no notice or knowledge that the said bill had not been made by the said D. and W., and they, before the said bill of exchange became due and payable according to the tenor and effect thereof, gave value for the same, upon the faith and credit of the defendants' acceptance thereof. Verification; and prayer of judgment if the defendants ought, contrary to their said acceptance of the said bill in the said first count mentioned, and to their acknowledgment thereby, to be admitted to say that the said D. and W. did not make the said bill in the said first count mentioned.

There was a similar replication to the first plea, so far as it related to the second count.

Special demurrer to the replication to the first plea, so far as it related to the first count, assigning for causes, *that the subject-matter of the [*211] said replication was matter of evidence only, and did not, by law, constitute an estoppel to the defendants' pleading the said plea to the first count; that the replication was a departure from the first count, wherein it was alleged that D. and W. made the bill therein mentioned, whilst it was admitted by the replication that they did not make any such bill; that the replication was inartificially and improperly pleaded, and without the certainty required by law in a plea of estoppel, in this, that it did not affirmatively and precisely state, by positive and direct averments, the facts which were necessary to constitute the alleged estoppel, namely, that there was such a bill as that alleged in the said first count, that the defendants did accept such bill, that they had sight of it, and that the acceptance was written upon a part of the said bill, whereon were written the names of D. and W. as drawers.

There was a similar demurrer to the replication to the plea so far as it related to the second count.

Joinder in demurrer.

Channell, Serjt., in support of the demurrers. Three questions are raised in this case: first, whether the defendants, after having accepted the bills, are at liberty to show that the names of the drawers have been forged, and that the bills were not, in fact, drawn by the parties by whom they purported to have been drawn; secondly, whether the plaintiffs can reply the acceptance by the defendants, by way of estoppel; and, thirdly, supposing they can do so, whether the estoppel has been pleaded with all the necessary circumstances.

It may be admitted, that the plaintiffs make out a *primâ facie* case by showing the acceptance of the bills by the defendants; but they must rely upon the acceptance, either as a declaration by the defendants that [*212] *the bills were properly drawn, or as an act done by the defendants to the same effect. In either case it is competent to the defendants to rebut the presumption. In *Wilkinson* v. *Lutwidge*, 1 Stra. 648, which was an action against the acceptor of a bill, it was objected that the plaintiff should not be admitted to prove the acceptance, until he had proved the hand of the drawer; but Lord RAYMOND, C. J., was of opinion, that proof of an acceptance was a sufficient acknowledgment on the part of the acceptor, who must be supposed to know the hand of his own correspondent; but he said it would not be *conclusive* evidence; and, therefore, if the defendant could

show the contrary, the reading the bill on behalf of the plaintiffs should not preclude him. So, in *Cooper* v. *Le Blanc*, 2 Stra. 1051, which was an action against an endorser of a note, the Chief Justice, (Lord Hardwicke,) refused to let the defendant in, to show forgery by similitude of hands, since it would tend to destroy all negotiation of notes and bills. But he seemed inclined to allow proof of *actual* forgery, if the defendant could have shown it. In *Jenys* v. *Fawler*, 2 Stra. 946, indeed, where the action was by the endorsee against the acceptor of the bill, Lord Raymond, C. J., would not admit the defendant to prove forgery, by calling persons acquainted with the hand of the drawer, who would swear they did not believe the bill to be in his hand. And his lordship strongly inclined, that even actual proof of forgery would not excuse the defendants against their own acceptance, which had given the bill a credit to the endorsee. This case does not appear reconcilable with *Wilkinson* v. *Lutwidge*, unless (as is suggested by Mr. *Nolan*, in a note to *Jenys* v. *Fawler*,) "a distinction arises where the action is brought by

*213] the payee against the acceptor, (as that case—*Wilkinson* v. *Lutwidge*—*seems to have been,) and where it is brought by an endorsee for a valuable consideration, as in the present, (*Jenys* v. *Fawler*.") The dictum of Buller, J., in *Smith* v. *Chester*, 1 T. R. 654, 655, will probably be relied on by the other side. His lordship said, "when a bill is presented for acceptance, the acceptor only looks to the handwriting of the drawer, which he is afterwards precluded from disputing; and it is on that account that an acceptor is liable, even though the bill be forged;" but that dictum was not necessary for the decision of the case. There is a similar dictum by Dampier, J., in *Bass* v. *Clive*, 4 M. & S. 13, 15, but which also was extrajudicial. *Price* v. *Neal*, 3 Burr. 1354, 1 W. Bl. 390, in which *Jenys* v. *Fawler* was cited, 3 Burr. 1356, will likewise be relied on; but it does not bear upon this case; the only question there being, whether under the circumstances, an action for money had and received could be maintained.

Secondly, even supposing the defendants were concluded from disputing the drawing of the bills, such matter is not pleadable *by way of estoppel*. The plaintiffs have endeavoured to put matter of evidence upon the record; which is contrary to one of the first rules of pleading. A defendant, in his plea, may always traverse a material allegation made by the plaintiff in his declaration. In an action against a drawer of a bill, although the bill has been accepted, it is not necessary to aver the acceptance; (*a*) but, in a declaration against the acceptor, it is necessary to allege the drawing; and that allegation, therefore, may be traversed. It does not follow that what may be conclusive as evidence, can be pleaded by way of estoppel. In the in-

*214] stances of *landlord and tenant, and several other cases, one party is estopped from disputing certain things, but the estoppel is not pleadable. In an action by landlord against tenant, if the defendant plead *nil habuit*, the plaintiff may demur.(*b*) If the lease be by deed, the plaintiff may certainly reply that fact by way of estoppel, because the demise is by indenture.

Thirdly, if the estoppel here was pleadable, it has not been properly pleaded. Although this is a technical objection, it is entitled to considera-

(*a*) Unless the bill be accepted, payable at a particular place, in which case it is necessary to account for, as well as to show, the special presentment at that place for payment, and the allegation is traversable.

(*b*) This would only be so where the declaration stated the demise to be by indenture. If the demise were so in fact, but it was not stated in the declaration, the plaintiff should reply the indenture by way of estoppel; for if he plead over, he loses the benefit of the estoppel. See 1 Wms. Saund. 325 a, n. (4).

tion. Matter of estoppel must be pleaded with every particularity. In order to raise an estoppel in this case it should have been shown that the defendants had an opportunity of inspecting the bills when, or before, they accepted them. But the replications here have not stated the circumstances necessary to give rise to such an estoppel. They do not allege that the defendants had *sight* of the bills, and accepted them *in writing;* and the language of the declaration does not help the omission. Both counts of the declaration, indeed, state that "the defendants had sight of the said bill of exchange, and then accepted the same;" but the defendants had no opportunity of traversing the allegation that they had sight of the bills. The statute 1 & 2 G. 4, c. 78, s. 2, having made no alteration with respect to the acceptance of foreign bills, a foreign bill may still be accepted by parol, or by a writing not on the face of the instrument. The allegation in the declaration—that the defendant had sight of the bills—was therefore immaterial, and consequently not traversable. The allegation in question is, in fact, made with reference to the sixty days which are computed from the day of sight; and any thing tantamount, that would have fixed the day of *payment, would have answered the purpose, as well as a reference to the day of sight. [*215

Bompas, Serjt., in support of the replications. The first question in this case is, whether the acceptance of the bills would be conclusive, *in evidence*, so as to preclude the acceptors from setting up that the bills were not drawn by the alleged drawers. In *Wilkinson* v. *Lutwidge* there was no decision on the point; and if it is to be taken to have been decided in *Cooper* v. *Le Blanc*, that case is contrary to the rest of the authorities. In *Jenys* v. *Fawler* the judge refused to admit evidence of the forgery. The language of the judges in *Smith* v. *Chater* and *Bass* v. *Clive* is very strong in support of this position. So, in *Cooper* v. *Meyer*, 10 B. & C. 468, 5 M. & R. 387, Lord TENTERDEN, C. J., said, "The acceptor ought to know the handwriting of the drawer, and is therefore precluded from disputing it."(a)

Secondly, there being an éstoppel in fact, it may be pleaded. [TINDAL, C. J. Is there any case in which matter of evidence has been pleaded by way of estoppel?] A deed is an instance; for that is a matter of fact which is pleadable by way of estoppel.(b) In *Veale* v. *Warner*, 1 Wms. Saund. 323 c, 326; 2 Keble, 568, the declaration was in debt on bond; the defendant having set out the bond on oyer, which was conditioned to perform an award, pleaded an award made that he, the defendant, should pay a certain sum, and averred payment; the plaintiff in his replication traversed the payment; whereupon the defendant rejoined, by way of estoppel, that the plaintiff had given a receipt for the money, and prayed judgment—if the plaintiff, against his own acknowledgment, ought to be admitted to deny payment of the money. Upon which *Serjt. Williams remarks in a [*216 note, 1 Wms. Saund. 325 a, n. (4), "This rejoinder, though a frivolous one, and pleaded with a view to entrap the plaintiff, is, however, in the nature of an estoppel *in pais;* viz., that the plaintiff, after acknowledging in writing that the defendant had paid him the money, ought not to be admitted to deny the payment of it; like the case of an estoppel by acceptance of rent(c) in Co. Litt. 352 a, and therefore properly concludes with *relying* upon the estoppel; according to the rule of pleading, that every plea ought to have its proper conclusion,—as a plea to the writ, to conclude to the writ; a plea in bar, to conclude to the action; an estoppel, to rely upon

(a) See also *Schultz* v. *Astley*, 2 N. C. 544.
(b) If by deed *indented*, Plowd. 434 a, W. Jones, 317, 459; 4 N. & M. 29
(c) This is in the *realty*.

the estoppel." The definition of an estoppel given in the *Termes de la Ley*, tit. *Estoppel*, p. 330, ed. 1667, is as follows: "Estoppel is, when one is concluded and forbidden in law to speak against his own *act* or *deed*, yea, though it be to say the truth;" and several instances are there given. The plaintiffs here contend that the defendants by their own *act*—namely, by having accepted the bills—are concluded from disputing the fact that they were drawn by Dæniker and Wegmann. Not only was it competent to the plaintiffs to rely on the acceptance as an estoppel, but it was requisite that they should do so; for there are instances where a matter, which is sufficient as an estoppel, if so pleaded, is not conclusive as evidence; as, for example, a judgment in ejectment is not conclusive evidence of title in the action for mesne profits, unless it be pleaded by way of estoppel; *Doe* v. *Huddart*, 5 Tyrwh. 846, 2 C. M. & R. 316;(a) neither is a recital in a deed; *Bowman* v. *Rostron*, 2 A. & E. 295, n., 4 N. & M. 551.(b)

*217] *Thirdly, the estoppel here is sufficiently pleaded. It was not necessary for the plaintiffs to show that the defendants had sight of the bills before they accepted them. If they, in fact, accepted them, it is immaterial whether they had sight of them or not. If this be not so, the averment in the declaration, that the defendants had sight of the bills, and then accepted the same, is material. The allegation in the replication that the plaintiffs, at the time the bills were endorsed, had no notice or knowledge that they were not drawn by Dæniker and Wegmann is probably immaterial; but that will not affect the validity of the replication. At any rate, if the replications be bad in form, the plea is bad also; for the validity of both depends upon the same question. To deny that Dæniker and Wegmann drew the bills, is no answer to the declaration.

Channell, Serjt., in reply. The plea undoubtedly depends upon the same question as the replications. The note of Mr. Serjt. Williams to *Veale* v. *Warner*, which has been cited, only means that the estoppel was rightly pleaded in point of *form*, though it was bad in *substance*.(c) *Doe* v. *Huddart* does not apply to the present case; for it may be admitted that matter of estoppel by record or by deed, is not conclusive unless pleaded; but it is not so with matters *in pais*. It is laid down in Chitty on Pleading, vol. i. p. 603, that "where the demise is not by deed, there can be no *pleading*

*218] by way of estoppel; especially as *the declaration may, by virtue of the statute 11 G. 2, c. 19, be in the general form for use and occupation; but it must be remembered that in general, even in such case, the party to whom the premises were let, or his assignee, shall not be permitted to dispute the title of the landlord by whom the former was let into possession, or the title of the assignee of such lessor." [CRESSWELL, J. Suppose it appeared from the declaration that the plaintiff had let the defendant into possession of the premises as tenant.] Unless it appeared that it was by

(a) See also *Doe* v. *Wright*, 10 A. & E. 763, 2 P. & D. 672. A judgment, generally speaking, is no estoppel, unless so pleaded; see *Outram* v. *Morewood*, 3 East, 346; *Vooght* v. *Winch*, 2 B. & A. 662. See also *Magrath* v. *Hardy*, 4 N. C. 782, 6 Scott, 627.

(b) See also *Carpenter* v. *Buller*, 8 M. & W. 209; and *Bowman* v. *Taylor*, 2 A. & E. 278, 4 N. & M. 265.

(c) This was, at least, not so decided. The rejoinder was probably pleaded to provoke the demurrer which ensued; but the question turned upon the validity of the award as set out in the plea; the defendant's counsel having purposely omitted part of the award so as to make it appear insufficient: and the plaintiff, by pleading over, instead of setting out the real award, having admitted the award as set out to be the true one. It was for this "trick," and "subtle pleading," that Saunders, the defendant's counsel, was "reprehended" by Kelynge, C. J.

deed,(a) it is submitted, it could not be pleaded as an estoppel.(b) The instances given in the *Termes de la Ley* appear to be all of estoppel by deed or by matter of record.

TINDAL, C. J. The first point in this case is, whether the drawee, after accepting and thereby giving an apparent validity to a bill, has a right, in an action against him as acceptor, to set up as a defence that the name of the drawer was forged, or other matter invalidating the bill. And it appears to me that he has no such right. It certainly does seem that, in the two authorities cited from Strange, *Wilkinson* v. *Lutwidge*, 1 Stra. 648; *Cooper* v. *Le Blanc*, 2 Stra. 1051, there was a readiness on the part of the judges to admit evidence of forgery; but subsequent cases have excluded such a line of defence. Most of these have been mentioned in the argument; but I will refer to two others which appear to me very strong upon this point. *Drayton* v. *Dale*, 2 B. & C. 293, 3 D. & R. 534, was an action by the endorsee, against the maker, of a promissory note, made payable to one Clarke or his order; the defendant, by his second plea, pleaded that Clarke before the making of the note became a *bankrupt, and that his property was duly assigned to assignees, whereby the interest, title and [*219 right to endorse the promissory note, before the time of endorsement, became vested in the assignees; whereby the endorsement by Clarke was void, and created no right in the plaintiffs to sue. The plaintiff replied that the endorsement was made with the consent of the assignees; and issue was taken on that allegation; upon which a verdict was found for the defendant. But the court held that the plaintiff was entitled to judgment *non obstante veredicto*, because the defendant, who had made the note payable to Clarke or his order, was estopped from saying that Clarke was not competent to make an order. In *Pitt* v. *Chappelow*, 8 M. & W. 616, which was an action by the endorsee against the acceptor of a bill drawn by one Baker, payable to his own order, there was a somewhat similar plea, but setting forth a second commission of bankruptcy against the drawer, under which 15s. in the pound had not been paid, and alleging that thereby the bill vested in the assignee under such second commission, and that Baker had no right to endorse; but the court held there also that the defendant was estopped by his acceptance of the bill, payable to Baker's order, from saying that Baker was incapable of transferring the bill by endorsement.(c) The only difference I can see between these two cases, is, that in the former, the objection was taken after verdict; in the latter, upon demurrer, as in the present case. These are both strong authorities to show that an acceptor having once acknowledged the right of a party to endorse, cannot afterwards deny that right; and I think they are equally strong, by inference, to establish, that an acceptor cannot set up a want of authority, or a want of identity, as to the party by whom the bill professes to have been *drawn. [*220 And this doctrine is of the greatest importance as applicable to bills drawn abroad, which obtain their credit and currency here on the faith of the acceptance, and not on the signature of the drawer, who generally is a stranger.

The question then arises,—whether the plaintiffs can set this up by way of estoppel. It is said that this may be evidence—and even conclusive evidence—against the defendant, but that the plaintiffs cannot avail them-

(a) i. e. by deed *indented*.
(b) See 1 Wms. Saund. 325 a, n.(c); 6 N. & M. 641, 643. Antè, vol. i. 129, 142; vol. ii. 843; vol. iv. 147, n.
(c) See *Mackay* v. *Wood*, 7 M. & W. 420.

selves of it as an estoppel. If, however, we find upon the record a fact which would have entitled the plaintiffs to a verdict, I do not see why they may not rely upon that fact by way of estoppel. Estoppel may be by matter of record, by deed, and by matter in pais. Co. Litt. 352 a. If, by the last branch, it is meant only that the matter may be given in evidence, it would certainly not be pleadable, and ought not to be put on the record. But there seems to be no reason why the meaning should be so confined. No very precise instances are given in the books where matter of this sort has been pleaded. But it is to be remembered that under the old system of pleading, almost every defence might have been given under the general issue; and the plaintiff, therefore, could not have known that a defence would be attempted to be set up which the defendant was estopped from making.(a) Lord Coke, in Co. Litt. 352 a, in speaking of estoppel by matter in pais, refers to estoppel by acceptance of rent; and it may be said that this naturally would be matter of evidence; but looking at the whole of the context, he appears to me to be treating it as being on the record, rather than as a matter for the jury.

*221] *With regard to the third objection, it appears to be answered by the declaration, which, after setting out each bill of exchange, alleges that the defendants had sight thereof, and *then*,—that is after having had sight of the bill,—accepted the same. Upon the whole, I think there must be judgment for the plaintiffs.

COLTMAN, J. I am of the same opinion. Notwithstanding some of the earlier cases, I think it may be taken as settled, that the acceptor of a bill of exchange is not at liberty to show that it was not drawn by the party who appears to be the drawer. My brother, *Channell*, has argued that this is not a matter of plea, but matter of evidence, and that matter of evidence cannot be pleaded. But the meaning of that rule, I apprehend, is, that a party shall not plead facts from which another fact, material to the issue, is to be *inferred*. But here the defence itself is pleaded. Then it is said that matter in pais cannot be pleaded by way of estoppel. *Veale* v. *Warner* is certainly no authority for such a mode of pleading. I think, however, that if a party has a legal defence to that which is set up against him, he cannot be precluded from pleading such defence. Then, it is argued that, at any rate, the estoppel is not sufficiently pleaded, inasmuch as it does not appear in the replications, that the defendants had sight of the bills. But if the bills were accepted by the drawees, it is not material whether they saw them or not. It is of immense importance that it should be understood as settled, that a party who accepts a bill is thereby precluded from disputing the drawing of that bill. Bills are received by bankers and bill-brokers upon the faith of the acceptance by the drawees, who must be presumed to have sufficient means of satisfying themselves as to the authenticity of the instruments.

*222] *ERSKINE, J. If this action had been brought before the new rules came into operation, the question would have arisen at nisi prius; for under the plea of non assumpsit, the defence now raised by the second plea would have been set up in evidence. And the question is, would the matter now replied have been a good answer to such defence, if raised under the general issue? Though former cases tend to show that an opinion existed that forgery of the drawer's signature might be given in

(a) This was so for more than a century preceding the rules of H. 4 W. 4, in actions of assumpsit and case. Matter of estoppel, however, arose more frequently in actions of trespass and replevin, in which, practically, there was no general issue.

evidence in an action against the acceptor, the later authorities all concur in deciding that this cannot be done. In addition to those already cited, I will mention the case of *Leach* v. *Buchanan*, 4 Esp. N. P. C. 226, which was an action against the acceptor of a bill, and where Lord ELLENBOROUGH held, that the defendant could not be allowed to show that the acceptance was a forgery after he had accredited the bill and induced the plaintiff to take it, by saying that the acceptance was his, and that the bill would be duly paid. I am, therefore, of opinion that if this question had arisen upon evidence given at the trial, the plaintiffs would have been held not to be at liberty to dispute the regular drawing of the bill.

Then comes the next question, whether this answer to the defence set up, is pleadable by way of estoppel. Since the new rules, the defence itself could clearly not have been given in evidence under the plea of non assumpsit. The defendants therefore have pleaded that Dæniker and Wegmann, the alleged drawers, did not make the bills. The plaintiffs, in their replications, add, as a further fact,—that which Lord ELLENBOROUGH considered material in *Buchanan* v. *Leach*,—namely, that they took the bills upon the faith of the defendant's acceptance *thereof. Why should that not be pleaded? It is laid down that an estoppel may be by act of record, by deed, or by act in pais. In the present case the estoppel arises by an act done by the defendants, which is neither of record nor by deed. It is difficult to say that at the trial the judge might have admitted evidence to prove that the drawing of the bills had been authenticated by the defendant's acceptance; but that the fact could not be pleaded. [*223

But then, it is contended, that if the matter be pleadable, it is not well pleaded; for it is said, it does not appear, on the face of the replication, that the bills were accepted after the drawees had had an opportunity of seeing the handwriting of the drawers. But it appears to me that each of the answers given by my brother *Bompas* to this objection is sufficient. It is alleged in the declaration, and admitted by the plea, that the defendants accepted the two bills in question; for the admission is, not that the defendants accepted *some bills*, but that they accepted *these very bills*.(*a*) Besides which, taking the replications and the admitted parts of the declaration together, it appears that the defendants had sight of the bills purporting to be drawn by Dæniker and Wegmann, before the acceptance.

CRESSWELL, J. I also think that there must be judgment for the plaintiffs upon this record. The declaration states that certain persons using the style and firm of Dæniker and Wegmann, in parts beyond the seas, made *their bills of exchange in writing, and thereby required the defendants to pay to Bahlsen, or order, 600*l.* and 1000*l.*, at sixty days' sight; and that the defendants had sight of the said bills of exchange, and then accepted the same. The defendants plead that Dæniker and Wegmann did not make the bills in the declaration mentioned. The first question is,—does this plea disclose any legal defence to the action? It is a very common method of testing the validity of a defence set up at nisi prius, to inquire how the evidence would look if expanded on the record. Supposing, under the old plea of the general issue, it had been admitted, or proved, that the bills declared on had been accepted by the defendants, and [*224

(*a*) If the defendants, without seeing the bills held by the plaintiffs, had agreed verbally or in writing to accept two bills for 600*l.*, &c., drawn by D. W., and the bills held by the plaintiffs, (and produced at the trial,) had been forgeries, the proper plea would seem to have been,—not that the bills accepted by the defendants were not drawn by D. and W., but that the bills held and sued on by the plaintiffs were not accepted by the defendants.

evidence had been then tendered on the part of the defendants that the bills were not drawn by the alleged drawers, there can be no doubt that the evidence would have been immediately rejected. Then why should a party be allowed to allege on the record that which he would not be allowed to prove? *Drayton* v. *Dale* was then a stronger case than the present. There, a defendant, who had made a promissory note payable to A., *or his order*, was held to be estopped from saying that A. had not legal capacity to endorse the note. In *Taylor* v. *Croker*, 4 Esp. N. P. C. 187, the acceptor of a bill drawn by two infants, payable to their own order, was held to be estopped from saying that the drawers, by reason of their infancy, were not competent to endorse. It has been ingeniously suggested that the acceptance, in this case, may have been by letter. To this it is sufficient to say, that the acceptance is admitted as it is alleged. As the fact is stated in the declaration, I think the plea is clearly bad; because it sets up as a defence an allegation which, if true, is no answer to the action. I will merely add that
*225] I see no reason why the matter upon which *the plaintiffs rely should not be replied by way of estoppel.(*a*)

Judgment for the plaintiffs.(*b*)

(*a*) The plaintiff might, it would seem, have demurred to the plea, the matter of estoppel appearing on the face of the declaration, (vide antè, p. 209,) and the plea containing no answer to the action.

(*b*) And see *Lainson* v. *Tremere*, 1 A. & E. 792, 3 N. & M. 603.

HENRY PRICE (suing by GEORGE, his Guardian) *v.* JAMES EDWARD DUGGAN.

To bring a party into contempt for not paying the amount of taxed costs, pursuant to the master's allocatur, where payment is demanded under a power of attorney, it is necessary to leave a copy of the power of attorney at the time of the demand.

COSTS having been taxed for the defendant, upon the verdict obtained by him,(*a*) the amount of the master's allocatur was demanded under a power of attorney.

Channell, Serjt., moved for an attachment against the guardian, for his contempt in not paying the amount of the allocatur. The allocatur had been served upon the guardian, by showing it to him and leaving with him a copy thereof. The power of attorney had also been shown to the guardian; but of this it did not appear that any copy had been left. He contended that, although in the case of an award, the service would have been insufficient, the same strictness is not required in the case of a refusal to pay costs after taxation. The party was bound to pay the moment the demand was made.

TINDAL, C. J. The reason is the same in both cases. The object for
*226] which the delivery of a copy of the *power of attorney is required, is to afford an opportunity of ascertaining whether the party who demands the costs really has authority to receive them. Rule refused.

(*a*) Vide antè, vol. ii. p. 641.

BRANCKER and Another, Assignees of C. HUMBERSTON and Another, Bankrupts, *v.* E. MOLYNEUX.

An order was made by the Court of Review substituting another debt in lieu of that of the petitioning creditor, (under 6 G. 4, c. 16, s. 18,) stating that the court "doth declare

that the debt of the said T. R., (the petitioning creditor,) &c., is an insufficient debt to support the fiat, &c.; and it appearing that the debt of the said petitioners, proved by them under the said fiat, &c., was incurred not anterior to the said debt of the said T. R.," &c. An action having been subsequently brought by the assignees, the order was amended by the Court of Review, on the eve of a new trial, by introducing a recital contained in the petition upon which the order had been made, "that the said petitioners *had duly proved a debt under the said* fiat;" but no statement to that effect was inserted in the mandatory part of the order. The amendment was made without notice to the defendant:

Held, that it was not necessary to give notice of the amendment to the defendant.

Held also, that the amended order must be taken to operate from its original date, and not from the date of the amendment.

But held further, that such amended order was insufficient, inasmuch as it did not adjudicate, as required by the statute, that the debt of the petitioners had been proved prior to their petition.

TROVER for 400 bales and 400 bags of cotton, of the plaintiffs, as assignees.(a)

The third trial of the cause(b) took place before Lord DENMAN, C. J., at the summer assizes for the southern division of Lancashire, in 1841. The *defendant had given notice to dispute the bankruptcy. It was proved that the fiat issued against the bankrupts on the 9th of June, [*227 1837, on the petition of one Roberts; and that the plaintiffs were appointed assignees on the 12th of July following. The plaintiffs also put in the following order of the Court of Review, dated the 25th of March, 1839, (before action brought,) substituting (under the 18th section of the 6 G. 4, c. 16)(c) a debt due to Fletcher and Cravy, for that owing to Roberts. In this order, as originally framed, the clauses printed below in italics were not inserted. About ten days before the third trial, however, upon an application to the Court of Review, the order was amended by inserting those clauses, and erasing the words placed between brackets. No notice of the application or of the amendment was given to the defendant.

"In the matter of C. Humberston and S. Frodsham, bankrupts.

"Whereas Robert Andrew Fletcher, of Liverpool, in the county of Lancaster, merchant, and Edward Charles Cravy, of Flushing, in the state of New York, in the United States of America, merchant, and late copartners, did, on or about the 4th of May instant, prefer unto this court their petition in the above matter, *setting forth, among other matters, that a fiat in bankruptcy, bearing date the 9th day of June, 1837, was, on the petition of Thomas Roberts, duly awarded and issued *against the said bankrupts, under which they were duly found and declared bankrupts, and that the said* [*228 *petitioners had duly proved a debt under the said fiat, and were creditors of the said bankrupts, for the sum of 150l., being the balance of an account for money lent and advanced to the said bankrupts, by the said petitioners, on the 13th day of May, 1837; and that the same debt was incurred by the said bankrupts not anterior to the debt of the said petitioning creditor under the said fiat; and* praying that this court would be pleased to order and allow the debt of

(a) See the pleadings, antè, vol. i. p. 710.

(b) The rule was made absolute for the first new trial in Trinity vacation, 1840, antè, vol. i. 710; for the second new trial, in Trinity term, 1841, antè, vol. iii. p. 84.

(c) Which enacts "that if, after adjudication, the debt or debts of the petitioning creditor or creditors, or any of them, be found insufficient to support a commission, it shall be lawful for the Lord Chancellor, upon the application of any other creditor or creditors, *having proved* any debt or debts sufficient to support a commission, provided such debt or debts has or have been incurred not anterior to the debt or debts of the petitioning creditor or creditors, to order the said commission to be proceeded in, and it shall, by such order, be deemed valid."

By the 1 & 2 W. 4, c. 56, the general jurisdiction of the Lord Chancellor in bankruptcy, is transferred to the Court of Review.

the said petitioners to be substituted for that of *the said* Thomas Roberts, [in the said petition mentioned] in the proceedings under the *said* fiat [therein also mentioned,] and that it might be proceeded in and deemed valid, and that the costs of the said application might be paid out of the estate and effects of the said bankrupts: now, upon hearing the said petition, and the affidavit of Robert Frodsham, gentleman, filed in support thereof, read, and what was alleged by Mr. S. of counsel for the said petitioners, and upon reading the affidavit of Frederick Frodsham, also filed in this matter, of the due service of the said petition upon the said Thomas Roberts, and also upon the said bankrupts, and upon Thomas Brancker the younger, and Thomas Martin, the assignees of the estate and effects of the said bankrupts; and no person appearing before this court on their behalf, this court doth declare that the debt of the said Thomas Roberts, and on which the adjudication of the bankruptcy of the said C. Humberston and S. Frodsham was made, is *and was* an insufficient debt to support the fiat issued against the said bankrupts; and it appearing to the court that the debt of the said petitioners Robert Andrews Fletcher and Edward Charles Cravy, proved by them under the said fiat, or so much thereof as is sufficient to support such fiat, was incurred not anterior to the said debt of *the said Thomas Roberts, and is an existing and sufficient debt to support such fiat: the court doth order that the said fiat be proceeded in, and that the costs of and occasioned by this application be paid out of the estate of the said bankrupts, being first taxed by the commissioners under the said fiat; but this order is not to prejudice any action pending under such fiat."

*229]

It was contended on the part of the defendant—first, that this order was inoperative against him, inasmuch as it had been made without notice to him; secondly, that, as then produced, it must be taken to speak from the time of the amendment, and not from the original date; and thirdly, that it contained merely a *recital*, and not an *adjudication*, that the substituted creditors had proved a debt under the fiat previously to their petition; and that, for these reasons, no sufficient petitioning creditor's debt was made out to support the fiat. His lordship declined to direct a nonsuit, but he reserved leave to the defendant to move to enter a nonsuit; and the case having gone to the jury, a verdict was returned for the plaintiffs, with 2086*l*. damages.

Channell, Serjt., in last Michaelmas term, obtained a rule nisi, pursuant to the leave reserved, or for a new trial. He cited *Muskett* v. *Drummond*, 10 B. & C. 153, 5 M. & R. 210; *Aireton* v. *Davis*, 9 Bingh. 740, 3 Moo. & Scott, 138; *Christie* v. *Unwin*, 11 A. & E. 373, 3 P. & D. 204; and *In re Clarke*, 3 Mont. & Ayrt. 609.

Bompas, Serjt., now showed cause. First, it sufficiently appears on the face of the order, that the substituted debt had been proved previously to the petition. In *Muskett* v. *Drummond*, the plaintiff produced an *order made by the Lord Chancellor under the section in question, whereby, after reciting a petition to him by M., he ordered, that, if the commissioners should be satisfied that M. had proved, under the commission against the bankrupt, a debt sufficient to support the commission, contracted not anterior to the petitioning creditor's debt, the petition should be proceeded in. That order was held to be invalid, inasmuch as it did not find, or call upon the commissioners to find, that the original petitioning creditor's debt was insufficient. The fact, however, is found in the present order. The decision in that case shows what the chancellor considered to be the proper construction of the act. He thought the debt must be proved to *his* satisfaction. A party may be entitled to prove a debt against the estate,

*230]

when he could not support a fiat. In *Airton* v. *Davis*, 9 Bingh. 740, 3 Moo. & Scott, 138, although the question came before the court, there was no decision upon the point. [ERSKINE, J. "Having proved," must mean "having proved before the application is made."] It means having proved a debt before the commissioner to the satisfaction of the chancellor. [TINDAL, C. J. It means having proved a debt of 100*l*. ERSKINE, J. It may be a legal debt, or an equitable debt.] In *Christie* v. *Unwin*, 11 A. & E. 373, 3 P. & D. 204, it was certainly held, that it must appear on the face of the order, that the creditor applying to have his debt substituted for that of the petitioning creditor, had proved a sufficient debt before making the application. But in that case, the order of the Lord Chancellor did not in any way show that the debt proposed to be substituted had been proved; but the present order does; for it states that it appears "to the court that the debt of the said petitioners *proved by them under the fiat*, or so much thereof as is sufficient to support such fiat, was incurred *not anterior to the said debt of the said Thomas Roberts, (the petitioning creditor,) and is an existing and sufficient debt to support the fiat."(*a*) [ERSKINE, J. It was formerly usual to recite the whole of the petition in the order of substitution; but it was ordered by the Court of Review (*b*) "that it shall not be necessary to recite such petitions at length in any order pronounced by the court thereon."] It will be sufficient if every material fact appears in the petition as recited; the petition in this case, as recited in the order, states "that the petitioners *had* duly proved a debt under the fiat, and were creditors of the bankrupts for the sum, &c.," so that the debt must have been proved before the petition was presented. [ERSKINE, J. The order merely recites that the petitioners *so state* in their petition; it does not even recite the fact itself, still less adjudicate it.] Every thing that is necessary to give jurisdiction to the court appears on the face of the order. [ERSKINE, J. The objection is, not to the jurisdiction, but that the order does not show an adjudication, by the court, that the debt had been proved, as required by the statute. COLTMAN, J. It is like an order of removal under the poor-law, which must contain an *adjudication* that the pauper had become actually chargeable.] (*c*) But, generally speaking, the court will intend that the justices have done right, if the contrary does not appear on the face of their order; as in *Rex* v. *Cornish*, 2 B. & Ad. 498, where an order of justices directing A. to pay the churchwardens and overseers of the poor of a *parish a weekly sum for the maintenance of B. and C., his grandsons, as long as they should be chargeable to the parish, was held to be sufficient, without stating that the *father* was unable, absent or dead.(*d*) In the inferior courts it is necessary that the jurisdiction should appear on the face of the proceedings; but that is not so with regard to superior courts, such as the courts of the county palatine of Durham, or of Chester, or the courts of great session in Wales, or the court of Ely; *Peacock* v. *Bell*, 1 Wms. Saund. 73; 1 Siderf. 330, 2 Keb. 182, 226; *Pigge* v. *Gardner*, 1 Lev. 208. [COLTMAN, J. It may make some difference that this is a parliamentary authority, and therefore that it must be shown to have been properly exercised.] But will the court presume that it has been improperly exercised? The authority of the jus-

[*231

[*232

(*a*) An order of the same form as in this case was set out in the replication in *Byers* v. *Southwell*, 6 New Cases, 39, and the replication was held sufficient, on demurrer.

(*b*) General rules and orders for regulating the practice of the Court of Bankruptcy. R. 30, A. D. 1830, 1 Deac. & C. xxix.

(*c*) See *Stallingburgh* v. *Hoxley*, 1 Sess. Ca. 131; *Rex* v. *Fisherton Delamere*, Ib. 45; *Rex* v. *Maulden*, 8 B. & C. 78, 2 M. & R. 146.

(*d*) See *Regina* v. *Read*, 1 P. & D. 413.

tices at sessions, with regard to the poor-rates, is derived from statute; but in *Rex* v. *Aire and Calder Navigation*, 2 T. R. 660, it was held, that they were the proper judges of the equality of poor rates, and that the Court of King's Bench would not interfere, upon the ground of the rates being unequal, unless the inequality were manifestly apparent on the rate. In this case it may surely be presumed that the Court of Review would not have made the order, without proof of the matters set forth in the petition.

Secondly, as to the necessity of notice of the amendment. If the Court of Review had thought that the defendant was entitled to such notice, they would have directed it to be given to him. It will hardly be contended that every debtor to the estate was to receive notice; and the defendant was not more entitled to receive it than any other debtor; for the pendency of
*233] the action would make no difference, the original order *having been made before the action was commenced. This court will not entertain any question as to the propriety of the amendment made by the Court of Review, or as to the practice of that court with regard to what notice thereof should be given; any more than a court of error will inquire into the propriety of rules made by the court below for amending the pleadings, striking out pleas, or the like. *Gully* v. *The Bishop of Exeter*, 10 B. & C. 584, 5 M. & R. 457, in the King's Bench; S. C. in Chancery, 5 M. & R. 499.

Thirdly, the order, as amended, must be taken to speak from its original date, and not from the date of the amendment only. In all cases of amendment, as of a writ of summons, of a declaration, of pleading, by a judge at the trial, of a record after judgment and writ of error, and in various other instances, the amendment would be wholly nugatory if it were only to operate from the date of such amendment. Where a correct memorial of an annuity had been enrolled incorrectly, and some years after the officer of the enrolment-office discovered and rectified the error before any proceedings were had to vacate the annuity, this court, finding the enrolment right when they called for it, would not inquire when the entry was made; though it was a high misprision in an officer to alter the enrolment without the sanction of the Court of Chancery. [TINDAL, C. J. That was the setting right of a mistake made by the officer.] So, where a fine is amended, it continues to be a fine of the term in which it was originally levied. [TINDAL, C. J. Otherwise, the five years and nonclaim would be of no avail.] Here, no amendment of the mandatory part of the order is required. It is a mere formal amendment. In *Garrick* v. *Williams*, 3 Taunt. 540,(*a*) an amendment was allowed after error brought; and the court ordered the transcript
*234] to be amended. In trespass, a verdict finding *that the defendant *is* guilty, means that he is guilty as alleged in the record. So here, "as proved," means as stated in the petition. It means so proved, as it is contended on the part of the defendant that it ought to be proved. [TINDAL, C. J. I understand that the objection is, that it is not alleged to be the *said* debt. ERSKINE, J. I suppose the objection is, that it does not appear that the court has decided. At the trial it was objected that the court had not adopted the statement of the petition.] A judgment in an inferior court does not state that the party was indebted, or that he promised, within the jurisdiction. [CRESSWELL, J. There it is admitted by the pleadings, that the cause of action arose within the jurisdiction. ERSKINE, J. *Non-assumpsit modo et formâ* puts in issue the allegation that the cause of action arose within the jurisdiction; therefore a verdict, *quod assumpsit modo et formâ*,

(*a*) See *Doe dem. Williams* v. *Lloyd*, antè, vol. i. p. 671.

shows that the cause of action arose within the jurisdiction.(a) [TINDAL, C. J. The court by which this order was made, is an *inferior* court.] Here, this court is placed in the situation of a jury. It was shown that an affidavit was filed in support of the petition. [ERSKINE, J. It does not appear what the affidavit stated.] The court will take notice of the affidavit, as an affidavit verifying the allegations of the petition which it is filed to support.

Channell, Serjt., (with whom was *Crompton*,) in support of the rule. The order is clearly bad. The court will look at the order as it stands; for it appears, by decided authorities, that no intendment in favour of its sufficiency will be made. The provisions of the act under which it was made, bear very hardly upon parties who contest a fiat, and ought therefore to be construed with great strictness. The order must show *upon the face of it all the facts necessary to give jurisdiction to the Court of Review—all those facts which are required by the eighteenth section of the 6 G. 4, c. 16; without which the Court of Review, which now exercises the functions of the Lord Chancellor, in matters of bankruptcy, would have had no jurisdiction. These orders, therefore, must be construed by the same rules that are applicable to the order of justices in matters regulated by act of parliament.(b) Now there are four conditions imposed by the bankrupt act, 6 G. 4, c. 16, s. 18, which must be complied with before the Court of Review can pronounce a valid order; first, the petitioning creditor's debt must be sufficient to support the commission; secondly, the creditor, whose debt is to be substituted for that of the petitioning creditor, must, prior to the application, have proved a debt sufficient to support the commission; thirdly, such debt must not have been incurred anterior to the debt of the petitioning creditor; and fourthly, the party applying for the substitution must himself have proved a debt against the estate. All these facts must appear, on the face of the order, to have been adjudicated by the court. Now the present order adjudicated only the first and third of these; the second and fourth being mentioned merely by way of recital in the petition. The cases cited when the rule was obtained, especially *Muskett* v. *Drummond* and *Christie* v. *Unwin*, are strong authorities to show that the order is invalid. *Muskett* v. *Drummond* is also important, as showing that the present order, as amended, is not binding upon the defendant, no notice of the amendment having been given to him. In that case it was unnecessary to decide whether the order itself was valid; but it was considered that the order was bad, in not showing that the former debt had been adjudged to be invalid. The *court, in giving judgment, intimated a doubt whether even "a *valid* order of the Lord Chancellor, under the above-mentioned act, would support a commission, by relation, in an action already commenced, and especially when the opposite party in that suit had no notice of such a proceeding," 10 B. & C. 161. Now, in this case, though the order was originally made after action brought, yet the amendment was not made till after two trials had in fact taken place, and upon the eve of a third trial. In *Aireton* v. *Davis*, 9 Bingh. 740, 3 Moo. & S. 138, the decision turned upon another point; but the court expressed itself, as strongly as could be expected, in favour of the objection. [TINDAL, C. J. In that case a new title was made pending the action. Here, the parties are the same. There, the defendant might come down prepared to contest the original petitioning creditor's debt; but that cannot have been the case here. ERSKINE, J. The Court of Review will either require an affidavit

[*235]

[*236]

(a) Vide 1 Wms. Saund. 74 a.
(b) See *Brook* v. *Jenney*, 2 Q. B. Rep. 265.

stating that no action is pending, or restrict the order to the particular action.] In *Ex parte Watson, in re Clarke*, 3 Mont. & Ayrt. 609, where a debt was substituted for that of the petitioning creditor, the court, when making the order, expressly said, that notice thereof must be given to the defendant in an action which had been previously commenced, and in which the validity of the petitioning creditor's debt was disputed. The same principle which would apply to an original order, will apply to an amended order; otherwise the greatest injustice may be produced. The order in this case was clearly had before the amendment, and was in fact admitted to be so; otherwise the amendment would not have been sought for. But the amendment is confined to a recital in the petition to obtain the order, stating that the petitioner had alleged that there was a debt; and no alteration has
*237] been made *in the mandatory or adjudicating part. It is consistent with every thing that appears upon the face of the order, that the substituted debt may have been proved only the day before the order was made. It is said on the other side, that you may look at the recital to explain the mandatory part. But if the allegation is not direct in itself, it must be so by *necessary* inference. The insertion of the word "said" in the mandatory part might have connected the order with the recital, and have given the plaintiffs a case. It has been said that this is like a verdict upon a plea of not guilty in an inferior court. To make the cases parallel, it should be supposed that the jury merely found that the plaintiff had *said* that the defendant was guilty. In *Ex parte Hall, in re Elliott*, 1 Mont. Deac. & De Gex, 217, the order, which had been held invalid in *Christie* v. *Unwin*, was amended by the Court of Review in the following form, prepared by Sir GEORGE ROSE—after reciting the substance of the petition—"and it appearing to this court, upon the proof thereof laid before it, that, after the adjudication of the bankruptcy of the said Thomas Elliott, and before the presenting the aforesaid petition, the debt of the said J. C., the petitioning creditor, and on which the adjudication of the bankruptcy of the said T. E. proceeded, was duly found to be, and is, an insufficient debt to support the said fiat against the said T. E.; and that, before and at the time of presenting the said petition, the said Northern and Central Bank (the petitioners) had, by one of their public registered officers, proved a debt under the said fiat against the said T. E., sufficient to support the same; and such debt of the Northern and Central Bank is an existing debt, and was incurred not anterior to the debt of the said J. C., the petitioning
*238] creditor under the said fiat; this court doth order that *the said fiat issued against the said T. E. be proceeded in." The order in the present case should have been amended pursuant to that form. If, instead of adopting such form, reliance is placed on the recitals, these recitals should be distinctly referred to. In *Byers* v. *Southwell*, antè, 231 a, the replication expressly stated, before setting out the order, that the substituted creditors "having then due and owing to them from the said J. C., (the bankrupt,) and having *before then proved under the fiat*, debts sufficient to support the said fiat, the debts so due and owing from J. C. to J. S. and J. S. (the petitioners) having been incurred not anterior to the debt of any of them, the said W. B., &c., (the petitioning creditors,) did duly present their petition," &c. This replication was held to be *bad*.

TINDAL, C. J.(a) This case comes before us upon a rule for a nonsuit,

(a) It had been suggested by the lord chief justice, but not acceded to, that the order of the Court of Review might be included in a bill of exceptions which had been tendered and was pending.

or for a new trial, upon certain objections that have been taken to an amended order made by the Court of Review, for substituting a new debt in lieu of that of the petitioning creditor, under the provisions of the statute 6 G. 4, c. 16, s. 18. But though I think that upon one of these objections the defendant may be entitled to succeed, he ought not to be allowed to enter a nonsuit. I think he ought to have a new trial on payment by the plaintiffs of the costs of the last trial.

The objections are three in number, and may be taken in the following order: first, that the amendment in the order of the Court of Review was improperly made—or, at least, that it cannot affect the defendant, as no notice of the application to make such amendment had been given to him; secondly, that the amended *order must be considered as speaking [*239 from the date of its amendment, and not from its original date; thirdly, that the order, even as amended, does not follow the power given by the act of parliament, inasmuch as it does not adjudicate that the substituted debt had been proved under the fiat before the application which resulted in such substitution.

I cannot agree in the remark that there is any hardship in the provision of the statute, which empowers a good debt to be substituted for that of the creditor upon whose petition the fiat originally issued, but which has been found insufficient to support it; on the contrary, the provision appears to me to be both remedial and extremely beneficial, by putting an end to great expense in useless proceedings at law which formerly ensued from the absence of such a power. The object of the enactment is, that where a fiat has issued upon a debt which is afterwards found to be insufficient, the fiat shall not wholly fail upon that account, but that another debt shall be substituted which shall be sufficient to support the fiat; and this is to be done, under the proper and just restriction, that such substituted debt shall not have been incurred prior to that of the petitioning creditor; thereby preventing the fiat from having a greater reach than it would originally have had.(a)

*With regard to the want of notice of the application to the Court [*240 of Review to amend the order, I am not aware that any necessity existed for giving such notice. Indeed, it is not easy to see to whom such a notice ought to be given. Is notice to be given to the whole body of debtors to the estate? or to all against whom actions may be pending? There might be a case, undoubtedly, in which it would be unjust to make such an order behind the back of a defendant in a pending action; as where the defence was founded upon the insufficiency of the petitioning-creditor's debt; for, in the absence of such notice, the defendant might be taken by surprise and thrown out of his line of defence. In that case notice would

(a) By the French Code de Commerce, as amended by the law of the 28th of May, 1838, the inception of the bankruptcy (*faillite*) may be carried back by a judgment of the commissioner (*juge commissaire*) on the application of any party interested, such application being open to opposition on the part of the bankrupt (*le failli*) within a week, and on the part of any other person interested, within a month, after the application has been affixed and published in the newspapers.—Articles 442 and 580. But no such application can be made after the expiration of the time allowed for the proof of debts.—Article 581. From this, as well as from other decisions of the commissioner, an appeal is given, the period for bringing which (in ordinary cases fifteen days) varies according to the distance of the domicile of the appellant from the place at which the judgment is pronounced, one additional day being allowed for every five myriameters (31 miles and 120 yards) in distance. Art. 582.

The same varying scale is adopted in the Code de Commerce pour les Etats de S. M le roi de Sardaigne of 30th December, 1842.

be just, if not necessary; and probably some order would be made to prevent parties who had proceeded without giving notice, from recovering full costs of suit. The order in *Ex parte Hale* may have been framed with reference to some such state of facts. Here, no such circumstances are suggested.

The second objection relates to the time from which the amended order is to take effect. I think that upon the principle upon which every amendment is allowed in legal proceedings, from the commencement to the end of the suit, it must be taken to be made *nunc pro tunc*, and that the order, as amended, must be read as though it had originally been drawn up in the state in which it appears. The amendment is confined to the recital, and must have been introduced to supply a misprision of the officer in drawing up the original order; and that, in a particular which must have been known *241] to the *defendant, whose situation could in no way be changed by the amendment. The supposed hardship upon the defendant might be urged in every case of amendment. It frequently happens that defendants go down to trial in the hope of tripping up plaintiffs upon slight variances.

But the third objection, namely, that the order, even in its amended state, does not show that the substituted debt had been proved, under the fiat, before the application was made for its substitution, I am afraid must prevail; though, I own, I have anxiously endeavoured to extract from the order a declaration to that effect. It is certainly stated in the petition, as recited in the order; but that is merely the allegation of the petitioners. It is necessary that the precise fact should appear to have been adjudicated by the Court of Review; but there is no finding or adjudication upon the subject. The court has thought it necessary expressly to adjudicate that the petitioning creditor's debt was insufficient, and that the substituted debt was incurred not anterior to such petitioning creditor's debt; and the fact of these two matters having been adjudicated upon in precise terms, strengthens the objection arising from the omission of the third. I fear, therefore, that we should trench upon the authority of *Christie* v. *Unwin*, if we were to hold this order sufficient. But as the objection is *inter extremos apices juris*, I cannot, as I before stated, consent that a nonsuit should be entered. The case should go down to a new trial upon payment of costs by the plaintiffs.

Coltman, J. I admit the validity of the last objection with extreme reluctance. It seems to me that this objection lies in a very narrow compass. *242] The order contains no allegation to satisfy us as to the time at *which the debt was proved. It does not say that the *said* debt was proved. Consistently with all that appears upon the face of the order, the debt of the petitioners may have been proved immediately before the order was made.

Erskine, J. I am of the same opinion. I think the order must clearly be taken to speak from the time of its original date, and not from the time of the amendment; upon the principle which governs all cases in which an amendment is made. In substance and in effect, the original and the amended order are one and the same order. The only alteration is, the insertion of that which the officer should have inserted originally. I see neither injustice nor hardship in holding this, as the original order was made before the action was commenced. If the object had been *after action brought* to substitute a new debt for that of the petitioning creditor, there might have been some ground for opposing the alteration at the time, or for now taking an objection upon the want of notice; but that is not the case;

for the order expressly provides, as is usual, that it shall not prejudice any action pending under the fiat.

As to the form of the order, it seems to me that it does not sufficiently appear upon the face of it, that the substituted debt had been proved at the time the petition was presented. It is so stated in the *petition*, as recited; but that statement is not adopted by the court in the mandatory part of the order. It might be, that the debt of the petitioners, though proved at the time when the order was made, had not been proved, as the statute requires, when their petition was presented. For this reason I think the order is invalid. I concur, however, in thinking that this is not an objection upon which the plaintiffs should be nonsuited, but that there should be *a new trial on payment by them of the costs of the last trial.(*a*) [*243

Rule absolute for a new trial on payment by the plaintiffs of the costs of the last trial, before the last day of next term.(*b*)

(*a*) Cresswell, J., having been counsel in the cause, declined giving any opinion.

(*b*) The objection was one of a most formal character. If, however, the order was bad, *ex quâcunque causâ*, it would seem that the defendant was entitled at the trial to a verdict upon the second issue,—that issue being taken in connection with the notice to dispute,—unless the plaintiffs elected to be nonsuited.

NORMAN v. CLIMENSON, BROWN, and TIFFIN.

To an action of trespass, by A. against B., C., and D., the three defendants pleaded jointly, and appeared by the same attorney and counsel. A. recovered a verdict against B. and C. on all the issues; and D. had a verdict against A. on all the issues. *Held*, that, in the absence of special circumstances, D., the successful defendant, was entitled to a third part of the costs of the joint defence; and that such third part might be set off against, and deducted from, the costs of A. against the other two defendants.

THIS was an action of trespass. The writ of summons was served on each of the three defendants, and a joint appearance was entered for them pursuant to the statute. The three defendants pleaded jointly by the same attorney, and the same counsel appeared for them at the trial. A verdict was obtained by the plaintiff against Climenson and Brown, and by Tiffin against the plaintiff, upon the whole of the issues. On the taxation of costs, the attorney for the defendants claimed to have one-third of the general costs of the defence deducted from the costs to be allowed to the plaintiff; but the master refused to make such deduction, and only disallowed out of the plaintiff's costs, those costs which exclusively referred to Tiffin, as the service of the writ of summons upon him, &c.

Bompas, Serjt., on a former day in this term, obtained a rule nisi for the master to review his taxation upon *an affidavit of the defendants' attorney, who stated that he had been employed by the defendants separately to defend the action, and that Tiffin, as well as the others, was liable to him for the costs of the defence. He cited *George* v. *Elston*, 1 New Cases, 513, 1 Scott, 518, and *Griffiths* v. *Jones*, 5 Tyrwh. 1092, 2 Cr. M. & R. 333. [*244

Channell, Serjt., now showed cause. This is not a case in which some issues have been found for the plaintiff, and some for the defendants, in which case the master, pursuant to the rule of H. T. 2 W. 4, r. 74, would have been bound to deduct the costs of the issues found for the defendants from the plaintiff's costs. Neither is this an application to allow the costs of the defendant Tiffin; for the rule seeks to have a certain amount of costs deducted from the plaintiff's costs, in favour of all the defendants. [TINDA.

C. J. By the thirty-second section of the 3 & 4 W. 4, c. 42, "where several persons shall be made defendants in any personal action, and any one or more of them shall have a *nolle prosequi* entered as to him or them, or, upon the trial of such action, shall have a verdict pass for him or them, every such person shall have judgment for and recover his reasonable costs, unless, in the case of a trial, the judge before whom such cause shall be tried, shall certify upon the record under his hand, that there was a reasonable cause for making such person a defendant in such action."] There is no doubt that Tiffin may recover costs from the plaintiff. But no foundation has been laid for the application to review the taxation of the costs to which the plaintiff is entitled from the two other defendants; for, in order to obtain leave to set-off Tiffin's costs against the plaintiff's, some special circumstances should have been shown; as in *George* v. *Elston*, where it was alleged that the plaintiff
*245] was *insolvent, and unable to pay the costs of the successful defendant. [Tindal, C. J. I cannot see what objection there can be to the course proposed, except on the part of Tiffin, who might not like to have the costs to which he is entitled swallowed up by their being deducted from those of the plaintiff against the other defendants.] Here, the defendants pleaded jointly, and appeared by the same attorney and counsel. In *Hughes* v. *Chitty*, 2 M. & S. 172, where, on a joint plea of not guilty to trespass and assault, one defendant was found guilty, with 1*s*. damages, and 1*s*. costs, and the other was acquitted, it was held that the latter was only entitled to 40*s*. costs; Le Blanc, J., and Dampier, J., observing, "that if the defendants had pleaded separately, it might have been different, but, as they had pleaded jointly, it would be making the plaintiff pay the costs of the other defendant, to allow increased costs to this defendant." Undoubtedly since then the rule has been laid down in *Gambrell* v. *Earl Falmouth*, 5 A. & E. 403, 6 N. & M. 859, that a successful defendant is *primâ facie* entitled to his separate costs, and to his proportion of the joint costs. There it was said by Lord Denman, C. J., "We have considered the matter, and think ourselves bound by the rule laid down by Mr. Baron Bayley in *Griffiths* v. *Kynaston*, 2 Tyrwh. 760, and afterwards confirmed in *Griffiths* v. *Jones*, 5 Tyrwh. 1092, 2 Cr. M. & R. 333, 4 Dowl. P. C. 159, viz. that the successful defendant is to be allowed all his separate costs, and, *primâ facie*, an aliquot part of the joint costs, unless the master is satisfied that some smaller proportion should be allowed, by reason of any other special circumstances." Here, the special circumstances, on which the master seems to have decided, are, that the defendants had but one attorney and one coun-
*246] sel. In *Gambrell* v. *Earl Falmouth*, there were separate *attorneys and separate counsel. Here, the claim to deduct one-third of the costs is made, not for Tiffin, but for the three defendants jointly. The two successful defendants would have been put to the same expense for the briefs, witnesses, &c., supposing Tiffin had not been included in the action. [Cresswell, J. In case Tiffin had been the only defendant, the expense of the defence would have been the same, and the plaintiff would have had to pay the whole. You must look at it in both ways.]

Tindal, C. J. It seems to me that the correct rule is laid down by the court of Queen's Bench in *Gambrell* v. *Earl Falmouth*. Let it therefore be referred to the master to see if there are any special circumstances in this case to take it out of that rule; for if not, then Tiffin will be entitled to a deduction of one-third of the costs of the joint defence.

The rest of the court concurred. Rule absolute accordingly.

Bompas, Serjt., who was to have supported the rule, referred also to *Starling* v. *Cozens*, 5 Tyrwh. 823, 2 C. M. & R. 445, 3 Dowl. P. C. 782; *Starving* v. *Cousins*, 1 Gale, Exch. 159; *Lees* v. *Reffitt*, 3 A. & E. 797; *Lees* v. *Kendall*, 5 N. & M. 340; and *Bartholomew* v. *Stephens*, 5 M. & W. 386.

*PRYME v. BROWNE. [*247

Upon an application to set aside a certificate for costs granted by the sheriff under the 3 & 4 Vict., c. 24, s. 2, on the ground that he at first refused to grant it, and afterwards gave it, out of deference to the wishes of others, the court will require the facts to be proved beyond all doubt.

The proper course in such a case seems to be, for the party making the application to ascertain what occurred, from the sheriff himself.

THIS was an action for a libel published in The Cambridge Chronicle. The defendant having suffered judgment by default, a writ of inquiry was executed before the undersheriff of Middlesex, when the jury assessed the damages at a farthing. The undersheriff having certified that the "grievance in respect of which the action was brought was wilful and malicious," under the 3 & 4 Vict., c. 24, s. 2, in order to give the plaintiff his costs, the same were taxed and paid by the defendant under protest.

Channell, Serjt., on a former day in this term, obtained a rule calling on the plaintiff to show cause why the certificate, the taxation of costs, and the allocatur should not be set aside, and why the costs paid should not be repaid to the defendant, or to his attorney. The affidavits, on which the motion was grounded, stated, that on the verdict being returned, the plaintiff's counsel applied to the undersheriff to certify; when, after hearing the defendant's counsel, the undersheriff refused the application, and the defendant's counsel endorsed his brief accordingly, and was in the act of leaving the court, when the plaintiff's counsel appealed to the undersheriff to alter his decision, suggesting that the jury, in finding the verdict they did, were evidently influenced by the belief that such verdict would carry costs; that the undersheriff immediately, and without reference to the defendant's counsel, turned to the jury and asked them if such had been their impression; that one of the jury replying in the affirmative, the undersheriff observed *that he was desirous of carrying out their view, and should therefore certify. [*248

Bompas, Serjt., now showed cause upon affidavits, which stated that the certificate was granted within two or three minutes after the verdict was pronounced, some discussion having taken place as to whether or not the undersheriff had *power* to certify; that the undersheriff never did, in fact, *refuse* to certify, or appeal to the jury, as suggested in the affidavits on the other side; though it was admitted that the jury had intimated their understanding and intention that the verdict they gave should carry costs; and that the defendant had since been informed by the undersheriff that he did not at any time refuse to certify.

Channell, Serjt., in support of the rule, submitted that the affidavits on the part of the defendant were not answered, as the counter-affidavits contained no distinct denial that the undersheriff had altered his decision in consequence of what fell from the jury.

TINDAL, C. J. Upon the affidavits the case is left in some degree of uncertainty, whereas, considering the nature of the application, the facts should have been placed beyond all doubt. The defendant, when about to make

the present motion, should have applied to the undersheriff, and ascertained from him distinctly whether he had ever refused to grant the certificate. As the case now stands, I do not think that we ought to interfere.

COLTMAN, J. The granting of the certificate was a matter entirely in the discretion of the undersheriff; and very strong evidence should be given before we set it aside.

*249] *ERSKINE, J. The ground on which the rule was granted was, that the undersheriff had exercised his own discretion, not in granting, but in refusing the certificate; and that he subsequently granted it only out of deference to the wishes of other parties. If that had been so, the court would have set the certificate aside, on the ground that he had not exercised his own judgment. But, according to the affidavits on the part of the plaintiff, the hesitation of the undersheriff proceeded, not from any doubt as to whether the certificate ought to be granted, but as to whether he had the power to give it. I think that a sufficient ground has not been laid for the court to interfere with the discretion of the presiding judge.

CRESSWELL, J., concurred. Rule discharged, with costs.

WILSON v. NISBETT.

Where upon a writ of trial the issue is delivered with blanks for the teste and return of the writ of trial, and the defendant retains it without making any objection, he cannot afterwards complain of the omission, even supposing the blanks in the issue to amount to an irregularity.

A notice of trial by continuance before the sheriff, need not specify the place or hour, as it will be taken to refer to the place and hour mentioned in the original notice.

ASSUMPSIT, against the defendant, as the acceptor of a bill of exchange for 12*l*. 12*s*., and on an account stated.

The defendant denied his acceptance of the bill of exchange; and, to the second count, pleaded non assumpsit; whereupon issue was joined.

*250] The plaintiff's attorney having obtained an order to try the cause before the sheriff of Middlesex, on the 7th *of April, 1842, delivered the issue in the form prescribed by the rules of H. T. 4 W. 4, the teste and return of the writ of trial being left in blank, as follows:—

'And forasmuch as the sum sought to be recovered in this suit, and endorsed on the said writ of summons, does not exceed 20*l*., hereupon on the day of , 1842, pursuant to the statute in that case made and provided, the sheriff is commanded that he summon twelve, &c., and who neither, &c., who shall be sworn truly to try the issues above joined between the parties aforesaid, and that he proceed to try such issues accordingly; and when the same shall have been tried, that he make known to the court here what shall have been done by virtue of the writ of our lady the queen to him in that behalf directed, with the finding of the jury thereon endorsed, on the day of April," &c.

The following notice of trial, bearing date on the 7th of April, 1842, was endorsed on the issue:

"Take notice that the issue joined in this cause will be tried on Tuesday, the 19th day of April, instant, at eleven o'clock in the forenoon, before the sheriff of Middlesex, at the sheriff's office, No. 24, Red Lion Square, in the said county of Middlesex, pursuant to the statute in such case made and provided."

On the 16th of April the defendant's attorney was served with this further notice:

"I do hereby continue the notice of trial in this cause to Thursday next, the 21st day of April, instant."

The defendant's attorney, considering this notice as insufficient, did not appear at the trial, and the plaintiff had a verdict for the amount of the bill of exchange mentioned in the declaration.

Bompas, Serjt., on a former day in this term, obtained a rule calling on the plaintiff to show cause why the issue, and all subsequent proceedings, should not be set *aside with costs, for irregularity. He contended that the omission of the date of the teste and return of the writ of trial in the copy of the issue delivered, was a variance from the writ of trial; and also that the notice of trial by continuance was a nullity, from not stating the place and hour at which the cause was to be tried. [*251

Talfourd, Serjt., now showed cause. With respect to the first objection, the issue was perfectly regular. The issue is always delivered in blank; nor can it be delivered otherwise; as the practice is, not to sue out the writ of trial until two or three days before the trial takes place; consequently the blanks cannot be filled up at the time when it is necessary to deliver the issue. Moreover, if there was any irregularity, it has been waived by retaining the issue. If the defendant meant to object to it, he should at once have returned it, and not have left the plaintiff to infer that it had been treated as valid.

TINDAL, C. J. The plaintiff might have given the defendant notice of trial after the delivery of the issue. The latter could not be injured by the delivery of the issue in blank, for he must have notice of trial of a precise date. Then what do you say to the other answer which has been given? If the defendant objected to the issue, should he not have returned it?

Bompas, Serjt. In *Lycett* v. *Tenant*, 4 New Ca. 168, 5 Scott, 479, the omission of the date of the writ of summons in the issue delivered, was held to be an irregularity, and the writ of trial was set aside with costs. So, in *Ward* v. *Peel*, 1 M. & W. 743, an issue which did not follow the form given by the rule of court, was set aside as irregular. It cannot be said *when the courts give a form, as they necessarily must, with blanks for the dates, that a plaintiff is not to fill them up. Here, if the plaintiff had delivered the issue incorrectly, he might have given the notice of trial at the regular time, and have filled up the blanks in the issue. [*252

TINDAL, C. J. The case last cited is very different from the present. There, it was a trial before a judge; here, it is before the sheriff. The defendant received this issue and retained it, without making any objection. Ought we to interfere in such a case?

Talfourd, Serjt. With respect to the objection to the notice of trial by continuance, no such notice was necessary. The practice is the same as to cases before the sheriff as at the sittings in Middlesex and London. [TINDAL, C. J. The cases are not exactly parallel. In the country, sheriffs do not sit at regular periods.] At any rate, it cannot be doubted that the notice by continuance imbodied, by reference, the place mentioned in the original notice of trial. But further, if the notice was irregular, it should have been objected to and returned at the time.

Bompas, Serjt. The cause not having been tried pursuant to the original notice of trial, the defendant was entitled to a second eight days' notice of trial, which should have contained the same particulars, as to the place and hour, as were given in the former notice. The defendant could not assume that the trial would take place at the same hour. It is well known that the

times of sitting in sheriffs' courts vary throughout the country. [ERSKINE, J. A form of a notice of trial by continuance upon a writ of inquiry, is given in Chitty's Forms, 339, 5th ed., which specifies the time.] That shows that this notice is irregular.

*253] *COLTMAN, J. In *Jones* v. *Chune*, 1 B. & P. 363, a motion to set aside a writ of inquiry, on the ground that the notice of continuance made no mention of the hour or place at which the writ of inquiry would be executed, was discharged with costs. EYRE, C. J., there said, "I think that if an original notice be given, specifying the hour and place as well as the day, and that notice be afterwards continued with an alteration of the day only, the latter will refer to the former, and incorporate the hour and place; and that it would be an irregularity in the plaintiff to execute his writ of inquiry at any other hour or place than those mentioned in the original notice."

Bompas, Serjt., admitting that he could not contend against the authority of that case—the rule was Discharged with costs.

CHARLES WYNNE *v.* JULIUS WYNNE and SARAH his WIFE.

A rent-charge is devised to B., the wife of A., not saying for her separate use. In replevin an avowry is made in the names of A. and B. for arrears of the rent-charge; and issue being joined upon the title to such rent-charge, the cause and all matters in relation to the rent-charge are referred to D., who awards that the arrears of the rent-charge, including as well those due when the action was brought, as arrears which accrued between the bringing of the action and the date of the reference, shall be paid to B. This is not an excess of authority, either by reason of the arrears accruing subsequently to the action being included in the sum awarded, or by reason of the payment being directed to be made to B. only.

The plaintiff having refused to pay the arrears to the wife, on the ground that the money had been demanded by and paid to the husband, the court made absolute a rule for an attachment against him.

REPLEVIN. The defendants, in right of the defendant Sarah, avowed in respect of an annuity or rent-charge of 20*l.* given and bequeathed by the
*254] will of one Robert Watkin Wynne out of the mansion in which, &c., *"to the said Sarah the wife of the said Julius, during her life, or so long as her conduct and behaviour should be discreet, and meet with the approbation of the testator's wife, or which, in case of her death, should be approved of by the survivors or survivor of his said trustees;" alleging a compliance with the condition,(*a*) and avowing the taking of the goods, as a distress for 50*l.*, being arrears of the annuity for two years and a half, ending the 2d of March, 1839.

Pleas in bar: first, that after the death of the testator and before the accruing due of the arrears, the conduct and behaviour of the said Sarah was not discreet, but on the contrary thereof, on the 2d of March, 1816, and from thence, &c., she the said Sarah was living in open, avowed, and notorious adultery, and in a state of polygamy with one J. R. Hutton, &c. Verification.

Secondly, that after the death of the testator and his wife, and before the accruing due of the said arrears, the conduct and behaviour of the said Sarah was not discreet, nor was the same approved of by the surviving trustee; and that before the taking of the distress, the surviving trustee disapproved of the conduct of the said Sarah; whereby the annuity wholly ceased; concluding to the country.

Replication to the first plea in bar,—that after the marriage of the said

(*a*) See the avowry at length, antè, vol. ii. p. 10.

Sarah with the said Julius, and more than seven years before the said Sarah committed any adultery with the said J. R. Hutton, &c., and more than seven years before the said Sarah was married to the said J. R. Hutton, the said Julius absented himself from the said Sarah for the space of ten years and upwards; and until the time of the marriage of the said Sarah with the said J. R. Hutton, and from thence continually until the accruing due of the said arrears, and at the time of the said intermarriage of the said Sarah with the *said J. R. Hutton, the said Sarah had no knowledge of the said Julius being alive. To the second plea in bar the similiter was added. [*255

Demurrer to the replication to the first plea in bar; and joinder.

Upon the cause coming on for trial at the last spring assizes for the county of Denbigh, a verdict was entered for the plaintiff under a rule of court, and the *cause*, and *all matters in relation to the annuity in question in the cause*, were referred to a barrister; the costs of the cause to abide the event and determination of the award, and the costs of the reference to be in the discretion of the arbitrator. On the case being heard before the arbitrator, the defendants, in support of the affirmative of the issue as to the discreetness of the conduct and behaviour of Sarah Wynne, offered in evidence a certificate bearing date the 9th of January, 1822, and purporting to be signed by Colonel Wynne and another, the surviving trustees of the will of Robert Watkin Wynne. An objection was taken to this certificate, on the ground that Colonel Wynne himself might have been called. The arbitrator refused to receive it, and also rejected a subsequent certificate, likewise signed by Colonel Wynne, and dated the 6th of July, 1838, which was tendered on the part of the plaintiff to show that, at that time, Colonel Wynne, who had then become the only surviving trustee, disapproved of the conduct and behaviour of Sarah Wynne; the arbitrator remarking that the defendants had failed to prove the issue. It appeared by a decree in equity, dated the 23d of December, 1816, given in evidence by the defendants, that the will of Robert Watkin Wynne was thereby ordered to be established, and the trusts thereof directed to be carried into execution; that by an order of the 5th of March, 1826, the receiver appointed in the equity suit was ordered to pay to Sarah Wynne the sum of 196*l.* in satisfaction of the then arrears of the annuity to the 2d of March, 1826; and that the *receiver was also directed out of the rents and profits of the devised estates, from time to time, to pay the annuity of 20*l.* to Sarah Wynne *for her sole and separate use* during her life, or until the further order of the court, by half yearly payments; that in pursuance of that order the sum of 196*l.* was paid to Sarah Wynne, and that the growing payments of the annuity continued to be regularly paid by the receiver to Sarah Wynne, and into her own hands, from the 15th of March, 1826, until the 2d of September, 1836; that John Wynne, the tenant for life of the estates charged with the annuity, died on the 19th of December, 1836, whereupon the plaintiff became, under and by virtue of the will of Robert Watkin Wynne, tenant for life of the estates; and that ever since he so came into possession of the estates so charged, he had refused to pay the annuity to Sarah Wynne. [*256

On the 14th of May last the arbitrator made his award in the following terms: "I do award and declare that the plaintiff had not at the time of the commencement of the said action any cause of action against the defendants in respect of the matters so to me referred as aforesaid; and I do further award and direct that, instead of the verdict so found for the plaintiff, a verdict in the said action be entered for the defendants. And I d

further award and direct that on the issue in law joined between the parties to the said action, judgment be entered for the defendants: and I do further award, order, and direct that the plaintiff forthwith shall and do pay *unto the defendant*, Sarah, the wife of the defendant Julius Wynne, the sum of 50*l*., as and for the arrears due on and up to the 2d of March, 1839, of the annuity or yearly rent-charge of 20*l*. mentioned in the avowry of the defendants in the said action, and also the further sum of 40*l*., being the arrears of the said annuity or yearly rent-charge of 20*l*. from the 2d of March, *257] 1839, unto the 2d of March now last past: and lastly, I do *award, order, and direct, that each of the said parties shall and do bear and pay his and their own costs of this reference, and one moiety of the costs of this my award."

Channell, Serjt., now moved on the part of the plaintiff to set aside the award. In the first place, the plaintiff was misled by the declaration of the arbitrator that the defendants had failed in establishing the issue which it lay upon them to prove. But for the arbitrator's remark, the plaintiff would have called evidence to show that Colonel Wynne, the surviving trustee, had disapproved of the conduct and behaviour of the defendant, Sarah. [Erskine, J. Is it sworn in your affidavits that the plaintiff would have called Colonel Wynne, if it had not been for the observation of the arbitrator?] It is not so stated in precise terms. [Maule, J. The case seems to have been left very bare by both parties. It is not improbable that the arbitrator may have been influenced by the presumption arising from the fact of the annuity being paid for so many years.]

A second objection is, that the arbitrator had no authority to direct payment of any arrears which accrued between the time of the distress and the order of reference on the 27th of March, 1841. It is clear that by the order of court, all that was referred to the arbitrator was, the cause, and all matters in relation to the annuity in question *in the cause*, and that no authority was given to him over the annuity generally. [Tindal, C. J. The part of the order to which you allude, is merely matter of description; the parties evidently meant to refer something more than the cause.]

Thirdly, the cause is left undetermined; for the arbitrator, instead of awarding payment of the arrears of the annuity to the two defendants, has directed them to be paid to *the defendant*, Sarah Wynne. The will of *258] Robert Watkin Wynne does not give the annuity to her for her *sole and separate use. The claim for the return of the goods replevied is made by the two defendants, and, consequently, the plaintiff cannot with safety pay the 50*l*. to the wife. [Maule, J. Although both the husband and wife are parties, the arbitrator has considered that the proper hand to receive the money is the wife's.]

Tindal, C. J. Suppose the case of a husband being abroad—would an award be bad which directed a payment to be made to his wife? We cannot but remember what passed upon a previous occasion.(*a*) It is evident that the husband has been acting in collusion with the plaintiff, in order to deprive his wife of this annuity; for it was not until he received an indemnity that he would permit his name to be used in this suit. The award of the arbitrator, that the money should be paid to the wife, was in accordance with the arrangement then come to between the parties. No authority has been cited that an award is bad for directing the payment to be made to the wife, and I see, therefore, no ground for setting aside this award.

The rest of the court concurred. Rule refused.

(*a*) Antè, vol. ii. p. 10.

On the 3d of July, 1841, judgment was signed for the 50*l.* and costs, and on the 7th the amount of the costs, 131*l.*, was tendered to the attorneys of Sarah Wynne, and at the same time a receipt of Julius Wynne for 90*l.* was produced, acknowledging that the two sums of 50*l.* and 40*l.* mentioned in the award had been paid to him. The attorneys refused to receive the costs *without the sums awarded, and at length levied the 50*l.* and costs under a fi. fa. [*259

Sir *T. Wilde*, Serjt., in Hilary term last, obtained a rule nisi for an attachment against the plaintiff for non-payment of the 40*l.* to Sarah Wynne, pursuant to the award.

Channell, Serjt., now showed cause upon affidavits, which stated that the 40*l.*, together with the 50*l.*, had been demanded by Julius Wynne, the husband, and had been paid to him by the plaintiff.

Although the plaintiff might have been discharged by payment to the wife, he is not liable to an attachment for having paid it to the husband. [TINDAL, C. J. If he had paid the wife pursuant to the award, how could he have damnified himself? The payment to the husband was clearly collusive. CRESSWELL, J. All the parties entered into a rule of court; and, among others, the husband bound himself to abide the decision of the arbitrator. Can he get rid of the award? And, if not, how can the plaintiff?] All that the husband consented to, was, that the wife should try the question as to her right to the annuity, but not that she should receive it. CRESSWELL, J. That question was decided by the award.] The objection is open to the plaintiff in resisting the attachment, for it appears on the face of the award.

Sir *T. Wilde*, Serjt., *contrà*, was stopped by the court.

TINDAL, C. J. The ground taken by the plaintiff is, that the husband permitted the wife to try her right to the annuity out of the funds of her friends, and yet, on the money being recovered, it is not to be paid to her. If the plaintiff has got himself into a difficulty, it is of his own creating. This is not a point of strict law, but is *rather an application to the equitable jurisdiction of the court. The question is, what was intended by the proceedings which have taken place. It was evidently meant that the wife should enjoy the fruits of the action; and the plaintiff must have known that such was the intention of the court. The plaintiff never would have paid this money to the husband but from a determination to prefer him to the claims of his wife. The attachment must therefore go. [*260

The rest of the court concurred. Rule absolute.

MILLER v. THOMSON.

In an action on a promissory note, the defendant having pleaded fraud, the plaintiff brought up a witness to disprove the fraud, but the defendant failing to make out a *primâ facie* case of fraud, the witness was not called: *Held*, that the plaintiff was entitled to the expenses of such witness.

No costs will be allowed upon a rule made absolute to review the master's taxation.

SIR *Thomas Wilde*, Serjt., had obtained a rule nisi for the master to review his taxation in this case. It was an action by the endorsee against the maker of a promissory note payable to the order of one Francis. The defendant pleaded (*inter alia*) that the note was obtained from him by the fraud of Francis and others; to which the plaintiff replied *de injuriâ*. Francis had been brought up by *habeas corpus* from Somersetshire, as a witness at the trial on the part of the plaintiff, for the purpose of disproving fraud; but he was not called, as the plaintiff made out a *primâ*

facie case on the bill, and obtained a verdict on the issue of fraud, the defendant not supporting his plea. The master had disallowed the expenses of Francis's attendance at the trial.

*261] *Channell, Serjt., showed cause.

Sir *T. Wilde*, Serjt., was heard in support of the rule.

TINDAL, C. J. The object of bringing up the witness was, not to make out a *primâ facie* case for the plaintiff, but to repel the case of fraud which *might* be set up by the defendant; but as no *primâ facie* case of fraud was made out, it became unnecessary to call the witness. I think the plaintiff, therefore, ought to be allowed the expenses of the witness, and the rule must be made absolute; but, as the master is, as to these matters, in the place of a judge, there will be no costs.

Per curiam. Rule absolute without costs.(*a*)

(*a*) In a note to the report of this case upon the motion to enter a nonsuit, *antè*, Vol. III. 579 (*b*), it is said that it was *formerly* essential to the validity of a bill of exchange that it should be payable in a different place from that in which it is drawn. It may be added, that this is still the law in most, if not all, of the continental states.

Thus by the *French Code de Commerce* of 1807, Art. 110, "La lettre de change est tirée d'un lieu sur un autre."

But what shall be a sufficient distance to constitute "un *autre* lieu," it is left to the discretion of the tribunals. Bravard, Manuel de Droit Commercial, No. 74.

The Spanish Commercial Code (Código del Comercio) of 1829, Art. 429, prohibits the drawing of bills of exchange payable in the place in which they are drawn (*en el mismo pueblo de su fecha*), and directs that such instruments shall be treated merely as promissory notes from the drawer to the payee, and that the acceptance shall operate only as an ordinary undertaking or suretiship (*afianzamiento ordinario*), to guaranty the solvency of the drawer.

The Dutch Commercial Code (Wetboek van Koophandel) of 1836.—Art. 210, &c., allows such instruments to be transferable by endorsement, not, however, as bills of exchange, but as assignments (*assignatien*).

The Code de Commerce pour les Etats de S. M. le Roi de Sardaigne, promulgated on the 30th of December, 1842, Art. 119, defines a bill of exchange in the same terms as the French Code. As is done here, it divides bills of exchange into two classes—those drawn from one place upon another within the kingdom, and those drawn from or upon foreign places.

*262] *NEEDHAM *v.* BRISTOWE.

"A. B. of the Fleet prison in the parish of St. B. in the city of L.," is a sufficient description of the plaintiff in the endorsement on a capias issued by him in person.

A rule nisi to set aside a judge's order—for arresting the defendant, to set aside the capias for irregularity, and to cancel the bail-bond,—may be made absolute, as to cancelling the bail-bond, under the 1 & 2 Vict. c. 110, s. 6, although no grounds be laid before the court for setting aside the order, and although there be no irregularity in the capias.

On a motion to set aside the judge's order, the affidavits on which such order was obtained should be before the court.

Semble, that the proper mode to bring the affidavits before the court, is to give notice to the judge's clerk that they are required. Per Coltman, J.

Shee, Serjt., on a former day in this term, 18th of April, had obtained a rule nisi, why an order in this cause made by Lord DENMAN, C. J., at chambers, dated the 15th of March, for holding the defendant to bail, should not be set aside; why the writ of capias, issued in pursuance of the same, should not be set aside for irregularity; and why the bail-bond should not be given up to be cancelled; and why the plaintiff should not pay the costs.

The learned serjeant stated, upon obtaining the rule, that the case had been at chambers before WIGHTMAN, J., who had referred it to the court. The facts were as follows:—Bristowe, the defendant, was the sole trustee

of the marriage-settlement of Needham, the plaintiff, (his brother-in-law;) and had advanced him the trust-money without security. In order to recover it, Bristowe had brought an action against Needham, which action was tried before Lord ABINGER, C. B., at the sittings after last Hilary term, when Bristowe recovered a verdict for 22,350*l.* Bristowe being indebted to Needham in 750*l.* for money lent, proposed, at the trial, to deduct this sum from the amount recovered in the action; but Lord ABINGER thought that the verdict ought to be taken for the whole amount, and that Bristowe might enter a remittitur for the 750*l.* Needham, *however, was taken in execution for the whole amount, and was committed to the Fleet prison. In November last, Needham obtained a judge's order to hold Bristowe to bail for the 750*l.*, on the ground that he was about to leave England; which order was set aside at chambers on the 25th of November. In March last, (after the trial of the action,) Needham again obtained a judge's order to hold Bristowe to bail on the same ground; which order on the 11th of March was rescinded at chambers. On the 15th of March, Needham obtained a third order to hold Bristowe to bail as before. This was the one now sought to be set aside. Various letters were referred to, as having been before WIGHTMAN, J., at chambers; and it was distinctly sworn that Bristowe had no intention of leaving England. In the endorsement on the capias, which was issued by Needham in person, Needham described himself as "of the Fleet prison in the parish of St. Bride, in the city of London," which description was the irregularity complained of. [*263

Bompas, Serjt., and *Channell*, Serjt., now showed cause. There is no irregularity in the capias. It is necessary, in following the form of the endorsement given in the act,(*a*) that the residence of the plaintiff should be stated, when the writ is issued by him in person, and that regulation has been complied with in this case; for, when a party is in prison, the prison is, to all intents and purposes, his residence. [TINDAL, C. J. The statement would certainly be sufficient in an affidavit; (*b*) and I think it is so in this case.]

Then there is nothing further to argue, as no other *irregularity in the proceedings is complained of, and it is not necessary to go into the merits. [CRESSWELL, J. Suppose nothing had been said about irregularity in the rule, it would have been competent to the other party to set aside the order upon the merits. Will the fact of his having inserted the word "irregularity" prevent his doing so? ERSKINE, J. Besides, the rule to set aside the order and cancel the bail-bond is not for irregularity.] There is still, however, a preliminary objection. The rule is drawn up—on reading the order and the affidavits upon which the rule nisi was obtained; but it is necessary that the court should also see the affidavits upon which that order was made, and these the defendant has not set out. In *Cooper* v. *Folkes*, antè, vol. i. 942, this court held, that on a motion to discharge a rule obtained for a distringas to compel an appearance, the affidavits on which such rule was granted must be brought before the court. [TINDAL, C. J. In that case were the affidavits in court?] That does not appear from the report; the rule had been drawn up, as in this case, upon reading the rule for the distringas, and the affidavits upon which the rule nisi to set it aside had been obtained; but the affidavits upon which the distringas was [*264

(*a*) 1 & 2 Vict. c. 110. Sched. When the writ is issued by the plaintiff in person, it is necessary to "mention the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such there be."

(*b*) And see 6 & 7 Vict. c. 18, sched. B. No. 3, 4, 6, 8, as to the notices and forms directed to be used with respect to lists of voters.

obtained must have been filed in the court. [TINDAL, C. J. It certainly does seem rather a strange thing to require a party to be at the expense of obtaining copies of the affidavits upon which a judge's order was obtained.] The affidavits in this case are at the judge's chambers, and the court has no means of ascertaining their contents. [TINDAL, C. J. (after referring to the master). They will be brought into court to-day. CRESSWELL, J. There may be this distinction,—that if a party seeks to show that a judge's order was improperly *made*, he must produce to the court the affidavits upon which it was obtained; but if he seeks to relieve himself from the *effects* of the order, he may admit
*265] that it *was properly made in the first instance. TINDAL, C. J. It may be, that the defendant seeks to set aside the order for something *ex post facto*. *Shee*, Serjt., stated that he had mentioned the affidavits to the court at the time he obtained the rule, and believed he had handed in office-copies; but he understood it was not the practice, in the master's office, on drawing up a rule, to notice office-copies of affidavits. TINDAL, C. J. It could not be drawn up on reading the original affidavits, as they are not in the custody of the party who obtains the rule. But although the defendant in this case may not be in a condition to set aside the order, he may be entitled to insist on his discharge under the sixth section of the imprisonment for debt act.(a) The proper form of the rule in that case would be, to call on the plaintiff to show cause, why the defendant should not be discharged out of custody, or why the bail-bond should not be delivered up to be cancelled; but we can decide that now.] The present rule has three objects; first, to set aside the order; secondly, to set aside the capias; and, thirdly, to cancel the bail-bond. The court has decided that the second of these cannot be entertained, as the capias is not irregular; if they now decide that the order cannot be gone into, there will be no ground for cancelling the bail-bond. [TINDAL, C. J. The latter point is still open to argument, under the sixth section of the act referred to, without impeaching the order.] The only authority the court has, under that section, is to discharge the defendant out of custody; but there is no such application in
*266] this case. [TINDAL, C. J. *I think the present rule may be made absolute as to cancelling the bail-bond.]

Shee, Serjt., applied for the costs.

TINDAL, C. J. I think the defendant is not entitled to the costs, as he has asked for too much. He is seeking to set aside the judge's order; and he has not brought before the court the materials upon which that can be done.

COLTMAN, J. It seems to me that the proper course in such a case would be, to give notice to the judge's clerk that the affidavits were required; and then he would send them into court.

Per curiam, (*Shee*, Serjt., consenting,

RULE absolute to deliver up the bail-bond to be cancelled; the costs to be costs in the cause.

(a) 1 & 2 Vict. c. 110, s. 6, enacts, "That it shall be lawful for any person arrested upon any such writ of capias, to apply at any time after such arrest, to a judge of one of the superior courts at Westminster, or to the court in which the action shall have been commenced, for an order or rule on the plaintiff in such action, to show cause, why the person arrested should not be discharged out of custody; and that it shall be lawful for such judge or court to make absolute or discharge such order or rule."

JONES v. ELDRIDGE.

An affidavit to ground a motion to set aside a writ of summons commanding C. E. (whose real name is C. D. E.) to answer A. B., was held to be properly entitled, "A. B. v. C D. E., sued as C. E."

Bompas, Serjt., had obtained a rule nisi to set aside the copy of the writ of summons in this case, and the service thereof, for irregularity, by reason of the omission of the memorandum at the foot of the copy, as to the time during which the writ might be served.

Channell, Serjt., now showed cause, and took a preliminary objection that the affidavit upon which the rule was obtained was wrongly entitled. The writ was addressed to *John Elridge;* and the affidavit was headed *Jones* v. *John Adams Eldridge*, sued as *John Elridge.* He contended the affidavit should have followed the writ, *and relied upon *Borthwick* v. *Ravenscroft*, 5 M. & W. 31, 7 Dowl. P. C. 393; where, in a [*267 motion to set aside a distringas, the affidavits entitled "*Borthwick* v. *Henry William Ravenscroft*, sued as *Henry Ravenscroft*," were held incorrect; as not being in conformity with the notice subscribed to the writ of distringas, which was entitled "Between *John Borthwick*, plaintiff, and *Henry Ravenscroft*, defendant." He also cited *Shrimpton* v. *Carter*, 3 Dowl. P. C. 648; where, in an action by *Geo. Shrimpton* v. *Wm. Carter*, an affidavit entitled *Geo. Shrimpton* v. *Wm. Carter, the Elder*, sued as *Wm. Carter*, was rejected as being improperly entitled,

Bompas, Serjt., in support of the rule, contended, that since the new rules, a defendant must appear in his right name, as he cannot plead misnomer in abatement. He relied upon *Finch* v. *Cocker*, 2 Dowl. P. C. 383, 2 C. & M. 412, S. C. nŏt S. P., 2 C. M. & R. 196, 3 Dowl. P. C. 678, where, a rule having been obtained for setting aside a bail-bond, on the ground of a variance in stating the defendant's name as *Cocker*, instead of *Cocken*. The affidavit on which the rule was obtained being entitled "*Finch* v. *Cocker*," it was insisted that it ought to have been entitled "*Finch* v. *Cocken*, sued by the name of *Cocker*," and the affidavit was held to be improperly entitled.

Tindal, C. J. I do not think that this affidavit is improperly entitled. The heading amounts, in effect, to the defendant's saying, "the plaintiff has sued me, *John Adams Eldridge*, by the name of *John Elridge*." The decisions that have been cited are contradictory; but I cannot distinguish this case from *Finch* v. *Cocker*, which has been relied on by my brother *Bompas*. *Borthwick* v. *Ravenscroft* certainly decides the contrary. *In this [*268 conflict of authority the best way appears to be to decide in conformity with the case which is most consistent with good sense; and that case, I think, is *Finch* v. *Cocker*.

The other judges concurring, and *Channell*, Serjt., not arguing the point as to irregularity—Rule absolute.(*a*)

(*a*) In *Swift* v. *Wright*, 7 Dowl. P. C. 863, it is said that, the defendant was described in the writ of summons as "Charles Wright," but in the distringas as "Charles James Jonathan Wright, sued as Charles Wright;" and that the latter process was held to be irregular, as varying from the writ of summons.

The same case is reported (nom. *Swift* v. *Knight*,) in 5 M. & W. 618, where it is said, that the defendant was described as "Charles Knight" in the *distringas*, and that he was described in the *writ of summons* and the plaintiff's affidavits, as "Charles James Jonathan Knight, sued as Charles Knight."

Upon inquiry at the rule office, it appears that, in the writ of summons, the plaintiff is described as "Charles Knight;" in the distringas as "Charles Jonathan Knight, sued as Charles Knight;" that the defendant's affidavits are entitled "Charles Jonathan Knight, sued as Charles Knight," and that the plaintiff's affidavits are entitled "Charles James Jonathan Knight," that being the true name.

*269] *JOHN BARTLETT, the Elder, v. JOHN BARTLETT, the Younger.

Same v. Symons.

Same v Lyne.

The assignee of a replevin-bond having brought actions severally against the principal and his two sureties, the court made a rule, that the proceedings in all the actions should be stayed upon payment of the rent due and costs; and that upon such payment not being made, the first action should be proceeded with, the defendants in the other two actions to be bound by the event of the first.

These were three actions upon one replevin-bond, brought by the assignee of the sheriff of Devon, against the principal, and each of the two sureties.

The distress was taken, and the replevin-bond executed, on the 18th of January last. On the 25th, a plaint was entered by Bartlett, the younger, in the county court; and on the 31st, an appearance was entered for Bartlett, the elder, as of the preceding 25th. Another court was held on the 22d of February, but negotiations being pending between the parties, no step was then taken by Bartlett, the younger. On the part of Bartlett, the elder, it was, however, insisted that there had been a default, and that the replevin-bond was forfeited; and on the 7th of March, he obtained an assignment thereof from the sheriff. The writs in the three actions thereon were issued on the 14th. On the 22d, a declaration in the replevin suit was filed, and a rule to avow given.

There was a dispute between the parties as to the amount of rent in arrear, but Bartlett, the younger, had tendered the sum which he alleged was actually due.

Appearances had been entered in the actions on the replevin-bond on the 30th of March.

A summons had been obtained before a judge at chambers to stay the proceedings in these actions without costs, or on payment of the costs in the first action only. This was heard before Maule, J., when a prelimi-
*270] nary objection was taken on behalf of the plaintiff in this *court, that the application was too late; as it was to set aside the proceedings for irregularity, and therefore fell within the thirty-third rule of H. 2. W. 4; and that the defendants, by entering appearances, had waived the irregularity. His lordship expressed an opinion that the application was not in the nature of an application on the ground of irregularity, and therefore not within the rule; but he decided he had no jurisdiction to entertain the question, except by consent, which was refused on behalf of the plaintiff.

Channell, Serjt., on a former day in this term, April 30th, upon affidavits of the above facts, had obtained a rule nisi to stay all proceedings in the three actions, on payment of the costs in the first mentioned action only, or upon such other terms as the court should direct. He referred to *Key* v. *Hill*, 2 B. & Ald. 598; 4 Ann. c. 16, s. 20, (*a*) R. G. H. 2 W. 4, r. 30, (*b*,) and 11 G. 2, c. 19, s. 23.(*c*)

(*a*) By which it is enacted, that "if the said bail-bond or assignment, or other security taken for bail be forfeited, the plaintiff in such action, after assignment made, may bring an action and suit thereupon in his own name; and the court where the action is brought may, by rule or rules of the same court, give such relief to the plaintiff and defendant in the original action, and to the bail, upon the said bond or other security taken from such bail, as is agreeable to justice and reason; and that such rule or rules of the said court shall have the nature and effect of a defeazance to such bail-bond or other security for bail."

(*b*) The effect of which is, that proceedings in several actions on the bail-bond may be stayed upon payment of costs in one action, unless sufficient reason be shown by the plaintiff why he should be allowed to proceed in more.

(*c*) By which it is enacted, that "if the bond so taken and assigned, be forfeited, the

Bompas, Serjt., now showed cause.

Channell, Serjt., was heard in reply. [*271

The court ultimately pronounced a rule, that all proceedings in the three actions should be stayed on payment of the rent and costs: otherwise, the rule to be discharged, and the plaintiff to proceed in one action, and the defendants in the other two actions to be bound by the event of that one.(a)

avowant, or person making cognizance, may bring an action and recover thereupon in his own name; and the court where such action shall be brought may, by a rule of the same court, give such relief to the parties upon such bond as may be agreeable to justice and reason; and such rule shall have the nature and effect of a defeazance to such bond."

(a) Upon application at the master's office it has been ascertained that the rule was never drawn up.

COTTAM and Another v. PARTRIDGE.

An open account between two tradesmen for goods sold by each to the other, without any agreement that the goods delivered on the one side shall be considered as payment for those delivered on the other, does not constitute such an "account as concerns the trade of merchandize between merchant and merchant" within the exception of the statute of limitations (21 J. 1, c. 16, s. 3.)

Since Lord Tenterden's act (9 G. 4, c. 14, s. 1,) the existence of items within six years, in an open account, will not operate to take the previous portion of the account out of the statute of limitations.

ASSUMPSIT for goods sold and delivered, and upon an account stated.

Pleas: first, except as to 3*l*. 8*s*., parcel, &c., non-assumpsit. Secondly, except as to the said sum of 3*l*. 8*s*., parcel, &c., the statute of limitations. Thirdly, except as to the said sum of 3*l*. 8*s*., parcel, &c., a set-off for goods sold and delivered, money lent, had and received, and due upon an account stated. Fourthly, payment into court of 3*l*. 8*s*., and no damages *ultrà*.

The replication joined issue on the first plea.

To the second plea, so far as the same related to the sum of 3*l*. 9*s*. 3*d*., parcel of the moneys in the first count mentioned, and also so far as the said plea related to the last count, the plaintiffs replied that they ought not to be barred from having their aforesaid action thereof *against the defendant, because they said that the said cause of action in the said first count mentioned as to the said sum of 3*l*. 9*s*. 3*d*., and the said cause of action in the said last count mentioned, and each of them, did accrue to the plaintiffs within six years next before the commencement of the suit, *modo et formà*; concluding to the country. Whereupon issue was joined. [*272

And as to the said second plea, so far as the same related to the residue of the said causes of action in the declaration mentioned,—that the said residue of the said causes of action were and are, and relate to, certain accounts still open and unsettled, concerning the trade of merchandize between merchant and merchant, that is to say, between the plaintiffs and defendant, as merchants; and that the plaintiffs and the defendant were merchants during the time the said account and matters arose and were subsisting between them. Verification; and prayer of judgment, and of damages on occasion of the non-performance of the promises in the declaration mentioned, as to the said residue of the said causes of action.

As to the third plea, so far as the same related to the sum of 3*l*. 12*s*. 0½*d*., parcel of the moneys in the said third plea mentioned, and not excepted thereby,—that the plaintiffs were not nor are indebted to the defendant as in that plea alleged; concluding to the country. Whereupon issue was joined.

And, as to the said third plea, so far as the same related to the residue of the matters of set-off in the said third plea mentioned, and not thereby excepted,—the statute of limitations.

And, as to the last plea, the plaintiffs took out of court the said sum of 3*l.* 8*s.*, in full satisfaction and discharge, &c.

Rejoinder. As to the replication to the second plea, so far as the same
*273] related to the said residue of the causes of *action in the declaration mentioned, that the said residue of the said causes of action were not nor are, nor was nor is either or any of them, nor did they or any or either of them, relate to accounts still open and unsettled concerning the trade of merchandize between merchant and merchant, nor were the plaintiffs and defendant merchants, *modo et formâ;* concluding to the country. Whereupon issue was joined.

And as to the replication to the third plea, so far as the same related to the said residue of the said causes of set-off in that plea mentioned, that the said causes of set-off were and are, and related to, certain accounts still open and unsettled concerning the trade of merchandize between merchant and merchant, that is to say, between the plaintiffs and defendant as merchants, and that the plaintiffs and the defendant were merchants during the time that the said accounts and matters arose and were subsisting between them. Verification.

Surrejoinder. As to the rejoinder to the replication to the third plea, so far as the same related to the said residue of the said causes of set-off in that plea mentioned, that the said residue of the said causes of set-off, were not nor are, nor did they relate to, accounts still open and unsettled concerning the trade of merchandize between merchant and merchant, that is to say, between the plaintiffs and the defendant as merchants, *modo et formâ;* concluding to the country. Whereupon issue was joined.

The cause was originally tried before TINDAL, C. J., at the London sittings after Trinity term, 1839, when a verdict was taken for the plaintiffs, by consent, for 44*l.* 12*s.* 8*d.*, subject to a special case. A fiat in bankruptcy being subsequently issued against the defendant, the plaintiffs de-
*274] clined to proceed with the argument of the *special case; whereupon the court, on the application of the defendant, granted a new trial.(*a*)

The cause was consequently tried a second time before ERSKINE, J., at the London sittings after last Michaelmas term.

The facts as they appeared at both trials were briefly as follows:—The plaintiffs were ironfounders, and wholesale dealers in agricultural implements, &c. The defendant, down to June, 1834, carried on the business of a retail ironmonger. The action was brought to recover the balance of an account for goods sold by the plaintiffs to the defendant between June, 1830, and June 1834. The value of the goods supplied to the defendant within six years before the commencement of the action was only 3*l.* 9*s.* 3*d.*; but the whole amount of what was due from him (after giving him credit for cash paid and goods sold) was 44*l.* 12*s.* 8*d.* It was proved by the clerk to the plaintiffs, that in May, 1834, he called upon the defendant for a settlement of the plaintiffs' account, when the defendant stated, that if the plaintiffs gave him credit for the goods he had furnished to them, there would be but little between them. It was left by ERSKINE, J., to the jury to say, whether the defendant had made any payment, or any delivery of goods to the plaintiffs by way of payment, within six years before the action

(*a*) Antè, vol. ii. p. 843; 3 Scott, N. R. 174; 9 Dowl. P. C. 629.

was commenced; or whether there had been any agreement between the parties to set the items on one side of the account against those on the other.

The jury returned a verdict for the defendant; but leave was reserved to the plaintiffs to enter a verdict for them on the second issue for 3*l.* 9*s.* 3*d.*; and on the third issue for 41*l.* 3*s.* 5*d.*; making together the sum of 44*l.* 12*s.* 8*d.*

*G. Hayes in last Hilary term, January 11, obtained a rule *nisi* accordingly; and referred to *Catling* v. *Skoulding*, 6 T. R. 189; [*275 and also to *Inglis* v. *Haigh*, 8 M. & W. 769, which, he contended, was an authority that ought to be reconsidered.

W. H. Watson now showed cause. Two questions arise in this case. First, whether the dealings between the parties are within the exception as to merchants' accounts in the third section of the statute of limitations;(a) secondly, there being items of account between the parties within six years, whether those items take the whole account out of the operation of the statute, the account remaining open and unsettled.

First, even if these are to be considered as merchants' accounts, still the defendant would be entitled to arrest the judgment, *Inglis* v. *Haigh*, 8 M. & W. 769; as it has been decided that the exception in the statute of limitations as to merchants' accounts, applies only to actions of account, or possibly to actions in the case for not accounting.(b) But it is *submitted that the accounts between these parties [*276 are not merchants' accounts within the meaning of the statute. They are merely debts due from one party to another, amounting to nothing more than cross demands, which, before the statute 2 G. 2, c. 22, could not have been set off against each other. If accounts such as the present were to be considered as merchants' accounts, an action for goods sold and delivered would not lie; for the contract would be to account, and not to pay *de die in diem*. *Catling* v. *Skoulding*, 6 T. R. 189, is, in fact, an authority precisely in point for the defendant. Cross sales of goods were there denied to be merchants' accounts within the exception in the statute. That case was put upon the ground that where there were mutual accounts between parties, the latter items would draw down the items which were beyond the six years; because credit having been given within that period, that fact was taken as evidence of an acknowledgment of there being an open account between the parties, and of a promise to pay the balance, so as to take the case out of the statute of limitations. An action of account will not lie upon a mutual sale of goods from one tradesman to another. At common law the action of *account* only lay against a bailiff or receiver, or a guardian in socage; and the 4 Anne (c)

(a) 21 Jac. 1, c. 16, s. 3., enacts "that all actions of trespass *quare clausum fregit*, all actions of trespass, detinue, action *sur trover*, and replevin for taking away goods and cattle, *all actions of account*, and upon the case, *other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants*, all actions of debt grounded upon any lending or contract without specialty, all actions of debt for arrearages of rent, and all actions of assault, &c., or any of them, which shall be sued or brought at any time after, &c., shall be commenced and sued within the time and limitation hereafter expressed, and not after (that is to say,) the said actions upon the case, other than for slander, and *the said actions for account*, and the said actions for trespass, debt, detinue, and replevin for goods or cattle, and the said action of trespass *quare clausum fregit*, within three years next after the end of this present session of parliament, or within six years next after the cause of such actions or suit, and not after," &c.

(b) Vide post, 278.

(c) 4 Anne, c. 16, s. 27, by which actions of account may be brought against the executors and administrators of every guardian, bailiff and receiver, and by one joint-tenant or tenant in common, and his executor or administrator, against the other, *as bailiff*, for receiving more than his share, and against his executor or administrator. The action of

merely extends the right to bring that action to demands against the executors of an accountant, and to cases between joint-tenants and *tenants in common. But a mere cross demand never gave *an action of account*. *Inglis* v. *Haigh*, 8 M. & W. 769, which was very elaborately argued, and the judgment in which was delivered after time taken to consider, has fully settled the point. The exception in the statute applies only to cases where a merchant has consigned goods, and where there is a consignee who would be bound to account. The words "their factors or servants" give the clue to the interpretation of the whole passage.

*277]

With respect to the second issue, which raises the question whether the statute of limitations applies to the sum of 3*l*. 9*s*. 3*d*. parcel of the sum mentioned in the first count—the defendant has paid 3*l*. 8*s*. into court; which will cover the 3*l*. 7*s*. 4*d*., the sum claimed by the plaintiffs in respect of the items accruing within the last six years of the account. The defendant says that the whole amount (except the 3*l*. 8*s*. paid into court,) including the 3*l*. 9*s*. 3*d*., accrued before the six years. [ERSKINE, J. The division of the sums in the pleadings appears to be quite arbitrary, and introduced merely for the purpose of letting in different answers.] It may be admitted that before the passing of Lord Tenterden's act (*a*) it had been held, that if goods had been bought within six years, so as to form an item of a running account between the parties, that would have drawn down the other items of the account, and thereby taken *them out of the operation of the statute of limitations.(*b*) But Lord Tenterden's act requires that every acknowledgment or promise of a debt shall be in writing to have that effect; and the introduction of the proviso, that the previous enactment shall not take away the effect of any payment, shows that, but for the express exception, the part payment of a debt would not have prevented the residue of such debt from being barred by the statute. This is the view taken of the 9 G. 4, c. 14, in *Williams* v. *Griffiths*, 5 Tyrwh. 748, 2 C. M. & R. 45, and *Waugh* v. *Cope*, 6 M. & W. 824. [TINDAL, C. J. It never was supposed that items on one side of an account only would draw down former items.]

*278]

If the court should finally be of opinion that the evidence is sufficient to enter a verdict for the plaintiffs, as prayed by the rule, then the defendant would crave leave to move in arrest of judgment. [TINDAL, C. J. Should he not have moved before?] Whilst the verdict for the defendant stood, he could not move in arrest of judgment.

G. Hayes in support of the rule. The exception contained in the third section of the statute of limitations is not confined to dealings between merchants and their factors; it extends to the cases of independent merchants dealing with one another. [CRESSWELL, J. The act speaks of accounts "between merchant and merchant, their factors or servants;" but it does not mention "their customers."] The effect of the construction contended

account was given to executors by stat. 13 Ed. 1, c. 23; to the executors of executors by 25 Ed. 3, s. 5, c. 5; and to administrators by 31 Ed. 3, c. 11. See the stat. of Marlbridge (52 H. 3, c. 23,) and the stat. of Westminster 2. (13 Ed. 1, s. 1,) c. 11.

(*a*) 9 G. 4, c. 14, s. 1. enacts, "that in actions of debt, or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only, shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments or either of them, (21 Jac. 1, c. 16; 10 Car. 1, sess. 2, c. 6; the Irish stat. of limitations,) or to deprive any party of the benefit thereof, unless such acknowledgment or promise, shall be made or contained by or in some writing to be signed by the party chargeable thereby;" "provided always, that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever."

(*b*) Vide suprà, 276.

for on the other side would be to deprive merchants of the benefit of the exception where they had dealings merely with each other. At common law the action of account lay in all cases of agency. In all the old authorities it is stated that it will lie against an agent, *bailiff or receiver. In Selwyn's Nisi Prius, title, Account, pp. 1, 2. 7th ed., it is said, [*279 "at the common law, account will lie against a bailiff, a receiver, and, in favour of trade and commerce, by one merchant against another;" and the same doctrine is laid down in Buller's Nisi Prius, p. 127, and in Bacon's Abridgement, Accompt (A.); where the reason given is, that "between these there was such a privity, that the law presumed them conversant with each other's disbursements, receipts and acquittance." On the one hand, where there is agency, it is not necessary that the parties should be merchants; so, on the other hand, where the parties are merchants, it is not necessary that there should be any agency. "Accounts between merchant and merchant" are clearly not confined to cases, where the one is the agent for the other, or to cases where parties are concerned in merchandize in the modern and limited sense of the word "merchant;" but extend to all shopkeepers. In *Hamond* v. *Jethro*, 2 Brownl. 99, it is said, "that it was agreed by all the justices, that by the law of merchants, if merchants join in trade, that, of the increase of that, if one die, the other shall not have the benefit of survivorship: and so of two joint shopkeepers; for they are merchants." [TINDAL, C. J. There is no doubt of that. But it does not follow that accounts between two several shopkeepers without any other privity between them, are to be considered as "merchants' accounts" within the statute.] An account between two parties must be either stated or open. Here, it had not been stated, and, therefore, it clearly remained open. And where there is such an open, current, unsettled account between two parties, who are merchants in law, with the understanding between them that the items on the one side are to go against the items on the other, it surely must be considered as a *merchant's account within the statute. [*280 [ERSKINE, J. But it was not shown at the trial that there was such an agreement.] It was undoubtedly treated at the trial as one current account between them. [CRESSWELL, J. That might make a sett-off unnecessary.] The application made by the plaintiffs' clerk to the defendant shows the light in which the account was considered by the parties. He applied for a settlement *of the account*, not for payment of the price of the goods; it is therefore clear the plaintiffs only demanded the balance of *an account*. The case of *Inglis* v. *Haigh*, 8 M. & W. 769, was decided after the present action had been tried. After that decision the plaintiffs in this case, if successful in this application, may not think it expedient to proceed to judgment. But this is not a motion in arrest of judgment: the question is, how the verdict is to be entered.

As to the second point, there are three ways by which claims, which would otherwise be barred by the statute of limitations, may be taken out of its operation. One is, by an acknowledgment of the debt; which, before Lord Tenterden's act, might be verbal; another is, by payment of money in part payment of the whole debt; which is an acknowledgment of a debt being due, not in words, but by an act done. The third method is, where there is a mutual account between parties, who have had dealings with each other within the six years, with reference to, and upon the faith of, such account being still unsettled between them. That was decided in *Catling* v. *Skoulding*, 6 T. R. 189, (*a*;) where the court were

(*a*) See *Clarke* v. *Bradshaw*, 3 Esp. N. P. C. 155; *Webber* v. *Twill*, 2 Wms. Saund. 127, n. (6)

clearly of opinion that such a case was taken out of the operation of the statute. Where goods are supplied under such circumstances, although they do not technically amount to a part payment, yet they are equivalent
*281] to it; and *perhaps ought to operate more strongly than a payment, in showing that the account is still unsettled and open. Lord Kenyon in that case uses the following language: "Here are mutual items of account; and I take it to have been clearly settled, as long as I have any memory of the practice of the courts, that every new item and credit in an account given by one party to the other, is an admission of there being some unsettled account between them, the amount of which is afterwards to be ascertained; and any act which the jury may consider as an acknowledgment of its being an open account, is sufficient to take the case out of the statute. Daily experience teaches us that if this rule be now overturned, it will lead to infinite injustice. In *Coles* v. *Harris*, Bull. N. P. 149, all the items were on one side; and DENISON, J., who well knew what was the proper replication in such cases, and was well acquainted with the import of the statute of limitations, said, where all the items are on one side, the last item which happens to be within six years shall not draw after it those that are of longer standing: but it was not doubted there, but that if there had been mutual demands the plaintiff might have recovered." The terms "acknowledgment or promise," in the 9 G. 4, c. 14, s. 1, do not apply to such transactions as took place between the parties in this case and in *Catling* v. *Skoulding*. Still less can a delivery of goods be construed to be an acknowledgment or promise *by words only*." The court are now called upon entirely to disregard that expression. It is argued on the other side, that the proviso shows that the effect of a part payment would not have been preserved by the earlier portion of the section, and that it was necessary that it should be expressly saved by such proviso; but that is not a correct inference. The proviso may have been
*282] added, *ex abundanti cautelâ*. [COLTMAN, J. It seems more *probable that the case of a delivery of goods as an acknowledgment would have been expressly excepted, if it was so intended to be, than that of a part payment.] The present case is quite beside the original intention of the statute, which was to prevent loose evidence of verbal acknowledgments. In *Williams* v. *Griffiths*, the facts were very different from those of the present case. One of the parties was tenant to the other, and was also his servant, and was to receive wages from him. There having been no payment on either side, the court held that this was not such an open account between them as would take the case out of the statute of limitations. That case is not inconsistent with *Catling* v. *Skoulding*; or if so, it was not so solemnly decided. There was, besides, no evidence in that case of any agreement to set one claim against the other; a circumstance on which *Parke*, B. comments in giving judgment. In *Willis* v. *Newham*, 3 Y. & J. 518, it was held that a verbal acknowledgment of a part payment was not sufficient to take the case out of the statute; and the same point was decided in *Bayley* v. *Ashton*, 12 A. & E. 493, 4 P. & D. 204; and in *Maghee* v. *O'Neil*, 7 M. & W. 531. [CRESSWELL, J. That is a wholly different point.] In *Tippets* v. *Heane*, 1 C. M. & R. 252, 4 Tyrwh. 772, *Parke*, B. says, "the principle upon which a part payment takes a case out of the statute, is, that it admits a greater debt to be due, at the time of the part payment. Unless it amounts to an admission that more is due, it cannot operate as an admission of any still existing debt." And his lordship expressed a similar opinion in giving the judgment of the court

in *Waters* v. *Tompkins*, Tyrwh. & G. 137, 2 C. M. & R. 723, 725. The cases of *Hart* v. *Nash*, 2 C. M. & R. 337; 5 Tyrwh. 955, and *Hooper* v. **Stephens*, 4 A. & E. 71, 7 C. & P. 260, S. C. *nom. Cooper* v. *Stevens*, 5 N. & M. 635, establish that a delivery of goods *may* be [*283 equivalent to a part payment in money. Now, in the present case, it is clear, that the delivery of goods had been so treated by the parties; the defendant having been applied to for payment, not of the price of the whole of the goods, but only for the balance of the account. There is no sound and substantial difference between those cases and the present.

Tindal, C. J. To this action, which is for goods sold and delivered, the defendant, except as to 3*l.* 8*s.* paid into court, has pleaded the statute of limitations. The plaintiffs, in order to avoid the effect of the statute, have in their replication divided their demand into two, alleging, as to 3*l.* 9*s.* 6*d.*, part thereof, that the causes of action did accrue within six years before the commencement of the suit; and as to the rest of their claim, "that the said residue of the said causes of action were and are and relate to accounts still open and unsettled concerning the trade of merchandize between merchant and merchant, that is to say, between the plaintiffs and defendant as merchants," &c. What the object of the plaintiffs could be, except indeed with a view to costs, in separating their demand, when the whole arose out of the same series of transactions, it is difficult to say. However, they have a right to our opinion upon the two questions thus raised. In *Inglis* v. *Haigh*, 8 M. & W. 769, (*a*,) the court of Exchequer seem to have decided that the exception in the statute of limitations, as to merchants' accounts, applies only to cases where an action of account, or an action on the case for not accounting, will lie, but not to an action of indebitatus assumpsit. Without going so far as that decision, (though I do not mean to *impugn it,) I think that the exception is not applicable where an action of account cannot be maintained; and I am [*284 of opinion, that, under the circumstances of the present case, an action of account would not lie. [His lordship read the third section of the statute, 21 Jac. 1, c. 16.(*b*)] The exception, therefore, extends only to such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants, and cannot apply except where an action of account, or an action on the case for not accounting, would lie. Is this a case in which an action of account could be maintained? It is laid down in Selwyn's Nisi Prius, p. 1, 8th edit., that, "by the common law, an action of account for the rents and profits, may be maintained by the heir after he has attained the age of fourteen years, against the guardian in socage; so at the common law, account will lie against a bailiff or receiver, and, in favour of trade and commerce, by one merchant against another." It has not been contended, that an action of account will lie in every case where there have been sales of goods between tradesmen, but only where there are mutual accounts, and an agreement has been come to, that the one shall be set off against the other, and the balance alone is claimed by the party in whose favour it is found; for, otherwise, the case could not be distinguished from the ordinary one of goods sold and delivered, with a claim of set-off of a similar description. The cases put in Selwyn show that the action of account is founded upon some trust or privity between the parties; as, for instance, there is a confidence or trust between the heir and his guardian; between the owner of land and his bailiff or receiver; and between merchant and merchant. The exception in the statute extends,

(*a*) Suprà, 277. (*b*) Antè, p. 275 n. (*a*).

*285] not only to accounts between merchant and merchant, but also to *accounts between merchants and "their factors or servants;" which latter words clearly import dealings creating a trust. Although account would lie where a merchant in this country consigns goods to a merchant or factor abroad, for sale on his account upon commission, it by no means follows that the action could be maintained in the simple case of mutual sales. The action of account is more like a bill in equity for enforcing the execution of a trust, than an ordinary action. The first judgment is, that the defendant do account, which is commonly called a judgment *quod computet;* whereupon, the defendant offering to account, the court assigns auditors to take and declare the account between the parties; and then the final judgment is, that the plaintiff do recover against the defendant so much as the latter is found to be in arrear. Neither in Selwyn nor in Buller is there a reference to any case where this action has been held to lie as between merchant and merchant. The only authority I have found is in Fitzherbert's Natura Brevium, 117 D., where it is said, "If two merchants occupy their goods and merchandizes in common unto their common profit, one of them shall have an action of account against the other in the county, or in the Common Pleas; and the form of writ is given, commanding "A., merchant, that justly, &c., he render to B., merchant, a reasonable account for the time in which he was the receiver of the money of him the said B., from whatever cause and contract coming to the common profit of them the said A. and B.; as by the law of merchants he may reasonably show that he ought to render to him," &c.; showing a privity between the two, and agreeing with the limited notion already expressed with regard to the action, rather than with a case of ordinary dealings between one tradesman and another. Is this a case of an account concerning the trade of merchandize

*286] between merchant and merchant? *Passing over the question whether ordinary tradesmen can be regarded as "merchants" (*a*) within the meaning of the statute—when this case is considered, it is nothing more than the ordinary one of two tradesmen selling goods to each other, without any agreement that the goods delivered by the one shall be considered as payment for those delivered by the other, or any understanding that the balance only shall be enforced on the one side or the other. There was nothing to prevent one party from suing the other for the whole of his account, and the other from bringing his cross action for his entire demand. It appears to me, therefore, that this is not an account concerning the trade of merchandize between merchant and merchant, and that the exception in the statute was not meant to apply to such a case.

With respect to the 3*l.* 9*s.* 3*d.*, I cannot help thinking that it was separated from the general account in order that the plaintiffs', in the event of their failing upon one point, might have the chance of succeeding upon the other, and so get their costs. Upon this part of the case it has been contended, that, notwithstanding the 9 G. 4, c. 14, there has been such a course of dealing amounting to an acknowledgment between the parties as will take the case out of the statute. I do not deny that the present case would, previously to the 9 G. 4, c. 14, have fallen within the principle of *Catling* v. *Skoulding*, or that the decision there was not perfectly good law at the time it was given. But as I read that statute, *Catling* v. *Skoulding* is now no longer applicable. [His lordship here read the first section of the statute, 9 G. 4, c. 14.]. The weight of the argument on the part of the plaintiffs rests upon the words "no acknowledgment or promise *by words*

(*a*) Vide T. 4 H. 6, fo. 26, pl. 6.

only *shall be deemed sufficient," &c. But in the enacting part [*287 which follows, the terms are, "unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby." In effect, the first part of the clause merely adverts to the existing state of the law. The clause then goes on to except the case of a part payment: "Provided always, that nothing herein contained shall alter or take away, or lessen, the effect of any payment of any principal or interest made by any person whatsoever;" leaving that particular case upon the footing on which it stood before. The ground on which part-payment was previously held to take the case out of the 21 Jac. 1, c. 16. was, that a payment of a part was an admission of the rest by inference, and that, from such payment, a jury might conclude that the rest was due. In *Catling* v. *Skoulding* it was held, that a jury might assume, from the existence of items in the account within six years, an acknowledgment within that period, of there being an open account between the parties, and a promise to pay the balance. When we find that the exception in the 9 G. 4, c. 14, is expressly confined to payment only, the inference is that every other kind of acknowledgment which is not in writing, was intended to be abrogated. *Expressio unius est exclusio alterius.* And this seems to be an answer to the second branch of the argument. I refrain from entering into the cases that have been cited for the purpose of showing that a delivery of goods may be equivalent to payment. It is unnecessary to consider those cases, as there was no evidence that the defendant's goods were sent by way of payment,—the jury having negatived that fact. The object of the 9 G. 4, c. 14, which is a beneficial statute, is very clear; if we were to yield to the arguments that have been urged on the part of the plaintiffs, we should be opening a door to all the *difficulties which were created by the construction put upon the [*288 statute of the 21 Jac. 1.

COLTMAN J. I concur in what has fallen from my Lord Chief Justice. The clause of the statute of James on which the first point arises has not at all times received the attention that has recently been given to it. Looking at the language employed, I do not see much room for doubt. It has been sought, on the part of the defendant, to limit the exception to actions of account against factors or servants; but the writ that has been cited from Fitzherbert shows that it lies between merchant and merchant, although neither of them be a factor. The nature of the action of account was in some degree considered in the recent case of *Baxter* v. *Hozier*, 5 New Cases, 288. It has been contended, on the part of the plaintiffs, that the exception in the statute as to merchants' accounts, applies to every case where two tradesmen furnish goods to one another. I do not, however, find that there is any authority for that position; and when *Baxter* v. *Hozier* was before the court, I looked into the books without finding much more than was laid down in Fitzherbert. The statements in Buller and Selwyn are true when understood with limitation. It appears to me that *account* would not lie between the parties to this action, and therefore that it is not a case of merchants' accounts within the meaning of the exception in the third section of the statute.

With respect to the second point, I think the cases which have been cited for the defendant are decisive, and that it would be frittering away the 9 G. 4, c. 14, if we were to hold that the delivery of goods had the effect of payment, and took the case out of the statute, as contended for on

*289] the part of the plaintiffs. Before *the statute, delivery of goods stood upon the same footing as payment would have done, each being evidence of an acknowledgment of the continuance of the debt. But now it is provided by that statute that no acknowledgment or promise, by words only, shall be deemed sufficient evidence of a new and continuing contract, whereby to take any case out of the operation of the statute of limitations, unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed by the party chargeable thereby; with an exception, from the operation of this new enactment, of payment of any principal and interest. All other kinds of acknowledgment are therefore expressly abrogated. At the trial the plaintiffs failed in proving that there had been any agreement that the goods delivered by the defendant should be taken by them in payment, or that the items on the one side of the account should be set off against those upon the other.

Erskine, J. Two questions have in this case been raised before us upon the replication to the second plea—the first being as to the sum of 41*l.* 3*s.* 7*d.*, which the plaintiffs claim to be entitled to recover, on the ground that the accounts between themselves and the defendant were merchants' accounts, within the exception in the third section of the statute of limitations. The question is, what does the statute mean by "such accounts as concern the trade of merchandize between merchant and merchant?" Mr. *Hayes* has contended that all accounts between two merchants, if there be any arrangement between them that the accounts shall be cross demands, are within the exception; and that the statute is not confined to accounts between merchants properly so called, but applies equally to all tradesmen having mutual dealings with each other. Admitting that retail tradesmen may be merchants within the meaning of the statute, the question *is, whether the accounts between these parties are merchants' *290] accounts within the statute. I agree with my Lord Chief Justice and my brother Coltman in thinking, that the exception is confined to accounts in respect of which the one party may maintain against the other an action of account, or an action upon the case for not accounting. The exception seems to have been inserted in order to give merchants the same period of time for proceeding at law to compel their correspondents or agents to furnish accounts, as they would have had if they had proceeded to enforce an account in equity. The words of the exception are,—not "other than in an action of account," but—"other than actions for an account," and they seem to refer alone to actions strictly brought for an account. If this be the true interpretation, is this a case between merchant and merchant so as to bring it within the exception? Mr. *Hayes* thought it necessary to qualify the proposition for which he contended, by limiting it to cases where there has been an agreement between the parties that the goods delivered on the one side shall be set off against those delivered on the other, and the balance only shall constitute the debt between them. If that had been the case here, there might have been some foundation for the argument. Indeed it would not have been necessary to consider whether these accounts were within the exception in the third section of the statute of limitations; for the case would have fallen within the proviso in the first section of 9 G. 4, c. 14. There was, however, no evidence of any such agreement, but simply a statement by the defendant, when applied to for payment for the goods furnished to him by the plaintiffs, that if the accounts were balanced there would not be much owing. It appears to me, therefore, that if the excep-

tion in the statute only applies where there has been such an agreement, the evidence does not bring this case within it.

*As to the second branch of the replication, which relates to the sum of 3*l*. 9*s*. 3*d*., it is contended that the cause of action is shown to have accrued within six years, inasmuch as there was an open account between the parties, and some of the items accrued within six years; and that this is sufficient to bring the case within the principle of the decision in *Catling* v. *Skoulding*. If this action had arisen before the passing of Lord Tenterden's act, *Catling* v. *Skoulding* would have been in point. At that time any promise would have been sufficient to take the case out of the statute of limitations; and where there was an account open on both sides, a promise to pay the balance might have been inferred. But now, the first section of 9 G. 4, c. 14, enacts that "in actions of debt, or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only, shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments (*a*) or either of them, or to deprive any party of the benefit thereof." It is said that this section does not apply to the present case, the plaintiffs seeking to take it out of the operation of the statute of limitations, not by an acknowledgment or promise by words only, but by an act done,—an act which, in *Catling* v. *Skoulding*, was held to be equivalent to a promise to pay. If the clause had stopped there, it might have applied to this case; but it goes on to say, "unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby." We must look at the whole of the clause taken together. The legislature may have supposed that by this language an acknowledgment by part-payment might be excluded. This *may have led to the introduction of the proviso, "that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever." Upon what principle is payment considered as taking a case out of the operation of the statute of limitations, except as an admission of the existence of a debt? The creditor is allowed to show that the payment was made on account of a larger sum remaining due; for there must be something to show that the payment had reference to a larger debt. Words accompanying the act of payment would be necessarily admissible to show the connection between the payment and such larger debt. Authorities have been referred to by Mr. *Hayes*, in which it was decided, that a statement made previously to the payment of money, might be given in evidence for the purpose of explaining the act of payment. He has also cited cases which show that an agreement that goods shall be received in part-payment, is sufficient to take the demand out of the statute. In the present case there was no evidence that the goods supplied by one party were sent in liquidation of the debt due by him to the other party; nor has it been shown that there was any agreement between the parties, either before or after the goods were delivered, that they should be received as part-payment. It does not appear to me, therefore, that this case has been brought within the proviso in Lord Tenterden's act, relating to the effect of payment.

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CRESSWELL, J. The case has been so fully discussed that I shall add but a few observations to what has been said.

The first question relates to open accounts, or rather to mutual dealings; for which the case of *Catling* v. *Skoulding* is relied upon by the plaintiffs.

(*a*) English act, 21 Jac. 1, c. 19; Irish act, 10 Car. 1, sess. 2, c. 6.

*293] In that case Lord KENYON was of opinion, that the existence of an *open account was a fact from which a jury might infer a promise to pay. Subsequently to that time the courts departed still further from the letter of the statute of limitations. In *Hellings* v. *Shaw*, 7 Taunt. 608; 1 B. Moore, 340, GIBBS, C. J., appears to have endeavoured to arrange the cases in which the words of the statute have been departed from. These he reduces under three heads; of which the second and third show how far the courts may go when they depart from the plain meaning of the language of a statute. Lord Tenterden's act was intended to get rid of acknowledgments by inference; and it contains no exception in favour of the sale or delivery of goods. No delivery of goods, therefore, is sufficient to take a case out of the statute, except under circumstances which render the delivery equivalent to payment.

With respect to the second point, it is difficult to say that, in one sense, these are not merchants' accounts; but, unless the language of the replication be understood in a sense which would make the replication bad, we must give to that language such a construction as will make it conformable to the statute; the exception in which, I think, refers only to such accounts as would support an action of account. Now, were the dealings of this case such as would enable the plaintiffs to maintain an action of account? Could they have called upon the defendant to render an account of goods sold to and by him? The only duty of the defendant was, to pay the price of the goods which he had bought from the plaintiffs. It is suggested that these dealings were to form one entire indivisible account. If that were so, two consequences would follow. The plaintiffs could only sue for the

*294] balance (*a*); and there could be no *set-off, inasmuch as this would be a case, not of mutual debts (to which alone the statutes of 2 G. 2, c. 22, s. 13, and 8 G. 2, c. 24, apply,) but of one account.

I therefore entirely concur with the rest of the court in thinking that the plaintiffs have not established their claim, either in respect of the 41*l.* 3*s.* 7*d.* or in respect of the 3*l.* 9*s.* 3*d.*, and that the rule obtained by the plaintiffs, to enter a verdict for those sums upon the second and third issues, must be discharged. Rule discharged.

(*a*) By the French law of set-off (*compensation*) mutual debts extinguish one another *pro tanto* from the moment they coexist, absolutely, and *pleno jure;* Code Civil, Art. 1289; even where the existence of the cross demand is unknown: Art. 1290; and the balance only can be sued for; *Ibid.*

In England it not unfrequently happens, that a party who is indebted on the balance of accounts, refuses to come to any settlement; and when sued, being unable to get rid of the costs by pleading a set-off, he prefers bringing a cross action for the purpose of annoying his creditor, or of obtaining a sacrifice of part of his demand, or in the hope of effecting both these objects, more especially when the ill-feeling and dishonesty are fomented and encouraged by an unscrupulous adviser.

The evil might, perhaps, be remedied by adopting the French system of treating the balance only as the debt, (as, in effect, is done in cases of mutual credit in bankruptcy,) or by enabling plaintiffs to give notice of their readiness to allow a set-off, and to make such notice pleadable in bar of a cross action brought in respect of the matters embraced by such notice.

As to the old French law of Compensation, and the Roman law upon which it was founded, see Pothier, Traité des Obligations, No. 623, &c.; Dig. lib. 16, tit. 2, de Compensationibus.

END OF EASTER TERM.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Trinity Term,

IN THE

FIFTH YEAR OF THE REIGN OF VICTORIA.

The judges who usually sat in banc during this term were,

Tindal, C. J. — Maule, J.
Erskine, J. — Cresswell, J.

ANTONIO BONZI and LEWIS BONZI *v.* PATRICK MAXWELL STEWART.

Where a factor has raised money by a wrongful pledge of the goods of his principal, it is competent to the latter, in taking the account between himself and the factor, to abandon the goods, and treat the money raised thereon as money had and received to his own use.

A., a factor, after depositing dock-warrants with the defendant as a security for an advance of money, withdrew them from the defendant's hands and substituted other dock-warrants for silk belonging to the plaintiffs, the defendant having no notice that A. was not the true owner. *Held*, that this transaction was not protected by the second section of the factors' act (6 G. 4, c. 94), there being *no advance* of money on the faith of such warrants; and that the plaintiff might recover the value of such silk in trover. (*a*)

The defendant advanced money to A., upon a promise that he would deposit dock-warrants to the amount of the advance as a security. This advance took place on a Saturday, but the warrants were not deposited with the defendant till the Monday following, and were not, in fact, made out before that day. *Semble*, (if the question had been properly raised by the pleadings,) that this transaction was not protected by the second section of the factors' act as against the plaintiffs, (the real owners of the property to which the warrants related,) inasmuch as A. was not *intrusted with*, or in possession of, the warrants at the time of the advance. (*b*.)

A material allegation in a pleading, which is not traversed, is so far admitted, that it is not competent to the other party to disprove it.

Therefore where, in trover for bales of silk, the defendant pleaded that A. was factor of the plaintiffs, and as such factor *was instructed by the plaintiffs with, and was in possession of, dock-warrants relating to the said bales;* that A., so being intrusted, &c., applied to the defendant for an advance of money upon the said bales as a security for repayment; that A., being so intrusted, &c., delivered the said dock-warrants and pledged the said bales with the defendant as a security for the said sum, *which the defendant did then advance and lend on the faith of the said dock-warrants*, and that the defendant had no notice that A. was not actual owner of the said bales; and the plaintiffs, in their replication, traversed the allegation *that the defendant advanced* and lent the money on the faith of the said dock-warrants *modo et formâ*. *Held*, that upon this record, the plaintiffs had admitted that A. was intrusted with, and in possession of, the dock-warrants, and that he pledged them with the defendant at the time of the advance; and therefore that it was not competent to the plaintiffs to give evidence that the dock-warrants were not deposited with the defendant, and were not in fact *in esse* at that time.

(*a*) See 5 & 6 Vict. c. 39, *s.* 2, post, p. 331. n.

(*b*) See 5 & 6 Vict. c. 39, *ss.* 1. 3, post, pp. 331, 332, n.

Trover, for sixteen bales of silk.

Pleas; first, not guilty. Secondly, that the plaintiffs were not possessed of the silk as of their own property. Upon both of which pleas issue was
*296] joined. Thirdly, as *to four bales of silk, parcel, &c., that at the several times hereinafter mentioned, certain persons using the firm, &c. of Douglas, Anderson and Co., were the factors and agents of the plaintiffs in the city of London, and that at the time of the delivery of the dock-warrants hereinafter mentioned, the said four bales of silk, parcel, &c., were deposited and warehoused in the warehouse of the St. Katharine's Dock Company, and the said D., A. and Co. were before, and at the time of, the pledge and delivery of the dock-warrants hereinafter next mentioned, as such factors and agents as aforesaid, intrusted by the plaintiffs with,
*297] and were then in possession of, divers, to wit, four dock-warrants for *the delivery of the said four bales of silk, parcel, &c., and in which said dock-warrants the said four bales of silk, parcel, &c., were described and mentioned; and the said D., A. and Co. being so intrusted with, and in possession of, the said dock-warrants, applied to the defendant for the loan and advance of a certain sum of money, to wit, the sum of 1900*l.* upon the pledge of the said four bales of silk, parcel, &c., as a security for the repayment of the said sum of money, and thereupon heretofore, to wit, on the 7th day of October, A. D. 1836, it was agreed between the defendant and the said D., A. and Co., that they should pledge with the defendant the said four bales of silk, parcel, &c., as a security for the said sum of money to be advanced by the defendant, and which he then agreed to advance to the said D., A. and Co. upon the faith of the said dock-warrants; and that the said D., A. and Co. being so intrusted with, and in possession of, the said dock-warrants, in pursuance of the said agreement, heretofore, to wit, on &c., did deliver to the defendant the said four dock-warrants, and did pledge with him the said four bales of silk, parcel, &c., as a security for the said sum of money, and which the defendant did then and there advance to the said D., A. and Co. upon the faith of the said four dock-warrants; and that the defendant had not notice before or at the time of the said pledge, or before or at the time of advancing and lending the said money, by the said dock-warrants, or either of them, or otherwise, that the said D., A. and Co. were not the actual and *bonâ fide* owners and proprietors of the said four bales of silk, parcel, &c., so pledged as aforesaid. And that the defendant at the same time, when, &c., detained, and still detains, the said four bales of silk, parcel, &c., under and by virtue of the said pledge as aforesaid, and for and on account of the said sum of money so
*298] advanced as aforesaid, which still remains unpaid; *which detention is the said conversion thereof in the declaration mentioned. Verification; and prayer of judgment, if the plaintiffs ought to maintain their action in respect of the four bales.

Fourthly, a similar plea as to ten bales, but omitting the statement that they were in the St. Katharine's dock warehouse.

Fifthly, a similar plea as the fourth, as to two bales.

Sixthly, as to four bales, that at the several times hereinfter mentioned, D., A. and Co. were the factors and agents of the plaintiffs &c., and the plaintiffs before and at the time of the pledge hereinafter mentioned, were indebted to D., A. and Co. as such factors and agents as aforesaid, in a large sum of money, to wit, the sum of 8,000*l.*, and which said sum of money still remains unpaid. And that at the time of the pledge hereinafter mentioned, D., A. and Co. as such factors and agents as aforesaid, had a lien

upon the said four bales of silk, parcel, &c., and had a right to detain the same for the said sum of money so due to them as aforesaid, and a right to enforce such lien against the plaintiffs. And that the plaintiffs being possessed of the said four bales of silk, parcel, &c.; did, before committing the said supposed grievances, consign the said four bales of silk, parcel, &c., to D., A. and Co. as such factors and agents as aforesaid, and that the said D., A. and Co. were before, and at the time of the pledge hereinafter next mentioned, as such factors and agents as aforesaid, intrusted by the plaintiffs with, and were in possession of, divers, to wit, four dock-warrants for delivery of the said four bales of silk, parcel, &c., and in which said dock-warrants the said four bales of silk were described and mentioned, and D., A. and Co., being so intrusted with, and in possession of, the said dock-warrants, to wit, on the 7th day of October, in the year aforesaid, under a certain agreement then made between D., A. *and Co. and the defendant, did pledge the said last-mentioned four bales of silk, parcel, &c. to the defendant, as security for the repayment of a large sum of money, to wit, the sum of 2567*l.* then due from D., A. and Co. to the defendant, and which said sum of money was, at the time of the said last-mentioned pledge, a debt due for money advanced by the defendant to D., A. and Co.; and a large part thereof, to wit, the sum of 2000*l.* still remains unpaid. And that D., A. and Co., being so intrusted with, and in possession of, the said dock-warrants upon such pledge last-mentioned, to wit, on, &c., did deliver to the defendant the said dock-warrants. And that the defendant had not notice before or at the time of the said last-mentioned pledge, by the said dock-warrants, or either of them, or otherwise, that the said D., A. and Co., were not the actual and *boná fide* owners and proprietors of the said last-mentioned four bales of silk, parcel, &c., so pledged as last aforesaid, and that the defendant at the said time when, &c. detained, and still detains, the said four bales of silk, under and by virtue of the last-mentioned pledge, on account of the said sum of money due from the said D., A. and Co. to the defendant, to the extent of the right of lien which the said D., A. and Co. had a right to enforce in respect of the four bales of silk, parcel, &c. as aforesaid; which is the conversion thereof in the declaration mentioned. Verification; and prayer of judgment. [*299

Seventhly, that at the several times hereinafter mentioned the said D., A. and Co. were the factors and agents of the plaintiffs, &c., and the said D., A. and Co. were before and at the time of the pledge hereinafter mentioned as such factors and agents as aforesaid, intrusted with, and in possession of, divers, to wit, sixteen dock-warrants, for the delivery of the said goods and chattels in the declaration mentioned, in which last-mentioned dock-warrants the said goods and chattels *were mentioned and described; and D., A. and Co. being so intrusted with, and in possession of, the said dock-warrants heretofore, to wit, on the 5th day of November, 1836, did pledge the said goods and chattels to the defendant as a security for a large sum of money, to wit, 6000*l.*, advanced and lent by the defendant to the said D., A. and Co., as then agreed upon between the defendant and the said D., A. and Co., on such pledge, upon the faith of the said dock-warrants; and that D., A. and Co. being intrusted with, and in possession of, the last-mentioned dock-warrants, did deliver to the defendant the last-mentioned dock-warrants, and the defendant did then and there advance and lend to the said D., A. and Co. the said sums of money upon the faith of the said dock-warrants. And that he had not notice before or at the time of the last-mentioned pledge, or at the time of [*300

the last-mentioned loan and advance, by the said dock-warrants, or either of them, or otherwise, that D., A. and Co. were not the actual and *bonâ fide* owners and proprietors of the goods and chattels in the declaration mentioned, and so pledged as aforesaid; and that the defendant detains the said goods and chattels under and by virtue of the said pledge, and for and on account of the said sum of money so advanced as aforesaid, which still remains wholly due and unpaid to the defendant; wherefore the defendant refused to deliver to the plaintiffs the said goods and chattels; which is the conversion thereof in the declaration mentioned. Verification.

Eighthly, that at the several times hereinafter mentioned, D., A. and Co. were the factors and agents of the plaintiffs, &c.; and that before, and at the time of, the pledge hereinafter mentioned, the plaintiffs were indebted to D., A. and Co. as such factors and agents as aforesaid, in a large sum of money, to wit, 8000*l.*, and which sum of money still remains due and

*301] unpaid. And *D., A. and Co., as such factors and agents as aforesaid, had a lien upon and a right to detain the said goods and chattels so in their possession as aforesaid, in respect of, and until payment by the plaintiffs of, the said sum of money so due by them to D., A. and Co. as last aforesaid; and the said D., A. and Co. being so in possession of such goods and chattels as such factors and agents as aforesaid, did heretofore, to wit, on the 2d day of October, and on divers days, &c., pledge with the defendant the said goods and chattels for divers sums of money, amounting, in the whole, to a large sum of money, to wit, &c., on those days and times lent and advanced by the defendant to D., A. and Co.; and which said sum of money remains unpaid to the defendant; and that the defendant, at the said time when &c., detained, and still detains, the said goods and chattels under and by virtue of the said pledge as aforesaid, and on account of the said sum of money so lent and advanced by the defendant as aforesaid to the extent of the right of lien of D., A. and Co., to detain the said goods and chattels for a debt due from the plaintiffs to D., A. and Co. as aforesaid; which is the conversion thereof in the said declaration mentioned. Verification.

Replication; to the third plea; that the defendant did not advance or lend to D., A. and Co. the said sum &c., in that plea mentioned, or any part thereof, upon the said four dock-warrants, in that plea also mentioned in manner and form, &c. Issue thereon.

The like to the fourth and fifth pleas.

To the sixth plea; that at the time of the pledge of the four bales of silk in the said plea in that behalf mentioned, the plaintiffs were not indebted to the said D., A. and Co., as such factors and agents in that plea alleged, in the said sum of 8000*l.*, or any part thereof, in manner and form, &c. Issue thereon.

*302] *To the seventh plea, a similar replication to that to the third plea, *mutatis mutandis*.

To the eighth plea, a similar replication to that to the sixth plea, *mutatis mutandis*.

At the trial before Tindal, C. J., and a special jury at Guildhall, the sittings after Hilary term, 1838, the following facts appeared.

The plaintiffs were silk merchants resident at Bergamo, in Italy. The defendant was a merchant in London. The action was brought to recover the value of sixteen bales of silk, which had been consigned by the plaintiffs, for the purpose of sale on commission, to the house of Douglas, An-

derson and Co., merchants in London, who had for some time acted as factors for the plaintiffs and other parties.

Previously to the 7th of October, 1836, D., A. and Co. had been in the habit of obtaining advances of money from the defendant, upon the security of goods, or bills of lading, &c., in their possession. On that day, being then indebted to the defendant in respect of such advances, they deposited with him five dock-warrants, four of which were for the like number of bales of silk belonging to the plaintiffs, (which were then lying in St. Katharine's dock, consigned to D., A. and Co.,) in exchange for twenty other dock-warrants relating to property of about the same value belonging to other parties, which D., A. and Co. were desirous of selling. No advance of money was made by the defendant at that time.

On the 15th of October following, being a Saturday, Mr. Anderson, of the firm of Douglas, Anderson and Co., applied to the defendant for a further advance of 3000*l.*, and stated at the time that he would give dock-warrants to the amount of such advance. The money was advanced accordingly; and on the Monday following, (the 17th,) ten dock-warrants, for as many bales of *silk, belonging to the plaintiffs, were deposited [*303 in respect of such advance. In point of fact, the dock-warrants were not in existence on the Saturday; and Mr. Anderson, when applied to for them in the afternoon of that day, after the money had been advanced, said that they had been busy, and had not had an opportunity of getting them.

On the following Saturday, (the 22d,) the defendant made a further advance to D., A. and Co. of 2000*l.*, on the security of other dock-warrants; and seventeen warrants, two being for silk belonging to the plaintiffs, were accordingly deposited with the defendant on the Monday following, (the 24th). At the time that both the last-mentioned advances were made, the bales of silk, in respect of which the warrants were afterwards delivered, were in dock, consigned to D., A. and Co., who had in their possession the bills of lading for them. It was in respect of these three transactions that the present action was brought.

On the 5th of November, in a conversation between Mr. Anderson and the defendant, it was agreed that the previous deposits should be held as securities for a further advance of 1400*l.* then made; and the further sum of 500*l.* was subsequently advanced on the 10th of November, on the express understanding that the sixteen warrants were to be charged therewith.

In January, 1837, D., A. and Co. stopped payment, having, at that time, in their possession various consignments of goods belonging to the plaintiffs, which were afterwards given up by the assignees under a fiat of bankruptcy against D., A. and Co.

A considerable body of evidence was gone into with regard to the state of accounts between the plaintiffs and D., A. and Co., for the purpose of ascertaining whether the plaintiffs were indebted to D., A. and Co. at the time the advances were made to them by the defendant, *so as to [*304 establish the lien set up in the fifth and eighth pleas. In these accounts the plaintiffs had taken credit for sums of money raised by Douglas, Anderson and Co., upon previous pledges of silk belonging to the plaintiffs, the amount of which had never been brought forward in their favour.

Upon the issues raised by the replications to the third, fourth, fifth and seventh pleas (as to the validity of the deposits in question), it was contended, on the part of the plaintiffs, that none of the transactions were pro-

*305] tected by the operation of the factors' act,(a) *inasmuch as the transaction on the 7th of October was an exchange of securities; and as, on the 15th and 22d of October, when the money was advanced by the defendant, the dock-warrants were not in existence, there was in neither case a deposit or pledge, as a security for money or negotiable instruments, of any document which Douglas, Anderson and Co. were intrusted with, and in possesson of, so as to fall within the second section of that act. For the defendant it was insisted, that the different advances had been made by him *bonâ fide*, upon the faith of the deposit of the dock-warrants, and in pursuance of the general understanding between the parties; and that they came within the spirit, if not the very letter, of the act.

Upon this point the Lord Chief Justice, adopting the view urged on behalf of the plaintiffs, expressed an opinion, that none of the transactions were protected by the factors' act. But his lordship ruled, that it was not open to the plaintiffs to raise the question upon the pleadings as they stood; and he therefore directed the jury to find a verdict (and the verdict was returned accordingly), for the defendant on the third, fourth, fifth and seventh issues—reserving leave to the plaintiffs to move to enter the verdict for them upon those issues—and for the plaintiffs on the second issue. A verdict was also found for the plaintiffs on the first, sixth and eighth issues.

Wilde, Serjt., in Easter term, 1838, obtained a rule *nisi*, according to the leave reserved, to enter the verdict for the plaintiffs upon the third,
*306] fourth, fifth and *seventh issues, or for a new trial, with liberty to the plaintiffs to amend their replication.

Sir *J. Campbell*, Attorney-General, for the defendant, in the same term, obtained a cross-rule for a new trial, upon the ground that the verdict as to the sixth and eighth issues was contrary to the weight of evidence

The rules were argued in Michaelmas term, 1838,(a) and in Easter term, 1839.(b)

Sir *J. Campbell*, A. G., *Maule* and *R. V. Richards* for the defendant. It

(a) 6 G. 4, c. 94, s. 2, which enacts, "that any person or persons intrusted with, and in possession of, any bill of lading, India warrant, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate, or warrant or order for delivery of goods, shall be deemed and taken to be the true owner or owners of the goods, wares, and merchandize, described and mentioned in the said several documents hereinbefore stated respectively, or either of them, so far as to give validity to any contract or agreement thereafter to be made or entered into by such person or persons so intrusted and in possession as aforesaid with any person or persons, body or bodies politic or corporate, for the sale or disposition of the said goods, &c., or any part thereof, or for the deposit or pledge thereof, or any part thereof, as a security for any money or negotiable instrument or instruments advanced or given by such person &c., upon the faith of such several documents, or either of them: Provided such person &c. shall not have notice, by such documents, or either of them, or otherwise, that such person or persons so intrusted as aforesaid is or are not the actual and *bonâ fide* owner or owners, proprietor or proprietors of such goods &c. so sold or deposited, or pledged as aforesaid."

Sect. 3, enacts, "that in case any person or persons &c., shall, after the passing of this act, accept and take any such goods &c. in deposit or pledge from any person or persons so in possession and intrusted as aforesaid, without notice as aforesaid, as a security for any debt or demand due and owing from such person or persons so interested and in possession as aforesaid, to such person &c. before the time of such deposit or pledge, then, and in that case, such person &c. so accepting or taking such goods &c. in deposit or pledge, shall acquire no further or other right, title or interest in or upon or to the said goods &c., or any such document as aforesaid, than was possessed, or could or might have been enforced, by the said person or persons so possessed and intrusted as aforesaid, at the time of such deposit, &c., as a security as last aforesaid; but such person &c. so accepting &c. such goods &c. in deposit &c., shall and may acquire, possess and enforce such right, &c., as was possessed and might have been enforced by such person &c. so possessed and intrusted as aforesaid.

(b) November 20. Before *Tindal*, C. J., *Vaughan*, *Bosanquet*, and *Coltman*, JJ.

(c) April 25. Before *Tindal*, C. J., *Bosanquet*, *Coltman*, and *Erskine*, JJ.

cannot be disputed on the other side, that the defendant had *bonâ fide* advanced large sums of money to Messrs. Douglas and Co., the factors, or that the dock-warrants were deposited on the 15th and 22d of October, and for the sums so advanced. Neither can it be denied that, by the agreement between the factors and the defendant, whatever warrants had been previously deposited by the former in the hands of the latter for advances, should stand charged with any subsequent advances made by the defendant to the factors. On the other hand, it is admitted on the part of the defendant, that the dock-warrants deposited on the 7th October in exchange for other warrants, cannot be charged with the advances previously made in respect of the warrants then given up. But the point in dispute is, whether, because on the 15th and 22d of October, dock-warrants were not deposited with the defendant *uno flatu* with the advances of the money, but were delivered two days afterwards, such advances are not to be considered as made *bonâ fide* on the faith and security of those warrants. It is contended on the part of the defendant, that the advances in question were protected by the factors' act; *and, moreover, that the warrants deposited on the 7th of October, are charged with the subsequent advance made on the 15th; and that, in like manner, the warrants deposited on that day and on the 22d are charged with the advances respectively made on the 22d of October and the 5th and 10th of November. [*307

Under the old law, a factor entrusted with goods or their symbols for the purpose of sale, could not lawfully pawn either; and if he did, the owner might recover them from the pawnee, although the latter might have had no notice that the factor was not the true owner. *Paterson* v. *Tash*, 2 Stra. 1178, 15 East, 44.(*a*) The second section of the factors' act, 6 G. 4, c. 94, was passed to remedy what was felt to be a great evil in the commercial world;(*b*) its object being to enable parties safely to advance money on the security of warrants or other symbols of property, provided they had no notice that such warrants or other symbols were not the property of the persons pledging them. Formerly, a factor, though he was the apparent owner of goods, and at liberty to sell, could not pledge; and the intention of the act was to enable such apparent owner to pledge; so that if the real owner trusted his agent with the possession and apparent ownership of his property or its symbols, and the agent obtained money thereon, the party advancing the money might *have a lien, to the extent of the advance, against the real owner. A sale and a pledge, therefore, are, by that act, put upon the same footing. It is true, that, in order to give validity to the pledge, the factor must have the symbols of the property in his possession; but if he has, he is empowered to pledge the property as a security for the advance of money, and such a contract is equally valid as a sale by him would have been. [*308

It is important to consider the state of the pleadings. The plaintiffs rely on the fact, that on the 15th and 22d of October, when the advances were made by the defendant, the dock-warrants were not actually in the

(*a*) In 1816, Gibbs, C. J., told Manning that this case was misreported; but that having been acted upon, it could not now be shaken.

And see *Daubigny* v. *Duval*, 5 T. R. 604; *De Bourhot* v. *Goldsmid*, 5 Ves. 211; *Martini* v. *Coles*, 1 M. & S. 140; *Shipley* v. *Kymer*, Ib. 484; *Solly* v. *Rathbone*, 2 M. & S. 298; *Cockran* v. *Irlam*, Ib. 301, n.; *Barton* v. *Williams*, 5 B. & A. 395; 3 Bingh. 139; 10 B. Moore, 506.

(*b*) The evil had been partially remedied by the 4 G. 4, c. 83, which enacted, s. 1, that persons in whose names goods were shipped, should be deemed the owners, so as to entitle consignees to a lien thereon in the absence of notice; and by sect. 2, any person might take goods or bills of lading in deposit from a consignee, but without acquiring any further right than was possessed by the consignee.

possession of the factors; but the defendant contends, that it is conclusively admitted on the face of the record that they were then in their possession; that it was not competent to the plaintiffs to give evidence to the contrary; and that such evidence has no bearing on the case, and ought not to influence the court to interfere with the verdict. The third plea (which is pleaded as to four of the bales of silk, in respect of which the dock-warrants were deposited on the 7th October), contains eight distinct allegations, only one of which is traversed by the replication. The first allegation is, that Douglas, Anderson and Co. were the factors and agents of the plaintiffs; the second is, that the four bales of silk were warehoused in the St. Katharine's docks; the third—which is the material allegation now sought to be disputed—is that Douglas, Anderson and Co. were, before and at the time of the pledge and delivery of the dock-warrants, as such factors, intrusted by the plaintiffs with, and were then in possession of, four dock-warrants, for the delivery of four bales of silk, in which warrants the said four bales were described; the fourth is, that Douglas, Anderson and Co., being so intrusted and in possession of the warrants, applied to the defendant for a loan and advance of money, upon the pledge of the four bales as
*309] a security; the fifth, that it was agreed *between the defendant and Douglas, Anderson and Co., that they should pledge with the defendant the four bales as a security for the money to be advanced, and which the plaintiff agreed to advance on the faith of the said dock-warrants; the sixth, that Douglas, Anderson and Co., being so intrusted with, and in possession of, the dock-warrants, in pursuance of the agreement, did deliver to the defendant the dock-warrants, and did pledge with him the four bales of silk, as a security for the sum advanced. There is no traverse of any one of these allegations. The seventh allegation, which is traversed, is, that the defendant did then advance such sum to Douglas, Anderson and Co., on the faith of the said four dock-warrants. The eighth, which is not traversed, is, that the defendant had no notice before, or at the time of, the pledge, or the advance, or otherwise, that Douglas, Anderson and Co. were not the owners of the four bales. The fourth plea, as to fourteen bales, and the fifth, as to two bales, contain similar allegations, *mutatis mutandis*. The seventh plea, as to the whole sixteen bales, contains a pointed allegation, that at the time of the respective pledges, Douglas, Anderson and Co. were in possession of the dock-warrants. The replication is not *de injuriâ*: it takes issue on one allegation only. It is the same to the third, fourth, fifth and seventh pleas, namely, that the defendant did not advance or lend the sum of money in the plea mentioned on the faith of the dock-warrants, *modo et formâ*. It is not competent, therefore, to the plaintiffs to make it a part of their case, that Douglas, Anderson and Co. were not in possession of the dock-warrants at the time of the pledge and advance. They will contend, however, that the prior allegations in the pleas are mere matter of inducement; and, therefore, that the denial *modo et formâ* in the replication puts in issue the whole plea. But the rule is, that all substan-
*310] tive allegations in pleading, which *are not traversed, are admitted; even though denied by a *protestando*, they would not have been put in issue, but would have been admitted for the purposes of this cause. Lord Coke says, protestation is an exclusion of a conclusion, that a party to an action may by pleading incur.(a) The doctrine established by *Harrington* v. *Macmorris*, 5 Taunt. 228, 1 Marsh. 33, and *Montgomery* v. *Richardson*, 5 C. & P. 247, that one part of a record cannot be used as an admission on

(a) See Co. Litt. 124 *b*.

another part, is not disputed.(*a*) But where a distinct and substantive pleading contains several allegations, and issue is tendered and taken as to one only, all the traversable allegations that are not traversed, must be taken as admitted; Com. Dig. Pleader, (G. 2.) In *Cowlishaw* v. *Cheslyn*, 1 C. & J. 48,(*b*) which was an action of trespass *quare clausum fregit*, the defendant pleaded that A. C. was seised in fee, and being so seised, granted a right of way by a lost deed. The plaintiff replied that A. C. did not grant, *modo et formâ:* and it was held, that on these pleadings, it was not competent for the plaintiff to give evidence to show that A. C. was not seised in fee, for the purpose of rebutting the presumption of the grant. The allegation in the present case, of the possession of the dock-warrants by Douglas, Anderson and Co., is either material, or it is not; if not material, *cadit quæstio;* if it be material, it is not put in issue: it might have been traversed, and not having been so, it is admitted, and it is not therefore open to the plaintiffs to contradict the statement by evidence. [COLTMAN, J. The pleas allege that the factors were in possession of the dock-warrants, not at the time of the advance of money to them, but "at the time of the pledge and delivery of the dock-warrants" by them. *Wilde*, Serjt. *Therein lies the whole fallacy of the argument upon the other side.] The pleas state that the factors were in possession of [*311 the dock-warrants at the time of the pledge and delivery thereof, "*as hereinafter stated;*" and they go on to say, that *being so in possession of the dock-warrants*, they applied to the defendant for an advance upon the pledge of the bales; and that it was agreed, a sum should be advanced upon such security; and that the factors, being so in possession of the warrants in pursuance of such agreement, did deliver to the defendant the dock-warrants as a security for the sum which the defendant did *then* and there *advance* to them.

It is impossible to read these pleas in any other way than as containing a statement that the factors were in possession of the warrants at the time of the advance of the money. It is contended that the allegation is mere matter of inducement; but that cannot be; for the main argument on the other side is, that the factors' act does not apply unless the warrants be in the possession of the factor at the time of the pledge. If, as argued upon the other side, the denial *modo et formâ* involves a denial of all the allegations, it would have the same effect as the replication *de injuriâ*, or even a larger effect than that replication is allowed to have; for it would put in issue matter of title, which cannot be done by *de injuriâ*. Besides, the addition of *modo et formâ* to the denial is mere surplussage. *Nevil and Cook's* case, 2 Leon. 5; Com. Dig. Pleader, (G. 1). It is said that *de injuriâ* could not have been replied in this case. It is immaterial to the defendant's case whether it could or not; but probably it might have been replied, upon the authority of *Crogate's* case, 8 Co. Rep. 66; *Selby* v. *Bardons*, 3 B. & Ad. 2; affirmed, 3 Tyrwh. 431; 1 C. & M. 500, and *Solly* v. *Neish*, 5 Tyrwh. 625; 2 C. M. & R. 355; 4 Dowl. P. C. 248. The case of *Parker* *v. *Riley*, 3 M. & W. 230, may perhaps be relied upon by the other side [*312 upon this point; but that case has no application here, for it only decides, that when a plea to a declaration on a contract amounts to the general issue, the replication *de injuriâ* is bad. TINDAL, C. J. [There may be a doubt, perhaps, whether that replication would be good in this case, where an interest is claimed.] The rule, it is submitted, only applies to real property. But

(*a*) See also *Knight* v. *M'Douall*, 12 A. & E. 438; *Gould* v. *Oliver*, ante, Vol. II., p. 208.
(*b*) See 4 N. & M. 322, n. (*a*).

supposing it to apply here, and that *de injuriâ* could not have been replied, that point has no bearing on the case. For *quâcunque viâ datâ*, whether *de injuriâ* could or could not have been replied, the allegation in question is not traversed. *Edmunds* v. *Groves*, 2 M. & W. 642; 5 Dowl. P. C. 775, will also be relied upon. That was an action of assumpsit by the endorsee against the maker of a promissory note. The plea was, that the note was given for a gaming debt, and endorsed to the plaintiff with notice thereof, and without consideration. The plaintiff replied, that the note was endorsed to the plaintiff without notice of the illegality, and for a good and sufficient consideration; on which issue was joined; and it was held, that, on these pleadings, the illegal making of the note was not so admitted as to render it necessary for the plaintiff to give any evidence of consideration; but that, in order to compel him to do so, the defendants ought to have proved the illegality by evidence. The question therefore was, on whom the *onus probandi* lay. Lord *Abinger*, C. B. said, "I think it was incumbent on the defendant, who set up as a defence this fact, that the note came into the hands of the plaintiff with notice of its original infirmity, to have produced some evidence to prove it: or, in other words, that the *onus probandi* was on him." And *Alderson*, B., added, "An admission on the
*313] record is merely a waiver of requiring proof of *those parts of the record which are not denied, the party being content to rest his claim on the other facts in dispute: but if any inferences are to be drawn by the jury, they must have the facts, from which such inferences are to be drawn, proved like any other facts." These observations appear at first sight very strong in favour of the other side; but the question there was, which way the presumption lay; and the court decided for the plaintiff against the presumption of illegality. The defendant had offered no evidence of illegality, and therefore the court gave judgment for the plaintiff. The expressions of *Alderson*, B., must be understood with reference to the subject-matter under consideration, and not as contravening an established rule in pleading. *Bennion* v. *Davison*, 3 M. & W. 179, will also be cited on the other side; the marginal note of which is as follows:—"Declaration in assumpsit stated that *the defendants were the owners* of a vessel lying in a certain river, and bound to Liverpool; that the plaintiff caused to be shipped on board her a quantity of potatoes, to be safely carried by the defendants, *as owners* of the said vessel, to Liverpool; and in consideration thereof, and of certain freight, the defendants promised the plaintiff, to take proper care of, and safely carry, the said goods *as aforesaid:* with a breach, that, through the defendants' negligence, they were damaged. Plea, non assumpserunt: Held, that the ownership of the defendants was not admitted by the plea. A plea denying a particular fact alleged in the declaration, does not admit other *immaterial* allegation in the declaration. *Quære*, whether it admits the other *material* allegations, so as they may be taken as facts to go to the jury?" In that case *Parke*, B., said, "It is not necessary to say more than this as to the effect of an admission on the record, that, at all events,
*314] the *taking issue on one fact averred in the declaration, is only an admission of the other *material* averments necessary to be proved. Taking it, that here there is an admission of the material allegations, there is no admission of the allegation of ownership, because that is perfectly immaterial."(*a*) That, therefore, was the case of an immaterial allegation,

(*a*) But Alderson, B., added, "It is clear that this averment, being an immaterial one, was not admitted; but it is not to be taken for granted, that, if it had been material, there was an admission of it as a fact to go to the jury."

which could not have been traversed. But here, a plea, denying the possession of the dock-warrants by Douglas, Anderson and Company as factors, would have been an answer to the action. The rule may be thus stated: if a material fact be alleged by way of inducement merely, it is not traversable; but if the denial of it would be an answer to the action, then, if it be not traversed, it must be taken as admitted.

With regard to the effect of the evidence, supposing it to be admissible, it is said that on the 7th of October, when the four dock-warrants were deposited, no fresh advance of money was made, and that undoubtedly is so; the warrants were changed for others, which were not the property of the plaintiffs, but had been previously deposited with the defendant as a security for advances made on the faith of such previous deposit. It is admitted that no lien arises under the factors' act in respect of that exchange. Then, on the 15th of October (the defendant at that time still holding the four warrants deposited on the 7th) an agreement was entered into between the defendant and Douglas and Co. for a new advance of 3000*l*. on warrants to be immediately handed over by the latter. The 3000*l*. was advanced on that day. Douglas and Co. had the bills of lading in their possession at the time; and the bales of silk were landed in *their name. The warrants, however, were not actually procured till the Monday following, but they were then handed over to the defendant. Can there be any doubt that this advance was made on the security of these dock-warrants? It is not necessary that in every case the factor must hand over the warrants at the actual time of the advance. It was not necessary that they should be *in esse* at the time. [VAUGHAN, J. Suppose the warrants had been in existence at the time, but the factor had left them at home, and had brought them to the defendant on Monday.] Or suppose he had brought them on the same afternoon—or an hour after the advance—would it be contended, that would not have been sufficient? Or suppose the interval of a few minutes only. No one can do two things at the same moment. The whole must be looked at as one transaction in pursuance of the existing agreement. The advance and deposit must be considered as having taken place *semel et simul*. But it is said that the advance was made on the *personal* credit of Douglas and Co.; that however is not so. Credit was clearly given; but none in the proper and mercantile sense of the word. *Credit* was indeed given by the defendant to their statement that they would deposit the warrants—for no human affairs could be conducted without some confidence. The case then stands thus: the defendant had a lien for the advance made on the 17th of October in respect of the ten warrants that were then virtually deposited with him; and also in respect of the four warrants that were then virtually deposited with him; and also in respect of the four warrants previously deposited on the 7th. The transaction on the 22d is of the same character as that on the 17th, and the same observations apply—so that in effect the defendant had a lien in respect of all the sixteen warrants. It further appears, that on the 5th of November it was agreed, that any deposits then in the hands of the defendant, should be held as a security for *subsequent advances. The 1400*l*. advanced on that security was clearly advanced on the faith of the ten warrants; so with regard to the advance of 500*l*. upon the 10th of November. Will it be contended that, as the warrants were not on these occasions in the corporal possession of Douglas and Co., but of the defendant, the transactions were therefore not within the protection of the factors' act? The warrants were in the constructive possession of the factors; and

[*315]

[*316]

consequently the fair construction of the act will protect these transactions. Again, on the latter occasion, the 10th of November, there was an express agreement that the ten warrants should be retained as a security for the 500*l.* then advanced; so that if all the former transactions were struck out, there would still be a lien for 500*l.*, and therefore there was no tortious conversion by the defendant.

[The learned counsel then went into the question of the state of accounts between the plaintiffs and Messrs. Douglas, Anderson and Co.; but it does not appear to be necessary to report this part of the argument.]

As to the other branch of the rule with regard to a new trial, it would be useless to make it absolute unless a repleader were awarded. But this is not a case for the interference of the court. The pleadings are good and sufficient as they stand; and there is no pretence for awarding a repleader. The justice of the case is clearly with the defendant. Both parties are innocent, but one must suffer. And the plaintiffs having enabled their factors to appear as the owners of their property, have no right to make the defendant a loser by their act.

Wilde, Serjt., *Kelly* and *James* for the plaintiffs. The object of the factor's act was, to prevent the possibility of fraud being committed by English on foreign *merchants, who intrusted the former with their
*317] property. It introduced guards and cautions which the courts of law will not break down. In this case the plaintiffs are foreign merchants; their factors, the English merchants, are bankrupt; it is a case in which the court will be disposed to render every legitimate assistance to the plaintiffs. It is said that the question is, whether the money was advanced by the defendant on the faith of the dock-warrants; and that the advances may have been made, though the warrants were not then in existence. The fallacy consists in the meaning attributed to the word "faith." The plaintiffs contend that it is used to signify a "deposit," or "pledge" (the words of the act). Therefore, where an advance is made on the faith of the symbols of property, it is indispensable that they should be in existence at the time, for if not in existence, there can be no deposit of them. The third, fourth, fifth and seventh pleas are substantially the same; and the question may therefore be disposed of with reference to the third plea. That plea contains much introductory matter—setting, *inter alia*, an agreement between the defendant and Douglas and Co., as to the pledge of the dock-warrants. There would have been no use in traversing that allegation, or any of the others which are mere matter of inducement. The important averment is, that "the said Douglas, Anderson and Co. being so intrusted with, and in possession of, the said dock-warrants," (that is, at the time of the delivery and pledge,) "in pursuance of the said agreement, did deliver to the defendant the said four dock-warrants, and did pledge with him the said four bales of silk, as a security for the said sum of money, and which the defendant did then and there advance to the said Douglas, Anderson and Co., upon the faith of the said four dock-warrants." This allegation is traversed by the plaintiffs, *modo et formâ*. There *is no necessity to extend that traverse; but it clearly tra-
*318] verses the whole of that distinct allegation in the plea; and the existence of the dock-warrants at the time of the advance is therefore included. In *Cowlishaw* v. *Cheslyn*, the plea was, that A. C. did not make the grant as alleged in the declaration. Might not the defendant, under that issue, have shown that A. C. was not, in fact, in existence at the time of the

alleged grant? *De injuriâ* would not have been a good replication in this case, because the defendant claims an interest in the goods through the plaintiffs. No case has been cited in support of the position that that rule is limited to cases relating to real property. *Solly* v. *Neish*, 5 Tyrwh. 625; 2 C. M. & R. 355; 4 Dowl. P. C. 248; *Selby* v. *Bardons*, 3 B. & Ad. 2; 3 Tyrwh. 431; 1 C. & M. 500; *Bennion* v. *Davison*, 3 M. & W. 179; *Noel* v. *Boyd*, Tyrwh. & Gr. 211; 4 Dowl. P. C. 415; and *Whittaker* v. *Mason*, 2 N. C. 359; 2 Scott, 567, show that the replication of *de injuriâ* would have been improper; and also that where one particular fact is traversed, all the other facts alleged are not to be taken as conclusively admitted.

The question therefore comes round to this—what is put in issue by the replication here? It is, in terms, whether the advance of money was made upon the faith of the dock-warrants. But how could an advance be made on the faith of documents that were not *in esse* at the time? The delivery of the warrants is clearly in issue, and their existence is unquestionably involved in that issue. In *Cross Keys Bridge Company* v. *Rawlings*, 3 N. C. 71; 3 Scott, 400, the plaintiffs declared against the defendants for carelessly impinging with a ship against their bridge, and thereby doing damage. The defendants pleaded that the plaintiffs improperly narrowed the channel by an obstruction, without this, that the damage was occasioned by the carelessness of the defendants; and it was held that under *this plea, the defendants were entitled to give evidence in disproof [*319
of their carelessness, after they had failed to establish the obstruction imputed to the plaintiffs. That is an authority to show that the introductory allegations in this case are matter of inducement; and may be disproved. [TINDAL, C. J. In that case there was a special traverse, and all that preceded it was necessarily matter of inducement, and could not have been traversed.] In *Ridley* v. *Tindall*, 7 A. & E. 134, it was held that where the defendant in assumpsit pleads that he paid, and the plaintiff accepted, moneys in full satisfaction, a replication alleging that the plaintiff did not accept the moneys in full satisfaction, puts the payment as well as the acceptance in issue. That case was decided on the authority of *Webb* v. *Weatherby*, 1 N. C. 502; 1 Scott, 477; where to a plea of payment of 3*l*. 8*s*. 2*d*. in satisfaction and discharge of the defendant's promise, the plaintiff replied, that the defendant did not pay it in satisfaction and discharge, nor did the plaintiff receive it in satisfaction and discharge; and, on demurrer, this replication was held to be good. *Mills* v. *Barber*, Tyrwh. & G. 835; 1 M. & W. 425; 5 Dowl. P. C. 77, is an authority to the same effect. The judgment of *Alderson*, B., in *Edmunds* v. *Groves*, 2 M. & W. 642; 5 Dowl. P. C. 775. Antè, 312, 313, is strongly in favour of the position contended for on the part of the plaintiffs. In *Firmin* v. *Crucifix*, 5 C. & P. 98,(a) it was ruled by Lord LYNDHURST, C. B., at nisi prius, that the statements in a special plea, on which judgment had been given for the plaintiff on demurrer, could not be used, at the trial of the cause, as an admission on the record by the defendant; but that the cause must be tried on the general issue, without any reference to the special plea at all; and Lord TENTERDEN, C. J., ruled in a similar *manner in [*320
Montgomery v. *Richardson*, 5 C. & P. 247; and this ruling was afterwards upheld by the court. In *Grant* v. *Kearney*, 12 Price, 773, it was held, that protestation of matter in a replication had not the effect of admitting it, so as to dispense with proof of it on the trial of the issue.

(a) And see antè, vol. ii. p. 220.

These authorities establish that there is no admission in the pleadings in the present case to preclude the plaintiffs from showing that, in fact, the warrants were not in existence at the time of the advances, or,—which amounts to the same thing,—that the moneys were not, in fact, advanced, upon the pledge of the warrants. [Tindal, C. J. Suppose the warrants had been locked up in a drawer, the key of which had been mislaid, at the time of the advance.] Still some symbol might have been given to transfer the property. The fact that Douglas and Anderson were possessed of the warrants is clearly in issue; *à fortiori*, therefore the fact of their existence is in issue; for how could the factors be possessed of them, if they were not *in esse?* The advances were made on the credit of the factors, upon a promise of the deposit of some warrants, not upon the faith of an actual deposit. The defendant would have been as well satisfied if, on the Monday following, the factors had brought him any other warrants of the same value, as those belonging to the plaintiffs.

But then it is argued, that, even conceding that no lien was created at the time of the original delivery of the dock-warrants, still the defendant would have a lien in respect of the subsequent advances. But if the original delivery did not confer a lien, as not being a transaction protected by the statute, the subsequent dealings between the factors and the defendant would not validate such transaction; and if so, the refusal to deliver the warrants to the plaintiffs would amount to a conversion. In *M'Combie*
*321] *v. *Davies*, 6 East, 538; S. C., not S. P., 7 East, 5, it was held, that taking the property of another by assignment from one who had no authority to dispose of it, and refusing to deliver it to the principal after notice and demand of him, was a conversion. Then, with regard to the transaction of the 7th of October, that was clearly a case of exchange or transfer of warrants, and not a pledge or deposit, for money, of negotiable instruments (such warrants not being "negotiable instruments" within the meaning of the factors' act); and, consequently, the transaction was not protected by that act, and no lien was created in respect of it; *Taylor* v. *Kymer*, 3 B. & Ad. 320. Then, it is argued that the *actual* possession of the warrants by the defendant, at the time the subsequent advances were made, may be considered as the *constructive* possession of the factors. But that is not so; the warrants would not have passed upon the bankruptcy of the factors to their assignees as being in their possession, order or disposition. Actual possession, or, at all events, the right to actual possession (which is inconsistent with a lien claimed by another party), must exist in such a case. *Greening* v. *Clark*, 4 B. & C. 316; 6 D. & R. 375. [Bosanquet, J. Supposing there had been a valid deposit in the first instance under the factors' act, could not a further advance have been made in respect of such deposit without putting an end to the former transaction?] It is submitted that it could not. But at any rate there was no valid deposit in this case. *Cur. adv. vult.*

Tindal, C. J. now delivered the judgment of the court. This was an action of trover to recover the value of sixteen bales of silk. The defendant pleaded, first, not guilty; secondly, that the plaintiffs were not lawfully
*322] possessed; *thirdly, as to four of the bales of silk, that Douglas, Anderson and Co. were the factors and agents of the plaintiffs in the city of London, and at the time of the delivery of the dock-warrants after mentioned, the said four bales of silk were warehoused with the St. Katharine's Dock Company; and Douglas, Anderson and Co. were before, and at the time of, the pledge and delivery of the four dock-warrants, as

such factors and agents, *intrusted by the plaintiffs with, and were then in possession of*, four dock-warrants in which the four bales of silk were described and mentioned, and that, "being so intrusted with and in possession" of the said dock-warrants, "they applied to the defendant for the loan and advance of 1900*l.* upon the said four bales of silk, as a security for the repayment of the said sum; and that it was thereupon, to wit, on the 7th of October, 1836, agreed between the defendant and Douglas, Anderson and Co., that the said Douglas, Anderson and Co. should pledge with the defendant the said four bales of silk, parcel, &c., as a security for the said sum to be advanced by the defendant, and which sum the said defendant then agreed to advance to the said Douglas, Anderson and Co. upon the faith of the said dock-warrants. And the plea then proceeds to allege, that Douglas, Anderson and Co., being so intrusted with, and in possession of, the said dock-warrants, in pursuance of the said agreement, delivered to the defendant the said dock-warrants, and did pledge with the defendant the four bales of silk as a security for the said sum of money "which sum of money the said defendant did then and there advance and lend" to the said Douglas, Anderson and Co. on the "faith of the said dock-warrants;" and the defendant further states, in his plea, that he had no notice at the time of the pledge, or of the advancing or lending the money, by the said dock-warrants or otherwise, that Douglas, Anderson and Co. were not then actual and *bonâ fide* owners and proprietors of the said four bales *of silk, parcel, &c.; and justifies the detainer of the said silk under such pledge. [*323

The plaintiffs, in their replication to this third plea, say, that the defendant did not advance or lend to the said Douglas, Anderson and Co. the said sum of 1900*l.* in that plea mentioned, or any part thereof, upon the faith of the said four dock-warrants in that plea mentioned, in manner and form, &c.; upon which issue is joined.

The fourth plea is pleaded in the same form—as to a pledge of ten bales of silk; the fifth—as to a pledge of two bales of silk; and the seventh plea —as to a pledge of the sixteen dock-warrants; to each of which pleas, respectively, a similar replication is pleaded as to the third plea, and issue joined thereon. The sixth and eighth pleas justify the detaining of the silks, in those pleas respectively mentioned, upon a pledge by Douglas, Anderson and Co. to the defendant, under the provisions of the third section of the stat. 6 G. 4, c. 94; the pleas alleging that the plaintiffs, before and at the time of the pledge, were indebted to Douglas, Anderson and Co., as their factors and agents, in a sum which is still unpaid, and for which they had a lien on the bales of silk; and that they pledged the same to the defendant as a security for a large sum, viz. &c., then due from Douglas, Anderson and Co. to the defendant; and that the defendant detains the silks, under such pledge, on account of the money then due to him, to the extent of the right or lien which Douglas, Anderson and Co. then had a right to enforce.

The replications to the sixth and eighth pleas respectively deny that the plaintiffs were indebted to Douglas, Anderson and Co., as such factors and agents, in manner and form, &c.; upon which issue is joined.

At the trial of the cause before me at Guildhall, the jury found a verdict for the plaintiffs on the first and *second issues, upon which no question now arises; and a verdict was entered, by my direction, [*324 for the defendant upon the third, fourth, fifth and seventh issues, which, as stated above, justify on the ground of a pledge of the dock-warrants by the

factors, under the provisions of the second section of the factors' act (6 G. 4, c. 94); and as to the sixth and eighth issues,—which justify on the ground of a pledge by the factors for a debt due to them from the plaintiffs before the pledge, to the extent of the factor' lien,—the jury found a verdict for the plaintiffs.

The case has come before us on cross motions; one, a motion on the part of the plaintiffs to enter the verdict for them on the issues raised on the third, fourth, fifth, and seventh pleas; or if that be not granted, then for a new trial, with leave, if necessary, to amend the replication as to those pleas; and another motion on the part of the defendant, to set aside the verdict as to the sixth and eighth issues, and for a new trial thereon.

As the only point raised upon the sixth and eighth issues involved an inquiry as to the real state of the accounts between the plaintiffs and their factors, before and at the time of the respective pledges,—upon which the evidence at the trial was far from satisfactory,—the case has stood over for a very considerable time, upon the understanding that the court should be furnished with a state of the accounts agreed upon by both parties; which would at once have put an end to all doubt in whose favour those issues ought to be entered. But as it appears no such agreement can be obtained, but each party has furnished his separate statement of the accounts, differing from each other, we can only determine this part of the question before us by the evidence given at the trial. Now it is clear that the affirmative of these two issues rests with the defendant. It is the defendant who asserts that, before and at the *time of the pledge, the
*325] plaintiffs (the principals) were indebted to their factors; and the burthen of such proof rests, therefore, upon him. And as the jury,—a jury of merchants,—have given their verdict against the defendant upon this precise point, we ought to be entirely convinced that such verdict is wrong before we can be called upon to set it aside. Indeed, in this case, the special jury at the trial, in the course of the summing up, on these pleas, stated that they had taken down the figures correctly, and that they found there was no debt.

It was objected, on the part of the defendant, that the jury were wrongly directed, at the trial, to give credit to the plaintiffs for the sums raised by the factors upon two former wrongful pledges of their silks, of which the amount had never been brought forward in favour of the plaintiffs. But we do not find that the jury was so directed, but that the whole case as to the debt due to the factors was summed up, and left to the consideration of the jury, as mercantile men, to draw their own conclusion whether there was a debt or not; and we can see no objection, in point of law, if the jury have given credit for those sums in the account between the factors and their principals; for we conceive, on the principle laid down in *Marsh* v. *Keating*, 1 Mont. & Ayrt. 592, in Dom. Proc.; S. C. 1 N. C., 198; 1 Scott, 5, that Messrs. Bonzi were at liberty, at any time when they found that their factors had wrongfully raised money on their goods, in taking the account between themselves and their factors, to abandon the goods altogether, and to treat the money so wrongfully borrowed by them on the pledge of the goods, as money had and received to the use of themselves. On the other hand, the plaintiffs objected altogether to the principle on which the account was made up by the factors. But, without entering into a
*326] *discussion on this point, we think this matter was a question peculiarly for the consideration of a jury of merchants; and we cannot see that they have come to a wrong conclusion with sufficient certainty to

induce us to set the verdict aside. Perhaps, however, from the conclusion at which we have arrived upon the rule obtained by the plaintiffs, our determination as to the defendant's rule may not be considered of so much importance.

The plaintiffs' rule seeks to set aside the verdict which has been entered for the defendant upon the issues raised on the third and other pleas,—which are grounded on the second section of the factors' act,—and to enter such verdict for the plaintiffs; or that, at all events, there may be a new trial, with liberty to the plaintiffs to amend their replication. As to the third plea, which justifies the detaining of the four bales of silk, on the ground of the pledge made on the 7th of October, we think the rule for entering the verdict for the plaintiffs, so far as that plea is concerned, ought to be made absolute. For it is clear, upon the evidence in the cause, that no advance whatever or loan was made at the time of such pledge, on the faith of those four dock-warrants, but that they were tortiously delivered by the factors to the defendant, in exchange for other warrants of other persons then in his possession, and upon the security of which an advance had been previously made to the factors. Such a delivery of dock-warrants would, according to the case of *Taylor* v. *Kymer and Another*, 3 B. & Ald. 320, being a delivery in respect of an antecedent debt, give the defendant no greater right in respect of those warrants, than the factors themselves had, at the time of the deposit; and upon the finding of the jury on the sixth and eighth pleas, the factors appear to have had no lien at all. Such a delivery, therefore, is *neither within the letter nor the meaning of the second section of the factors' act; it is in effect a wrongful [*327 delivery, upon which no part of the advance mentioned in the third plea was made; and the verdict on the issue in that plea ought to be for the plaintiffs. But this observation goes only to the third plea, and the goods covered by it, and does not affect those included in the fourth and fifth pleas, which relate to the delivery of the dock-warrants on the 17th and 24th of October; nor does it affect the seventh plea, which is framed to cover the whole quantity of silks in the hands of the defendant, upon the ground of a subsequent advance upon the whole. As to the verdict on the fourth and fifth issues, the objection taken and argued before us on the part of the plaintiffs, is, not only that the factors were not in possession of the dock-warrants in the fourth and fifth pleas mentioned, at the time the advances were respectively made, on account of which advances they were afterwards delivered, but that the dock-warrants themselves were not even in existence until two days after the advances were made; and as to the issue on the seventh plea, the objection taken is, that the factors were not in the possession of the dock-warrants at the time the pledge mentioned in that plea took place. But we think that neither of these objections is open to the plaintiffs upon the present state of the record.

The real question between these parties,—the question which involves the whole right and justice of the case,—is undoubtedly this, (viz.) whether the factors, at the time of the original pledges of the dock-warrants stated in the respective pleas, were, not only *in the possession* of those dock-warrants, but *intrusted* with them by the true owners, within the meaning of the factors' act; a question, however, as we have already stated, which, as the pleadings stand at present, the plaintiffs are estopped from raising. That the act gives no authority to a factor *to pledge a dock-warrant belonging to his principal, for an advance of money to the factor, except [*328 in cases where the factor is not only possessed of the dock-warrant, but

"intrusted therewith by the principal," is now so fully settled by the case of *Phillips* v. *Huth*, 6 M. & W. 572, and the still later case, in the court of Exchequer Chamber, of *Hatfield and Another* v. *Phillips and Others*, 9 M. & W. 647, that it is quite unnecessary to do more than refer to the judgments in those cases, and the reasons there given in their support; and, therefore, the right of the owners of these silks on the one part to recover them, and of the defendant on the other part, who has advanced money upon them to the factors, to retain them, ought to depend on the evidence which the defendant can produce that the factors were intrusted with the dock-warrants before and at the time of the respective pledgings; that is, either evidence of direct authority in the particular instance, or of a course of dealing between the owners and the factors on former occasions, such course of dealing being known and recognized by the owners, or of the course of trade generally observed between principal and factor with respect to this particular commodity. For the second section clearly enacts, that it is only such factor "*who is*" "*intrusted with and in possession of* any bill of lading, dock-warrant," &c. that shall be deemed and taken to be the true owner, so far as to give validity to any contract or agreement entered into by the person so *intrusted and in possession* for the sale, disposition, deposit or pledge of any goods, as a security for money advanced or given upon the pledge of such several documents.

But, looking at the issue taken on each plea, we are of opinion, that, for the purpose of each separate plea, the plaintiffs must be taken to have
*329] admitted in each *plea that "before and at the time of the pledge mentioned in that plea the factors *were intrusted* by them with, and *were then in possession of*," the several dock-warrants upon which the respective advances are alleged to be made. In each plea there is a distinct separate allegation in the very terms above stated. It is a material allegation; and the subsequent allegation in the plea "that the defendant advanced and lent his money to the factors upon the faith of the said dock-warrants,"—upon which precise allegation alone the issue is taken by the plaintiff in his replication,—does not, in any manner, involve the former; which former allegation, not being denied, must, upon the general principles of pleading and the authorities, be considered to be admitted by these plaintiffs for all the purposes of the issue taken on each separate plea. See *Cowlishaw* v. *Cheslyn*, 1 Cromp. & Jerv. 48, and *Bingham* v. *Stanley*, 1 Gale & Dav. 237; S. C. 1 Q. B. Rep. 117. The issue taken by the plaintiffs does indeed, in its natural sense and meaning, involve no more than the precise question, whether the advance was made on the faith of the dock-warrants; for whether the factors were intrusted with the dock-warrants or not at the time of the pledge, if the advance was not made on the faith of the dock-warrants but on some other warrant, the case is as completely out of the provisions of the second section of the factors' act as if the factors had not been intrusted with them by the true owner. And this consideration distinguishes the present case from that of *Ridley* v. *Tindall*, 7 A. & E. 134, referred to on the part of the plaintiffs; for there, the denial in the replication that the money was accepted in satisfaction, was, necessarily, at the same time, a denial of the *payment* being in satisfaction
*330] —the payment in satisfaction and the acceptance *in satisfaction being one and the same act; for unless the money were *accepted* it could not be a *payment*, but a *tender* only: whereas, in the present case, the two propositions are not identical; the factors may have been in possession and may have delivered the warrants, but still the lender may not

have advanced his money on the faith of such delivery. The cases of *Edmunds* v. *Groves*, 2 M. & W. 642, and *Bennion* v. *Davison*, 3 M. & W. 179, appear to be clearly distinguishable from the present.

We therefore think the plaintiffs are not entitled to have the verdict entered for them either on the fourth, fifth, or seventh issues, because, upon the evidence, the money was advanced by the defendant to the factors upon the occasion of each of these pledges, on the faith of the goods; which is all that is put in issue; nor could the plaintiffs be so entitled, on a new trial, although the factors were not proved to be intrusted with the dock-warrants, whilst the pleadings remain in their present state. But as the justice of the case manifestly requires that the plaintiffs should be at liberty to go to a new trial, and to put in issue the possession of the factors, and their being intrusted with the dock-warrants at the time of the respective pledges made, we think the plaintiffs should be allowed to amend their replication for this purpose; but that, in such case, they must pay the costs of the former trial.

The rule of the plaintiffs must therefore be disposed of, by making it absolute for entering the verdict in their favour on the issue raised on the third plea, or for a new trial altogether, with liberty to amend the replication; in which latter case it must be on payment of costs. And as to the rule obtained by the defendant, we think it must be discharged.(a)

(a) By the 5 & 6 Vict., c. 39, s. 1, after reciting the 6 G. 4, c. 94, and that "whereas advances on the security of goods and merchandize have become an usual and ordinary *course of business, and it is expedient and necessary that reasonable and safe facilities should be afforded thereto, and that the same protection and validity should be [*331 extended to *bonâ fide* advances upon goods and merchandize as by the said recited act is given to sales, and that owners intrusting agents with the possession of goods and merchandize, or of documents of title thereto, should in all cases where such owners by the said recited act or otherwise would be bound by a contract or agreement of sale, be in like manner bound by any contract or agreement of pledge or lien for any advances *bonâ fide* made on the security thereof; and whereas much litigation has arisen on the construction of the said recited act, and the same does not extend to protect exchanges of securities *bonâ fide* made, and so much uncertainty exists in respect thereof, that it is expedient to alter and amend the same, and to extend the provisions thereof, and to put the law on a clear and certain basis," it is enacted, that "any agent who shall be intrusted with the possession of goods, or of the document of title to goods, shall be deemed and taken to be owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien, or security *bonâ fide* made by any person with such agent so entrusted as aforesaid, as well for any original loan, advance, or payment made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof; and such contract or agreement shall be binding upon and good against the owner of such goods, and all other persons interested therein, notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent."

By sect. 2, it is enacted, "that where any such contract or agreement for pledge, lien, or security shall be made in consideration of the delivery or transfer to such agent of any other goods or merchandize, or document of title, or negotiable security, upon which the person so delivering up the same had at the time a valid and available lien and security for or in respect of a *previous advance* by virtue of some contract or agreement made with such agent, such contract and agreement, if *bonâ fide* on the part of the person with whom the same may be made, shall be deemed to be a contract made in consideration of an advance, within the true intent and meaning of this act, and shall be as valid and effectual, to all intents and purposes, and to the same extent, as if the consideration for the same had been a *bonâ fide* present advance of money: provided always, that the lien acquired under such last-mentioned contract or agreement, upon the goods or documents deposited in exchange, shall not exceed the value, at the time, of the goods and merchandize which, or the documents of title to which, or the negotiable security which shall be delivered up and exchanged."

*Sect. 3, provides that the statute is to be construed to protect only *bonâ fide* transactions, without notice that the agent pledging is acting without authority, or [*332 *malâ fide* against the owner.

And by sect. 4, it is enacted, that "any bill of lading, India warrant, dock-warrant warehouse-keeper's certificate, warrant or order for the delivery of goods, or any other

document used in the ordinary course of business, as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented, shall be deemed and taken to be a document of title within the meaning of this act; and any agent intrusted as aforesaid, and possessed of any such document of title, whether derived immediately from the owner of such goods, or obtained by reason of such agent's having been intrusted with the possession of the goods, or of any other document of title thereto, shall be deemed and taken to have been intrusted with the possession of the goods represented by such document of title as aforesaid; and all contracts pledging or giving a lien upon such document of title as aforesaid, shall be deemed and taken to be respectively pledges of and liens upon the goods to which the same relate; and such agent shall be deemed to be possessed of such goods or documents, whether the same shall be in his actual custody, or shall be held by any other person subject to his control, or for him, or on his behalf; and where any loan or advance shall be *bonâ fide* made to any agent intrusted with, and in possession of, any such goods or documents of title as aforesaid, on the faith of any contract or agreement in writing, to consign, deposit, transfer or deliver such goods or documents of title as aforesaid, and such goods or documents of title shall actually be received by the person making such loan or advance, without notice that such agent was not authorized to make such pledge or security, every such loan or advance shall be deemed and taken to be a loan or advance on the security of such goods or documents of title, within the meaning of this act, though such goods or documents of title shall not actually be received by the person making such loan or advance till the period subsequent thereto; and any contract or agreement, whether made direct with such agent as aforesaid, or with any clerk or other person on his behalf, shall be deemed a contract or agreement with such agent; and any payment made, whether by money, or bills of exchange, or other negotiable security, shall be deemed and taken to be an advance within the meaning of this act; and an agent in possession as aforesaid of such goods or documents shall be taken, for the purposes of this act, to have been entrusted therewith by the owner thereof, unless the contrary can be shown in evidence."

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*333] *HODSON *v.* PATTERSON.

Where the defendant had obtained a rule for the costs of the day for not proceeding to trial, and the master, by his allocatur, endorsed on the rule, had ascertained the amount of such costs, the court thought it unnecessary to grant the defendant a rule for the payment of that amount, in order to entitle him to issue execution for it under the 1 & 2 Vict., c. 110, s. 18.

In this case the defendant had made a rule absolute for the costs of the day for not proceeding to trial. The master had taxed these costs at 80*l.* 1*s.* 6*d.*, and had endorsed his allocatur on the rule to that effect.

Bompas, Serjt., now applied for a rule, calling upon the plaintiff to show cause why he should not pay to the defendant or his attorney the sum so allowed by the master.

The learned serjeant suggested that the rule for the costs of the day might not be sufficient for the defendant to issue execution (under the 1 & 2 Vict., c. 110, s. 18,(*a*)) for the sum allowed, inasmuch as such rule did not mention any specific sum. [TINDAL, C. J. When the costs are allowed by the master, is it not the same as if they were mentioned in the rule?] In *Jones* v. *Williams*, 11 A. & E. 175; S. C. in Exch. 8 M. & W. 349, where, under an agreement of reference a sum was awarded to be paid by the plaintiff to the defendant, and afterwards the agreement was made a rule of court; it was held that the plaintiff could not, by virtue of the rule of court,

(*a*) Which enacts "that all rules of courts of common law &c., whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the effect of judgments in the superior courts of common law, and the persons to whom any such moneys, or costs &c., charges or expenses, shall be payable, shall be deemed judgment-creditors within the meaning of this act &c.; and all remedies hereby given to judgment-creditors are in like manner given to persons to whom any moneys, or costs &c., charges, or expenses, are by such orders or rules &c. respectively directed to be paid."

issue execution for the sum under the statute, because the eighteenth section was applicable *for such purpose only where the money payable by the rule was expressed in the rule itself. [MAULE, J. In such a case the rule would merely be to obey the award. TINDAL, C. J. The statute speaks of rules "whereby any sum of money shall be payable." Was not the rule for the costs of the day such a rule, though the exact sum was to be ascertained by the officer of the court?] If the rule now applied for is necessary, and is made absolute with costs, the difficulty may certainly arise, that the defendant may have to apply for a separate rule for these costs, and so on *ad infinitum*. [CRESSWELL, J., referred to *Neale* v. *Postlewaite*, 1 Q. B. Rep. 243, where, by a rule of court, the costs of an attorney against his client were referred to taxation by the master, on the usual undertaking to pay what should be found due. The master having made his allocatur, and the money not having been paid, the court made an order that the client should pay the money, but that the attorney should abandon his right to move for an attachment; the purpose of applying for such order being, that the attorney might become a judgment creditor under the statute.] So in *Doe* v. *Amey*, 8 M. & W. 565, it was held that the court had authority, under the statute, to order a party by rule, to pay a specific sum of money awarded by an arbitrator to be paid by him; and that, on such rule being made absolute, execution might issue against the party for the amount so specified in the rule. [TINDAL, C. J. You cannot take the rule to the officer to register, under the nineteenth section of the act, until you have the allocatur; but the moment you have allocatur, it seems to me, it becomes a rule of court to pay the sum allowed.] It is clear the defendant might proceed now by attachment; and the object of the act seems to have been to give the remedy against *the property instead of proceeding against the person of a party.(a) [*334 [*335

TINDAL, C. J. I think that, at all events, the court is not called upon in this case to grant what would be a novel rule. There is no precedent for such a proceeding, and no case similar to the present. The decisions which have taken place on awards stand upon a different footing. In those cases it was not a necessary consequence of the submission to arbitration that any money would become payable. The parties therefore were obliged to go to the court to obtain a rule for payment of the money awarded. As at present advised, I cannot help thinking, that when the condition was complied with by the master in making his allocatur for a certain sum, the rule became a rule of court for the payment of that particular sum. I do not wish, however, to be understood as giving a regular decision on that point.(a) But I do not think it necessary to grant a rule in this case.

COLTMAN, MAULE and CRESSWELL, JJ., concurred. Rule refused.

(a) The statute enacts, that rules &c. for the payment of money, shall have the effect of judgment. The statute, therefore, not only subjects the property of the party to execution, but gives a more direct remedy against the person (by *ca. sa.*) than could formerly have been had by attachment.

(b) See *Jones* v. *Williams*, 8 M. & W. 349.

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*SCOTT and Another v. CHAPPELOW. [*336

Where, in assumpsit, the plea admitted the contract in fact, but sought to avoid it on the ground of illegality, it was held that such plea set up matter of excuse, and that *de injuriâ* was a proper replication.

To an action by the drawers against the acceptor of two bills, the defendant pleaded that

an illegal company had been formed, that they had accepted bills in furtherance of the purposes of the company, that the plaintiffs had become the endorsees and holders of two of such bills, and that it was agreed between the plaintiffs (having notice) and the company that the bills should be renewed; that, in pursuance of such agreement, the company accepted the bills in suit (the defendant then being a member), and upon no other consideration: *Held*, that the replication *de injuriâ* was good.

Held also, that the marginal note in the demurrer-book, of the points to be argued, is for the information of the court, and not for that of the parties; and that a party whose pleadings are specially demurred to may attack the pleadings of the other side, although he has not set down the points upon which he intends to object.

ASSUMPSIT. The first count of the declaration stated that the plaintiffs, by the name of "*Claude Scott* and Co.," heretofore, to wit, &c., made their bill of exchange in writing, and directed the same to the defendant, under the name, &c. of "The Talacre Coal and Iron Company," and thereby required the defendant to pay to the plaintiffs 126*l* 12*s*. 2*d*., with interest thereon, &c.; and the defendant, to wit, by one W. W., his agent in that behalf, then accepted the said bill, and promised the plaintiffs to pay, &c.

Second count, upon a similar bill between the same parties for the same sum, at six months.

Third count, upon an account stated.

Fourth plea: That before the making of the bills of exchange hereinafter in this plea mentioned, or any of them, and before the making of the bills of exchange in the said first and second counts mentioned, or either of them, to wit, on, &c., it was agreed between Lewis Levason, George Frederick Baker, and divers other persons, in manner following; that is to say, that the said L. L., G. F. B., and the said other persons, should form a public

*337] joint-stock company, under pretext of carrying *on by means of such company the trade and business of mining, and that the said company should consist of a great number of members, to wit of 5000 persons; and that the said company should become possessed of, and interested in, divers lands, tenements, hereditaments and personal estate; and the profits, from time to time arising from the trade and business which the said company might carry on, should be divided into a great number of shares, to wit, 23,600 shares; and that the interest in such shares should be vested in the said members of the said company in various proportions; and that the interest in the said lands, &c., should be vested in the said members of the said company in proportion to the numbers of the said shares in which they were respectively interested as aforesaid; and that the said company should act as a corporate body; and that the same shares should be transferable without any restriction, notwithstanding that the said company had not obtained, and notwithstanding that the said company might not obtain, before or during the time of their so acting as such corporate body, or before or during the time while the said shares should be so transferable without restriction, any act of parliament, or charter of incorporation, or any grant by letters patent or otherwise, enabling the said company so to act as a corporate body, or legalizing the transfer of the said shares without restriction as aforesaid. And further, that after the making of the said agreement, and before the drawing of the bills of exchange hereinafter in this plea mentioned, or any of them, and before the drawing of the bills in the said first and second counts mentioned, or either of them, to wit, on the day and year last aforesaid, the said L. L., G. F. B., and the said other persons did succeed in forming the said company, and that the same was then formed by, and then consisted of, the said persons, who so

*338] agreed to form the *same, being a great number of persons, to wit, 2000 persons, who then became and were the members of the said

company; and that the said company did then, in pursuance of the said agreement, purchase for the purposes of the said company, and did then become and be, and thence continually up to and at the several times of the drawing of the several bills of exchange hereinafter mentioned, and at the time of the making of the said bills of exchange in the said first and second counts mentioned, were, for the purposes of the said company, possessed of and interested in divers lands, &c., and did during and at the several times last aforesaid, carry on divers trades and businesses; and that the said lands, &c., whereof and wherein respectively the said company were so possessed and interested respectively, and the profits from time to time arising from the trade and business which they so carried on as aforesaid, were, during and at the several times last aforesaid, divided into a great number of shares, to wit, 23,600 shares; and that the interest in the said shares, during and at the several times last aforesaid, was vested in the members of the said company, for the time being, in various proportions; and that the interest in the said lands, &c., at the said several times last aforesaid, was vested in the members of the said company, for the time being, in proportion to the number of such shares in which such members, for the time being, respectively were interested as aforesaid; and that the said members of the said company were subject to the liabilities of the said company, as between themselves, in like proportion; and further, that during and at the several times last aforesaid the said company did presume to act, and did act, as a corporate body, and did profess that the shares aforesaid were transferable without any restriction, and did pretend to transfer the said shares; and that during and at the said several times last aforesaid, the *said shares were transferable without any restriction; and that, at the said several times of the making of the said agreement, [*339 and of the formation of the said company, and during and at the said several times last aforesaid, the said undertaking and project of the said company was an attempt tending to the common grievance, prejudice and inconvenience of great numbers of the subjects of Her Majesty, the then and now Queen, in their trade and other lawful pursuits; and further, that no act of parliament was ever passed, and that no charter of incorporation or letters patent ever was or were made or granted, whereby the said company was authorized to act as a corporate body, or whereby the transfer of the said shares or the existence of the said company was rendered legal; of all which premises the said L. L. and G. F. B. always had notice and knowledge. And whereas at the said time when it was so agreed to form the said company, the said L. L. and G. F. B. were interested in divers of the lands and tenements and hereditaments afterwards purchased by the said company in the manner hereinafter mentioned, and had expended divers sums of money in mining operations therein, and were also possessed of divers machinery and effects then being thereupon; and it was then agreed between the said L. L. and G. F. B., and the other members of the said company, that the said company should purchase the interest of the said L. L. and G. F. B. in the said lands, &c. (including the value of the said mining operations), and the said machinery and effects, from the said L. L. and G. F. B., for the purposes of the said company; and the said company then did accordingly, for the purposes of the said company, purchase from the said L. L. and G. F. B., and then became and were possessed of and interested in, for the purposes of the said company, the interest of the said L. L. and G. F. B. in the said lands, &c. (*including the value of the said mining operations therein), and the [*340

said machinery, &c., which said lands, &c., machinery, &c., then became and were parcel of the lands, tenements, hereditaments and personal estate whereof and wherein the said company is hereinbefore alleged to have become possessed and interested as aforesaid. And further, that at the said time of the said agreement between the said company and the said L. L. and G. F. B., it was agreed that as an equivalent for, and in exchange and payment for, the said interest of the said L. L. and G. F. B. in the said lands, &c. (including the value of the said operations), and the said machinery, &c. the said L. L. and G. F. B. should be paid by the said company divers sums of money, amounting to the sum, to wit, of 20,000*l.*, and that the said L. L. and G. F. B. should receive from the said company, and become and be the owners of divers, to wit, 1100 of the said shares. And further, that after the making of the said last-mentioned agreement, to wit, on the day and year last aforesaid, the said company accepted divers negotiable bills of exchange, drawn by the said L. L. and G. F. B. jointly, and by the said L. L. and G. F. B. severally, upon the said company, for divers sums of money, amounting, to wit, to the sum of 20,000*l.*, and then delivered the said bills to the said L. L. and G. F. B. on account of the said sum so agreed to be paid to them as aforesaid; and the said L. L. and G. F. B. then accepted the said bills from the said company, on account of the said sum so agreed to be paid to them as aforesaid. And further, that afterwards, to wit, on, &c., the plaintiffs became and were the endorsees and holders of two of the said bills so accepted by the said company and delivered to the said L. L. and G. F. B. on the account aforesaid. And further, that afterwards, to wit, on the day and year last aforesaid, it was agreed between the said company and the plaintiffs,
*341] *that the said bills, whereof the plaintiffs were the endorsees and holders as aforesaid, and which were then due and payable, should be renewed in manner hereinafter mentioned; and thereupon afterwards, to wit, on the day and year last aforesaid, the said company (the defendant then being a member thereof and share-holder therein) accepted the bills of exchange in the said first and second counts of the declaration mentioned, and then delivered the same to the plaintiffs in lieu of, and in satisfaction for, the said bills of exchange, whereof the plaintiffs were the holders and endorsees as aforesaid, and upon no other account and for no other consideration whatever: and further, that the plaintiffs always, before, and at, the said several times of their becoming endorsees and holders of the said bills hereinbefore in that behalf mentioned, and of the making of the agreement with them in that behalf hereinbefore mentioned, and of the said accepting of the said bills in the said first and second counts of the declaration mentioned, and before the plaintiffs ever gave any value or consideration for the said bills whereof they were the holders and endorsees as aforesaid, or either of them, to wit, on the day and year last aforesaid, had notice and knowledge of the premises and matters in this plea mentioned, and every of them. Verification.

Replication; *de injuriâ.*

Special demurrer, assigning for causes, that the matter pleaded in the said last plea, so far as it relates to the first count of the declaration, is not matter of excuse, or any such matter as can be replied to, in the manner in which it is replied to, in the said replication, so far as it relates as last aforesaid; and that the matters alleged in the said last plea ought to have been traversed directly, and in the negative of the terms therein used or otherwise, and not by the general replication *de injuriâ*, as they are tra-

versed by the said replication; and that the *said last plea so far as it relates to the said first count, contains matter, which is either [*342 matter of denial of the defendant having been ever liable to perform the promise in the first count alleged, or else is matter which discharges him from the performance of the said promise; and that the said last plea, so far as it relates to the said first count, shows that the said promise in the said first count mentioned, was illegal and void in its inception, &c. Joinder.

The plaintiffs, in their marginal note, stated that, besides contending for the propriety of the replication, they meant to insist that the plea afforded no answer to the action, and that it was bad in substance.

Gaselee, Serjt., for the defendant, first objected that it was not competent to the plaintiff to attack the plea upon this marginal note. From *Parker* v. *Riley*, 3 M. & W. 230, it appears that where there is a demurrer to a pleading, and the party joining in demurrer does not state in the margin of his demurrer-book any objection to a former pleading, he is not entitled to object to its sufficiency on the argument; especially where it is only cause of special demurrer. [MAULE, J. The only effect of this objection would be, to put off the argument for the present.(*a*) If the plea is bad in substance, it must be set aside either here, or in error. The marginal note in the demurrer-book is meant for the information of the court, and not for that of the other party. The origin of the rule clearly shows that the marginal note was for the use of the court.] The new rule, Reg. Gen. H. T. 4 W. 4, r. 2,(*b*) *must have been intended for the benefit of the [*343 parties. The defendant here is in this situation, that he cannot tell what point he has to argue.

TINDAL, C. J. The court do not complain of the difficulty. The marginal note is for their advantage, not for that of the parties. The plaintiffs say the plea is bad in substance; by which they must mean that the whole is worth nothing. It does not seem to me that there is any thing in the objection.(*c*)

(*a*) In a case cited as *Coleby* v. *Graves*, by Knowles, *amicus curiæ*, in *Parker* v. *Riley*, 3 M. & W. 235, where no notice had been given by the party who joined in demurrer of the objections which he intended to raise, the court of Queen's Bench is said to have postponed the case, in order that the points might be stated in the margin of the demurrer-books.

(*b*) *Vide infrà*, 344. n.

(*c*) In the court of King's Bench a rule of M. 17 Car. 1, (A. D. 1641,) required the delivery of the paper books to the judges. (Rules and Orders in K. B. and C. P. 1739.) In the same court a rule was made, E. 2 Jac. 2, (A. D. 1686,) further regulating the delivery of the paper-books to the judges, and adding, "that the exceptions, which shall be insisted on, upon the argument, *shall be marked in the margin of those books.*" (*Ib.*) Formerly these marginal notes do not appear to have been communicated to the adverse party. From a passage in Bohun's Institutio Legalis (3d edit. 1724), it appears to have been not unusual for a party to demur specially, and then *catch* his opponent by bringing on something else that was naught in substance. The above rule was revived by R. H. 38 G. 3, (A. D. 1798); but in *Appleton* v. *Binks*, (A. D. 1804,) 1 J. P. Smith Rep. 361. (S. C. not S. P. 5 East, 148,) where there was a *general* demurrer, the court complained that in that case, as in some others, the points to be argued were omitted to be stated in some of the papers. In the demurrer-books, made up by the defendant, they were stated; and Lawrence, J., observed that, the party who objects to the pleadings and makes the points, should leave a copy of them with the two other judges to whom he does not deliver paper-books.

In Hilary term, 48 G. 3, (1808,) the following rule was promulgated in this court: "It is ordered, that from henceforth, in all special arguments in this court, the exceptions which are intended to be insisted upon, shall be marked in the margin of the books to be delivered to the respective judges: (1 Taunt. 203,) being to the same effect as the rules in K. B.

In *Clarke* v. *Davies*, 7 Taunt. 72; 2 Marsh. 386, (1816,) upon a general demurrer to a plea *in* bar in replevin, it appeared that the defendant had delivered paper-books, in the margin

Gaselee, Serjt. Secondly, the replication is bad; for it puts in issue matter of record. The plea states that the company had no charter; which *345] is matter for the *court. [TINDAL, C. J. That objection is not pointed out by the defendant as a cause of demurrer.]

Then the plea is not matter of excuse; it is pleaded either in denial or in discharge of the contract alleged in the declaration, and to such a plea the replication *de injuriâ* is insufficient; *Whittaker* v. *Mason*. 2 new cases, 359. The plea discloses a contract which was illegal in its inception, and states that the plaintiff knew of the illegality; this therefore is clearly not the admission of a contract, the non-performance of which the defendant seeks to excuse. In *Parker* v. *Riley*, 3 M. & W. 230, it was held, that when a plea to a declaration on a contract amounts to the general issue, the replication *de injuriâ* is bad; and it was intimated as the opinion of the court, that it is also bad where the plea is in avoidance of the contract itself. In *Humphreys* v. *O'Connell*, 7 M. & W. 370, indeed, to an action by an endorsee against the acceptor of a bill of exchange, where the defendant pleaded that it was accepted for a gaming debt, and that the plaintiff, before the endorsement to him, had notice thereof, the

of which were stated two points, which the defendant meant to make on the argument, to invalidate the plea; and the plaintiff had delivered paper-books, in the margin of which was stated a point which the plaintiff meant to make on the argument, as showing that the defendant's cognizance was bad; the court were at first inclined to consider that the effect of the practice established in this respect, was, that the plaintiff, by delivering paper-books which contained that point only, confined himself to that point, and abandoned the defence of the points, made by the defendant, as untenable, and could not be permitted to argue them; but Vaughan, Serjt. for the plaintiff, stating that the parties had supposed it sufficient, if each called the attention of the court to those points which himself intended to make, and that it was for the opposite party to supply the points which he intended to make, the court permitted the plaintiff to speak to all the points.

In Trin. T., 11 G. 4, (1830,) this court made the following rule:—"It is ordered, that from henceforth, in all special arguments in this court, notice in writing of all the points which are intended to be insisted upon by each of the parties, be delivered to the judges at their chambers two days before the day on which the case shall be set down for hearing, either by marking the points in the margin of the books delivered to the judges, or on separate paper; and that each of the parties do, within the same time, leave a copy of such notice at the chambers of the Lord Chief Justice, *to be delivered to the adverse party upon his application*." (6 Bingh. 802.)

In *Grottick* v. *Phillips* (9 Bingh. 721, 723, (1833,) when the case was called on for argument, it appearing that the party demurring had omitted to state in the margin of the paper-books the points to be discussed, the court were about to give judgment for the plaintiff, but upon the application of Coleridge, Serjt., allowed the matter to stand over—intimating at the same time, that in future *the penalty of immediate judgment* would always be attached to the omission by the party demurring to state the points of his argument.

The other courts, without adopting so strict a course, appear to have limited the parties upon the argument to the points stated in the margin. See *Darling* v. *Gurney*, 2 Dowl. P. C. 101. 104, (1833.) S. C. not S. P. 2 C. & M. 226.

By the new rules Reg. Gen. H. T. 4 W. 4, (1834,) r. 2, it is required that "in the margin of every demurrer, before it is signed by counsel, some matter of law intended to be argued shall be stated; and if any demurrer shall be delivered without such statement, or with a frivolous statement, it may be set aside as irregular by the court or a judge, and leave may be given to sign judgment as for want of a plea. Provided that *the party demurring may* at the time of the argument *insist upon any further matters* of law, *of which notice shall have been given to the court in the usual way*."

This rule has not been considered by this court as altering the former practice with respect to the marking of the points for argument, although the penalty denounced in *Grottick* v. *Phillips* does not seem to have been enforced; *Brogden* v. *Marriott*, 2 New Ca. 473. 479. (1836.)

But see *Lacey* v. *Umbers*, 3 Dowl. P. C. 732. (1835.) in the Exchequer (in which court there does not appear to have been any rule corresponding with that in this court of T. T., 11 G. 4.) *Verbeke* v. *Pearce*, 1 *Arnold*, C. P. 244. (1838.)

In *Ross* v. *Robeson*, 3 Dowl. P. C. 779, a defective marginal note was permitted to be amended by the court of Exchequer.

replication *de injuriâ* was held good; but that was upon the ground that the plea did not seek to avoid the contract, but *only contained matter of excuse. [TINDAL, C. J. That case may be supported upon the supposition that the *plea* was considered bad.] The case was decided upon the authority of *Isaac* v. *Farrar*, Tyrwh. & Gra. 281; 1 M. & W. 65; where, in assumpsit by the endorsee against the maker of a promissory note, the defendant pleaded special circumstances, which, he alleged, amounted to a gross fraud and imposition upon him; and that the note had been endorsed without consideration to the plaintiff, and with notice. The replication *de injuriâ* was held sufficient there, upon the same ground, namely, that the plea amounted only to matter of excuse for the non-performance of the promise, and to one ground of defence only. In the judgment of the court, as delivered by Lord ABINGER, C. B., it is said: "The plea confesses that the defendant made the note in question, and endorsed it to Richardson, who endorsed it to the plaintiff, which constitutes a primâ facie case of liability, and an implied promise to pay the amount to the plaintiff; and it avoids the effect of that admission, by showing that the note was made and endorsed without value *bonâ fide* paid, whereby the defendant was excused from performing that promise." In that case there was no illegality in the contract; for there is nothing illegal in accepting a bill without consideration; but here, there is illegality alleged which vitiates the whole contract. [CRESSWELL, J. The want of consideration in that case did not arise after the contract.] In this case the defendant alleges, in effect, that there was no contract at all, inasmuch as that declared on was illegal. In *Solly* v. *Neish*, 2 C. M. & R. 355; 5 Tyrwh. 625, in assumpsit for money had and received, the plea was that the money so received by the defendant, was the amount of the proceeds of the sale of goods consigned to him by P. and C. as their own goods, with the plaintiff's knowledge *and assent (but which, in fact, were the goods of P. and C. and the plaintiffs jointly), as a security for any money the defendant might advance to P. and C.; with power of sale to reimburse himself for such advances; that the defendant not knowing that the plaintiffs had any interest in the goods, made advances to P. and C. to the amount of 6000*l*., on the security of the goods which he afterwards sold, concluding with a set-off. It was held that this plea was —not matter of excuse, but—in denial of the promise, and that, therefore, the replication was bad.(*a*) [MAULE, J. It was competent to the defendant in that case to deny the promise, being an action for money had and received, to which non-assumpsit would have been, under the circumstances, the proper answer. But in an action on a bill of exchange, like the present, the defendant cannot traverse the promise; see Pleading Rules, H. 4 W. 4; Assumpsit 2; 10 Bingh. 470; 3 N. & M. 8. It would be strange if it were considered demurrable not to deny the promise, when the rule says it shall not be done.] The contract here is denied in the legal way. [MAULE, J. If so, may not such denial be traversed in the simplest way— by *de injuriâ*?] Not unless the plea offer matter of excuse. In *Jones* v. *Senior*, 4 M. & W. 123, to a declaration on bills of exchange drawn by M. and accepted by the defendant, and endorsed by M. to the plaintiff, the defendant pleaded, that before the accepting of the bills, he was indebted to M. in a larger amount, and that they were accepted on account of part of the debt; that after the acceptance, and before the bills became due, &c., the defendant was also indebted to other persons named, and was embar-

(*a*) It was held bad also on the ground that the plea claimed an *interest* in the money, and derived an *authority* from the plaintiff.

*348] rassed in his circumstances, and unable *to pay his debts in full; and thereupon, by an instrument in writing made between M. and the said other persons of the one part, and the defendant of the other, and subscribed by M. and the several persons whose debts were set against their names, they agreed to receive from the defendant a composition of 7s. in the pound on their respective debts, payable on a day named (which was after the bills became due.) The plea then averred payment of the composition by the defendant to M. and the other subscribing creditors; and also, that afterwards, and before the commencement of the suit, M. paid to the plaintiffs, and they received from him divers sums of money, amounting to a sum sufficient to satisfy all consideration whatever for, or in respect of, the endorsement of the bills in the declaration mentioned, and all money due from M. to the plaintiffs in respect of the bills or otherwise, and all claims and demands of the plaintiffs, in respect of the bills or otherwise on M., in full satisfaction and discharge of the bills, and of all claims and demands whatever in respect of them, or otherwise; and that the plaintiffs then became, and thenceforth continued, holders of the bills without consideration, and in fraud of the defendant and his creditors. To this plea, amounting to matter of *discharge*, and not of *excuse*, the replication *de injuriâ* was held bad. [Maule, J. In *Humphreys* v. *O'Connell* the replication was held good. How is that case distinguishable from the present? Here, there is a new contract with the plaintiff by means of another bill; In that case, there was a new contract by the endorsement.] The new bills in this case are tainted by the illegality of the original contract. As in *Chapman* v. *Black*, 2 B. & Ald. 588, where a bill of exchange, affected with usury, being in the hands of an innocent holder, he, on being
*349] informed of the *usury, took a fresh bill in lieu of it, drawn by one of the parties to the original usury, and accepted by the party who had accepted the former bill; and it was held that the holder could not maintain an action against the acceptor on this substituted bill; upon the principle, as stated by Lord Tenterden, C. J., in giving the judgment of the court, "that a substituted security generally stands in the same situation as the original." In *Humphreys* v. *O'Connell*, Parke, B. intimates that his opinion might have been different if the question had arisen between the original parties, as it does here. [Coltman, J. Is there any case where it has been expressly decided, that where the contract is good *primâ facie*, but the defendant, by his plea, seeks to avoid it on the ground of illegality, the replication *de injuriâ* is not sufficient?] There is no case expressly in point, but such appears to have been the leaning of the courts.

Channell, Sergt., contrà. The replication *de injuriâ* is properly pleaded in this case. It is not denied that to admit of such a replication, a plea must offer matter in excuse; but, it is submitted, that such is the effect of this plea. It admits of the existence of the contract in fact, and sets up an excuse for the non-performance of it. The cases cited on the other side are all distinguishable. *Parker* v. *Riley*, 3 M. & W. 230, is not an express decision on the point; it is only intimated by the court that if the plea was in avoidance of the contract, the replication *de injuriâ might* be bad.(a) In *Solly* v. *Neish*, 2 C. M. & R. 355; 5 Tyrwh. 625, the plea amounted to a denial of the facts from which the legal result would follow, that the
350*] money was had and received *to the use of the plaintiff; and the court said that the plea itself would have been held bad on special

(a) "It either amounts to the general issue, or is an avoidance of the contract itself; on the first supposition, it is clear the replication is bad; on the other, we are strongly inclined to think it so." Per Cur. M. & W. 237.

demurrer. [MAULE, J. The ground of the decision that the replication was bad in that case, was, that it came within the exception in *Crogate's case*, 8 Co. Rep. 66 b, as setting up an authority under the plaintiff. In *Jones* v. *Senior*, 4 M. & W. 123, the plea showed a discharge, as the facts stated amounted to a constructive payment in point of law. *Chapman* v. *Black*, 2 B. & Ald. 588, was decided under the old rules, and has no application to the present case. *Humphreys* v. *O'Connell*, 7 M. & W. 370, was decided on the same ground as *Isaac* v. *Farrar*, 1 M. & W. 65, which was similar to *Noel* v. *Rich*, 5 Tyrwh. 632; 2 C. M. & R. 360. That was an action by the endorsee against the drawer of a bill of exchange; the defendant pleaded that his endorsement was in blank; that the defendant delivered the bill to A., (not a party to the bill,) only to get it discounted for him; that A. fraudulently, and in violation of that special purpose delivered it to B. to secure a debt due from A. to B.; of all which the plaintiff had notice; the plaintiff replied, not exactly *de injuriâ*, but what was similar in effect; "that the defendant broke his promise, without the cause alleged by him in his plea;" the court held the plea was bad; but intimated a strong opinion that to such a plea, if good, the replication would have been proper. This case, of course, is not cited for the point decided, but for an illustration of the principle on which the plaintiff here relies. Lord ABINGER, C. B., in giving judgment, said, "Now, if a man puts his name to a bill of exchange, that is, *primâ facie*, a promise, as it is a transferable security, to pay the holder; a promise resulting, as matter of law, from the nature of the instrument. All the cases, *therefore, [*351 except where the promise is denied by denying the handwriting, are properly matter of excuse for the non-performance of the promise." Therefore it may be considered that in an action on a bill of exchange, if the handwriting be not denied, the promise is admitted, and every other defence to the action must be by way of excuse, unless indeed where it is positive matter of discharge. The plea in this case clearly amounts to matter of excuse; it states, in effect, that the first set of bills were tainted with illegality—that they were mere waste paper; and that as to the second set, there was no consideration for them; so that the plea amounts to a statement that there was no consideration; and to such a plea the replication *de injuriâ* is clearly proper. (He was then stopped by the court.)

Gaselee, Serjt., in reply. *Noel* v. *Rich* is one of the earliest cases on the subject, and, as applicable to the present case, contains only *dicta* thrown out by the court. The plea in *Jones* v. *Senior* amounted, in fact, to a plea of accord and satisfaction. In *Solly* v. *Neish* the decision rested on two grounds, one of which is in favour of the present defendant. All the cases show that where the illegality of a contract is set up between the original parties, it is not matter of excuse for its non-performance; for, illegality in the inception of a contract, in the same manner as fraud, renders it void *ab initio*.

TINDAL, C. J. I think, under the circumstances stated in this plea, that *de injuriâ* is a good replication. The plea, as it appears to me, amounts to no more, in substance, than an excuse for the non-payment of the bills by the defendant, by reason of there having been no consideration for his acceptance of them; and to such a plea, *de injuriâ* is a proper replication. What in this *case is the substance of the defence? It is that certain persons had entered into a speculation to form a company, [*352

which, it is alleged, was against public policy under the statute of George I.(a); and that certain bills of exchange, accepted by the company, came into the hands of the plaintiffs as endorsees. But that does not make them parties to the original bills, or to the original illegal transaction. Then, in a subsequent averment, it is stated that the plaintiffs took these bills with notice of their illegality, without affirming or denying whether the plaintiffs had the right to put the bills in suit. The plea then states an agreement that the original bills should be renewed, and that, in furtherance of this agreement, the bills in the declaration mentioned were accepted by the company, (the defendant being a member thereof,) and delivered to the plaintiffs in lieu of, and in satisfaction for, the former bills, "and upon no other account and for no other consideration whatsoever." This, then, being in effect an excuse set up for the non-performance of the contract—the making of which is not denied—on the ground of want of consideration for the acceptance of the bills, the replication *de injuriâ* is proper to put that excuse in issue. I am of opinion, therefore, that there must be judgment for the plaintiffs.

Coltman, J. No case has been cited to establish that where a plea shows that the contract declared upon is void by law, *de injuriâ* is an improper replication. Now this plea clearly goes in avoidance of the contract. There are some *dicta*, indeed, which appear to raise a doubt whether that replication is proper in such a case; but there does not appear to be any decision on the subject. The case of *Humphreys* v. *O'Connell*, 7
*353] M. & W. 370, seems *to be in point; and I think that this case falls within the rule in *Crogate's case*, 8 Co. Rep. 66 b, and that, the plea containing merely matter of excuse, and no denial of the cause of action, the replication is good.

Maule, J. I also think, both on the authorities and on principle, that the replication in this case is good. In most of the cases cited this form of replication has been held sufficient; certainly none of them show that such a replication, under circumstances like the present, would be bad. But upon principle also I think the replication is sufficient. The rule in *Crogate's case*, which is founded on good sense, is this: If the cause of action be admitted, but an excuse is set up, by which the defendant does not claim any interest in the matter of dispute or rely upon any authority derived from the plaintiff or given by law, then, the general replication *de injuriâ* is sufficient. And the reason seems to be, that it would be hard to put the plaintiff to traverse one fact only, when the defendant's excuse consists of several. Now, the substance of this declaration is, that the defendant accepted two bills of exchange, which were drawn upon him by the plaintiffs. This is admitted by the plea; and therefore a *primâ facie* cause of action is admitted by the defendant; but he says that he is excused from paying the bills by reason of the special matter which he states. If any portion of this excuse had arisen from an authority derived from the plaintiffs not to pay,—as if the defendant had set up accord and satisfaction,—I think the case would have fallen within the exception in *Crogate's case;* but the plea states no such authority. For these reasons, therefore, I am of opinion that the replication is sufficient.

*354] *The case of *Humphreys* v. *O'Connell* seems to me to be in point. There, the plaintiff was the endorsee and holder of a bill under circumstances similar to those in the present case. It has been pointed out as a distinction between that case and the present, that here the plaintiffs are

(a) 6 G. 1, c. 18, ss. 18, 19, the bubble act.

the drawers, and therefore original parties to the transaction, which, it is alleged, is void by illegality. Now I agree that the new bills mentioned in the plea in this case stand upon the same footing as the former, and that the plaintiffs must be considered as if suing upon the old bills; but that will bring the case directly within the principles of *Humphreys* v. *O'Connell*.

CRESSWELL, J. I am also of opinion that in none of the causes of demurrer set forth is there any thing to show that the present replication is bad.

The plea admits the acceptance of the bills by the defendant, and the promise to pay resulting therefrom; that which follows is matter of excuse for non-payment according to the promise; the case therefore falls directly within the principle of *Isaac* v. *Farrar*, 1 M. & W. 65; Tyrwh. & Gra. 281, and *Humphreys* v. *O'Connell*. Some *dicta* in the latter case have been relied upon, as showing that there the decision might have been different, if the question had arisen between the original parties to the bill. But if we are to consider this as an original transaction between the parties in this case, we must lay out of our consideration all that took place between those who were in fact the original parties; and then the plea will amount to one of no consideration, and will clearly fall within the cases just mentioned. Judgment for the plaintiffs.(a)

(a) *Vide Gibbons* v. *Mottram*, post, M. T. 1843.

*HEWITT v. PRICE. [*355

Railway shares were considered by the court as not being joint-stock within the 7 G. 2, c. 8, (the stock-jobbing act); and it was intimated that if a rule nisi for leave to *add* a plea raising a defence under that statute were granted, such rule would probably be discharged with costs.

Bompas, Serjt., applied for leave to add a plea in this case for the purpose of raising a defence to the action under the stock-jobbing act (7 G. 2, c. 8.).

The declaration was in assumpsit upon a contract by which the plaintiff agreed to sell, and the defendant to purchase certain shares in a railway company. The defendant had already pleaded, that the plaintiff was not possessed of the shares; that he was not the registered owner; and that he was not ready to transfer them to the defendant. The case had been at chambers before ERSKINE, J., who refused the application on the ground that the act did not apply to contracts for the sale of railway shares.

In *The London Grand Junction Railway Company* v. *Freeman*, Antè, Vol. II. p. 606; 2 Scott, N. R, 705, the provisions of the bubble act, 6 G. 1, c.18, s. 18, repealed by 6 G. 4, c. 91, were referred to; but the stock-jobbing act does not appear to have been mentioned; and it is submitted that such contracts as the present fall within the fifth and sixth sections of that act. By the former clause no money is to be paid or received for compounding differences for not delivering any public or joint-stock, or other public securities, or for not performing any contract in that respect; and by the sixth section no person who shall sell such stock, which is not paid for according to agreement, shall be obliged to transfer the same; but such stock may be sold to other parties, and the vendor may recover the damage from the first vendee. [CRESSWELL, J. It is difficult to see how that statute can apply to shares in a railway company. They *are not public stock or public annuities.] The statute speaks of [*356

"joint-stock" as well as of "public stock" and "public securities;" and it is submitted that joint-stock in a railway, in respect of which the shareholders contract no liability in their individual character, comes within the enactment. South Sea stock is within the act. [TINDAL, C. J. That stock was funded.] Omnium has also been held to be within the act. [CRESSWELL, J. For the reason given by Lord ELLENBOROUGH, C. J., in *Olivierson* v. *Coles*, 1 Stark, N. P. C. 496,(a) that "a person who has omnium is potentially in possession of stock." MAULE, J. In *Wells* v. *Porter*, 2 N. C. 722,(b) it was held that foreign stock is not within the provision of the statute; and, as was there said by BOSANQUET, J., "when we find the expression *public stocks*, we must intend the public stocks of this country." TINDAL, C. J. That case appears to be decisive. If, however, the defendant wishes to have the question more formally determined, he may take a rule nisi; but it will probably be discharged with costs. This is a very penal act. MAULE, J. It may be a question whether a defendant should be allowed to set up this defence *with* any other.]

Bompas, Serjt., declined taking a rule.(c)

(a) See *Brown* v. *Turner*, 2 Esp. N. P. C. 631; 7 T. R. 630.

(b) That was an action by the broker for commission, &c. The defence was, not that it was *joint* stock, but that it was *public* stock.

To an argument that the language of the enactment showed that such gambling contracts were illegal at common law, it was answered by the court, "that, at the most, such a contract would be *only void;* and the work of the agent who effected it could scarcely be called illegal." After the decision of the demurrer the action was compromised.

In a case between the immediate parties to the gambling contract, it would evidently be a sufficient defence that the contract was *void*.

(c) And see *Henderson* v. *Bise*, 3 Stark, N. P. C. 158; *Rossum* v. *Taylor*, Chitt. Stat. 1022, n.; *Mortimer* v. *M'Callan*, 6 M. & W. 58; 7 M. & W. 20; 9 M. & W. 636; Wilkinson's Law of Public Funds, Ch. IX.

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*357] *WILLIAM CRAWSHAY *v.* WILLIAM THOMPSON and Others.

Case, for "wrongfully, knowingly and fraudulently" stamping bars of iron made by the defendants, with a stamp resembling one used by the plaintiff, which the defendants knew, and intended, to be in imitation of the plaintiff's, and which was used by the defendants in order to denote that their iron was made by the plaintiff; and for knowingly, &c. selling the iron so marked as and for the plaintiff's iron.

A correspondence between the parties was given in evidence, in which the plaintiff charged the defendants with using the mark in question, as being a fraud upon him; the defendants, in answer, asserted that they had used the mark for many years continuously. This was not so, in fact; but it was shown that the mark had been adopted by them in the execution of orders received from foreign correspondents. *Held*, that it was properly left to the jury to say; first, whether the defendants' mark bore such a close resemblance to the plaintiff's as was calculated to deceive the unwary, and to injure the sale of the plaintiff's goods; and, secondly, whether the defendants used the mark with the intention of supplanting the plaintiff, or whether it was done in the ordinary course of business in execution of orders.

Held, also, that the notice of the resemblance of the mark given by the plaintiff to the defendants, did not, in the absence of proof of any intention to imitate it on the part of the defendants, give the plaintiff any cause of action.

The correspondence was commented upon by the counsel for the plaintiff in his reply, but not by the judge in summing up. *Held*. that it was not necessary that it should have been commented upon by the judge.

CASE. The declaration stated that the plaintiff, for divers years before and at the time of the committing of the grievances hereinafter next mentioned, was an iron manufacturer and exporter of iron, and exercised and carried on, and still did exercise and carry on the business of an iron manufacturer and exporter of iron; and the plaintiff, in the way of his said busi-

ness, did prepare, manufacture, make and sell, and still did prepare, &c., amongst other goods, divers large quantities of bars of iron, of a superior quality and description, which bars of iron the plaintiff during and at the time aforesaid was and still was accustomed to mark with a certain stamp or mark, stamped or impressed on the said bars of iron respectively, of a peculiar form, shape and appearance, consisting of, *to wit, two [*358
Roman capital letters, that is to say, the letters W. C.(*a*), disposed and placed and enclosed within a certain oval figure or bracket in manner and form following, that is to say, (WC); in order to denote that the said bars of iron so respectively marked as aforesaid were, and each of them was, prepared, manufactured, and made by the plaintiff, and to distinguish them from all bars of iron prepared, &c. by other persons. And the plaintiff, during and at the time aforesaid had sold, and still did sell, divers large quantities of such bars of iron so by him made and marked as aforesaid. And whereas the plaintiff, before and at the time of the committing of the grievances thereinafter next mentioned, had gained, acquired, and enjoyed great fame and reputation with the public, and also with divers foreign merchants in places beyond the seas, to wit, at Constantinople and Smyrna in Turkey, on account of the excellent quality of the said bars of iron so by him prepared, &c., and marked, and sold as aforesaid; whereby the demand for the said bars of iron of the plaintiff so distinguished and marked as aforesaid was very great. And the plaintiff, by means of the premises before and until, &c. had acquired and was acquiring divers great gains and profits by the sale of his said bars of iron so made and marked by him as aforesaid. Yet the defendants, well knowing the several premises, but wrongfully intending to injure the plaintiff in his sale of the said bars of iron, and to deprive him of the great gains and profits which the plaintiff might, and otherwise would, have acquired by preparing, manufacturing, marking, and selling such *bars of iron so by him made and marked [*359
as aforesaid, to wit, on, &c., and on divers other days, &c., did wrongfully, knowingly and fraudulently, and against the will and without the consent or license of the plaintiff, prepare, manufacture and make, and cause to be prepared, &c., divers, to wit, &c., 200,000 bars of iron, of similar form to those of the plaintiff, and did wrongfully, knowingly and fraudulently, and without the consent or license of the plaintiff, stamp or mark, and caused to be stamped or marked, the said bars of iron respectively with a certain stamp or mark, stamped or impressed on the said bars of iron respectively in imitation of the plaintiff's said stamp or mark, and of a form, shape and appearance very much resembling the form, shape, and appearance of the plaintiff's said stamp or mark, to wit, consisting of two Roman capital letters; that is to say, the letters W. O., disposed, and placed, and enclosed within a certain oval figure or bracket, in manner and form following; that is to say, (WO); and which last-mentioned mark the defendants then well knew and intended to be in imitation of, and similar in appearance to, the said mark so used by the plaintiff in that behalf as aforesaid; and was [*sic*] by the defendants so used and stamped or impressed on the said bars of iron respectively, in order to denote that such bars of iron so by them prepared, manufactured, made and marked as aforesaid, were respectively of the genuine manufacture of the plaintiff,

(*a*) Both letters are of the Roman character, though W., as remarked by the Lord Chief Justice on the motion for the new trial, is not, properly speaking, a Roman letter. So, the Germans call *all* letters in our ordinary type Latin letters, as distinguished from German, *i. e.* black-letter.

and were respectively bars of iron prepared, manufactured and made by the plaintiff; and the defendants did knowingly, wrongfully, and fraudulently, and against the will of the plaintiff, and without his license or consent, sell for their own lucre and gain the said bars of iron so by them prepared, manufactured, made and marked as aforesaid, as and for and under the false colour and pretence that the same were respectively bars of iron
*360] *of the genuine manufacture of the plaintiff, and so respectively prepared, manufactured and made by him as aforesaid; whereas, in truth and in fact, the plaintiff had never prepared, manufactured or made the said bars of iron, or any of them, or any part thereof. By means of which said several premises, the plaintiff had been and was wrongfully and unjustly hindered and prevented by the defendants from selling and disposing of divers large quantities, to wit, 200,000 of his said bars of iron, so by him prepared, manufactured and made as aforesaid, of great value, to wit, &c., which the plaintiff would otherwise have disposed of, and had been and was deprived of divers great gains and profits, which would otherwise have accrued to him from the sale thereof. And also by means of the premises, divers persons in parts beyond the seas, to wit, in Turkey aforesaid, had been induced to buy, and had bought, divers large quantities of the said bars of iron so made, marked and sold by the defendants as aforesaid, as and for bars of iron respectively of the genuine manufacture of the plaintiff, and also had been and were induced to believe, and did suppose, that the said bars of iron so made, marked and sold by the defendants as aforesaid, were respectively bars of iron made and marked, and sold, by the plaintiff as aforesaid. And because the said bars of iron so made, marked and sold, by the defendants as aforesaid, were respectively of inferior quality to those so made, &c., by the plaintiff as aforesaid, the said fame, credit and reputation, with the public, of the said plaintiff, had been and was greatly prejudiced and deteriorated; and also, by means of the premises, the plaintiff had been and was greatly injured and damnified in his said business, and otherwise; to the damage of the plaintiff of 30,000*l*., &c.

Plea: not guilty.

*361] At the trial before Tindal, C. J., at the sittings *for London after last Michaelmas term, the following facts were proved in evidence. The plaintiff was an iron manufacturer and the proprietor of extensive iron works near Merthyr Tidvil in South Wales. The defendants were also iron manufacturers and proprietors of iron works in the said neighbourhood: one of which was called "The Tredegar"—another "The Aberdare"—and a third, "The Penydarran Iron Works." They also carried on the business of iron merchants. It is the custom in the iron trade for the different iron masters to mark the iron made by them with a peculiar mark of their own; (generally a letter or letters, having some reference to the names of the maker, or the place where the iron is made). The plaintiff, and his father before him, had been for some years past in the habit of marking their bars of iron with their initial letters, placed in an oval thus—(WC). The marks usually adopted by the defendants were the words "Aberdare" and "Penydarran" upon the iron made at these places; and the letters c. T. o. upon that made at Tredegar. Since the peace in 1815, a large trade for iron had grown up between this country and Turkey and Greece (which had previously been supplied by Russia), and the plaintiff's iron, marked (WC), was in great estimation in the Turkish market, where the mark in question was generally known as "the comb mark." It

appeared to be the custom for several merchants to order iron from different English manufacturers, stamped with particular marks, differing from their own private marks. In the year 1837, the defendants received from a Mr. Kerr, a Turkish merchant in London, an order for a quantity of iron to be shipped by a certain vessel, and such iron was directed to be stamped W with a little o in an oval (W°). This order was executed at the Aberdare works; but the stamp was made W with a dot in an oval (W•). The plaintiff happening to be there at *the time, saw some of the iron [*362 so marked, and remonstrated with the defendant's manager on the alleged similarity of the mark to his own. No further notice was taken at that time; and the defendants, in execution of other orders, continued to supply iron stamped with the foregoing letters, which were afterwards varied, according to orders, to W with a large O, in an oval, thus; (WO). This latter mark was not used till 1838.

In March 1839, the plaintiff addressed a letter to the defendant *Thompson*, in which he complained of the continued use of the stamp, which he designated as "a palpable fraud" upon him. The defendant *Thompson*, in his answer (dated April of the same year), said, "I most readily admit that my house has for many years continuously made iron for the Turkish market, stamped (W:.) and (.:W) (and also other marks), and I conceive they are perfectly justified in so doing:" and, he added, "I believe the whole of the iron now made, or nearly so, for the Turkish market, is stamped in that form at whatever works it may be manufactured." Further correspondence took place between the parties; and in one of his letters, the defendant *Thompson*, referring to the mark in question, said: "In fact, it is a foreign mark (Russian), in corroboration of which you can find original and unequivocal testimony, if you make inquiry in the proper quarter." The use of the stamp was not discontinued by the defendants, but they used it only in the execution of foreign orders. Other manufacturers had used somewhat similar marks, having been ordered to do so for the Turkish market. The earliest instance proved, was in the year 1834, when Messrs. Bailey, an English firm, were ordered by a house in Constantinople to manufacture some iron, and stamp it (OM) (which, when inverted, would have the appearance of (OW)). This, the writer said, was the mark of a particular iron *much in request, and which he stated to be the [*363 original mark of the Constantinos. The Constantinos were a Turkish firm, who were supplied by the plaintiff with iron marked (WC). There was no evidence to show that any person had been actually deceived by the mark used by the defendants; but one witness stated that, possibly, in Asia Minor, it might be taken for the plaintiff's mark.

The Lord Chief Justice left it to the jury to say; first, whether they were satisfied that the defendants' mark bore such a close resemblance to the plaintiff's as, in its own nature, was calculated to deceive the unwary, or persons who were moderately skilled in the article, and to injure the sale of the plaintiff's goods; and, secondly, what was the intention of the defendants in using the mark complained of—whether it was for the purpose of supplanting the plaintiff, or done in the usual course of trade, and in execution of foreign orders sent to their house;—because, his lordship said, it seemed to him, that, unless there were such a fraudulent intention existing (at least before notice), and it were proved to the satisfaction of the jury, the defendants would not be liable. His lordship did not advert to the defendant *Thompson's* statement in his letter of April, 1839, that his

house had been "for many years continuously" in the habit of using the mark in question; but it had been fully commented upon by the counsel for the plaintiff as a mis-statement in point of fact. The effect of the notice contained in the plaintiff's letters, of the resemblance of the marks, with reference to the defendants' continuing to use them after such notice,—supposing the previous use to be found by the jury to have been innocent,—was reserved by his lordship, as a point of law, for the consideration of the court.

The jury returned a verdict for the defendants.

*364] **Shee*, Serjt., in last Hilary term(a), obtained a rule nisi for a new trial on the ground of misdirection, and of the omission of the Lord Chief Justice to comment upon the misstatement in defendant *Thompson's* letter, as to the continuous use of the mark in question.(b) He cited *Blofield* v. *Payne*, 4 B. & Ad. 410, 1 Nev. & Mann. 353; *Polhill* v. *Walter*, 3 B. & Ad. 114. *Foster* v. *Charles*, 6 Bingh. 396, 7 Bingh. 105, 4 Moo. & P. 61, 741. *Sykes* v. *Sykes*, 3 B. & C. 541, 5 D. & R. 292. *Millington* v. *Fox*, 3 Myl. & Cr. 338. *Smith* v. *Pelah*, 2 Stra. 1263. Com. Dig. Action on the case for negligence, (A. 5.).

Sir *T. Wilde*, *Bompas* and *Channell*, Serjts., now showed cause. First, as to the misdirection. If there was no semblance between the plaintiff's and the defendants' mark, calculated to deceive any one, there is no pretence for the action. The notice of the alleged resemblance can have no effect in this point of view; for, if in fact, the marks used by the defendants had no tendency to injure the plaintiff, any notice by the latter cannot give the marks that character. The jury have found a general verdict, and may therefore have negatived the fact of resemblance. But assuming that a resemblance did exist, then the second question was properly left by the Lord Chief Justice, whether the marks were used by the defendants for the purpose of supplanting the plaintiff; or whether they were used *bonâ fide*, in the usual course of trade, pursuant to orders received from correspond-*365] ents. The other side must argue, that it is *not necessary that the defendants should have *known* that the marks were calculated to deceive others, if, in fact, they were so calculated; but there is no authority for such a proposition. The intention of the party is an essential ingredient of the right of action. The cases cited when the present rule was obtained, fully support the summing up of the Lord Chief Justice. In *Sykes* v. *Sykes*, 3 B. & C. 541, 5 D. & R. 292, which was an action for fraudulently imitating the plaintiff's mark, and selling certain articles so marked, as and for articles of the manufacture of the plaintiff, it appeared that the plaintiff's father had formerly obtained a patent for the manufacture of shot belts, &c.; which patent had been held invalid by reason of a defect in the specification; but the father, and the plaintiff after him, had continued to mark their articles "*Sykes*' Patent," in order to distinguish them as their manufacture. The defendants subsequently commenced the manufacture of articles of the same sort, but of an inferior description, and sold them at a reduced price to the retail dealers. They marked them with a stamp closely resembling the plaintiff's, in order that the retail dealers might, as in fact they did sell them again as and for goods manufactured by the plaintiff. It was contended for the defendants, that, as one of them was named *Sykes*, he had a right to mark his goods with that name, and had

(a) January 13th. Before Tindal, C. J., Coltman, Erskine, and Maule, JJ.

(b) The case was also moved on the ground that the verdict was against evidence, but on showing cause, the Lord Chief Justice said, he thought the question was so entirely for the jury, that the court ought to be relieved from the consideration of that point.

also as much right as the plaintiff to add the word "patent," there being, in fact, no patent to protect the plaintiff's goods. But BAYLEY, J., at the trial overruled the objection, on the ground that the defendant had no right to mark his goods *as and for* goods manufactured by the plaintiff; and the court afterwards upheld his ruling. There, it expressly appeared that the goods were marked with the particular stamp, in order that they might be sold *as the plaintiff's. There was another point in that case upon which the other side might rely. It was proved that the retail [*366
dealers, who purchased of the defendants, knew by whom they were manufactured, and they sold them as the manufacture of the plaintiffs; and it was urged that the evidence did not support the allegation in the declaration, that the defendants sold the goods as and for goods made by the plaintiff, but that they sold them to third persons, in order that *they* might sell them as and for goods made by the plaintiff. The declaration however was held to be substantially proved. There the intention of the defendants that the goods so marked by them should be sold, either by themselves or others, as the plaintiff's manufacture, was clearly established. In *Blofield* v. *Payne*, 4 B. & Ad. 410, 1 Nev. & Mann. 353, the declaration stated that the plaintiff, being the inventor and manufacturer of metallic hones, used certain envelopes for the same, denoting them to be his; and that the defendants wrongfully made other hones, and wrapped them in envelopes resembling the plaintiff's, and sold them as and for the plaintiff's; whereby the plaintiff was prevented from selling many of his hones, and they were depreciated in value and reputation, those of the defendants being inferior; and it was held that the plaintiff was entitled to some damages for the invasion of his right by the fraud of the defendants, though he did not prove that the hones were inferior, or that he had sustained any specific damage. But in that case it was proved that the defendants had obtained some of the plaintiff's own wrappers, and had wrapped their hones in them; so that a fraudulent intention was also established in that case beyond all question. In *Millington* v. *Fox*, 3 Myl. & Cr. 338, the court of Chancery, it is true, granted a perpetual injunction against the use *by one tradesman of the trade marks of another, although such marks had been so used in ignorance of their being any person's property, [*367
and under the belief that they were merely technical terms; but the main question in that case ultimately turned upon the costs, which were refused to the plaintiffs; and there the marks used by the defendants were identically the same with those used by the plaintiffs, and not as is alleged in the present case, a mere resemblance. The Lord Chancellor, in giving judgment in that case, observed, "The sole object I had in looking into the pleadings in this cause was, to satisfy myself as to what ought to be done with respect to the question of costs; having previously come to the conclusion that there was sufficient in the case to show that the plaintiffs had a title to the marks in question; and they undoubtedly had a right to the assistance of a court of equity to enforce that title. At the same time, the case is very different from the cases of this kind that usually occur, where there has been a fraudulent use by one trader of the trade marks or names used by another. I see no reason to believe that there has in this case been a fraudulent use of the plaintiffs' marks. It is positively denied by the evidence; and there is no evidence to show that the defendants were even aware of the existence of the plaintiffs, as a company manufacturing steel; for although there is no evidence to show that the terms '*Crowley*' and '*Crowley Millington*' were merely technical terms, yet

there is sufficient to show that they were very generally used, in conversation at least, as descriptive of particular qualities of steel. In short, it does not appear to me that there was any fraudulent intention in the use of the marks. That circumstance, however, does not deprive the plaintiffs of their right to the exclusive use of those names; and therefore I stated, *368] that the *case is so made out as to entitle the plaintiffs to have the injunction made perpetual." The result therefore of that case is, that the Lord Chancellor decided that the plaintiffs were entitled to the sole use of particular marks, which indeed was not contested on the part of the defendants; but his lordship refused the costs, on the ground that the litigation was unnecessary, as the plaintiffs had abandoned their claim to an account.

Blanchard v. *Hill*, 2 Atk. 584, is in favour of the defendants. In that case Lord Hardwicke refused an injunction to restrain the defendant from using the Mogul stamp on his cards, although the plaintiff had suggested the sole right to be in him, by having appropriated the stamp to himself, conformably to the charter granted to the Card-makers' Company by king Charles I. His lordship said, "Every particular trader has some particular mark or stamp; but I do not know any instance of granting an injunction here, to restrain one trader from using the same mark with another; and I think it would be of mischievous consequence to do it." His lordship then referred to a case cited in *Southern* v. *How*, Poph. 144, (which had been mentioned in the argument,) where an action was brought by a cloth-worker against another of the same trade, for using the same mark, and judgment was given that the action would lie; "but," his lordship added, "it was not the single act of making use of the mark that was sufficient to maintain the action, but doing it with a fraudulent design, to put off bad cloths by this means, or to draw away customers from the other clothier." In *Knott* v. *Morgan*, 2 Keen, 213, an injunction was granted to restrain the defendant from running an omnibus having upon it such names, words and devices as to form a colourable imitation of the names, words and de- *369] vices on the omnibuses *of the plaintiffs; but the decision rested also on the ground of the imitation having been practised by the defendant, with the intention to deceive the public, and to injure the plaintiffs. *Foster* v. *Charles*, 6 Bingh. 396, 7 Bingh. 105, 4 Moo. & P. 61, 741, was an action for giving a false character; and *Corbett* v. *Brown*, 8 Bingh. 33, 1 Moo. & Sc. 85, 1 Moo. & Rob. 108, 5 C. & P. 363, was a similar action; but they are not material to the present case. In *Polhill* v. *Walter*, 3 B. & Ad. 114, a bill of exchange was presented for acceptance at the office of the drawee, when he was absent. The defendant who lived in the same house with the drawee, being informed by one of the payees, that the bill was perfectly regular, was induced to write on the bill an acceptance, as by the procuration of the drawee, believing that the acceptance would be sanctioned, and the bill paid by the latter. The bill was dishonoured when due, and the endorsee brought an action against the drawee, and, on proof of the above facts, was nonsuited. The endorsee then sued the defendant for falsely, fraudulently and deceitfully representing that he was authorized to accept by procuration. On the trial, the jury negatived all fraud in fact; but it was held, notwithstanding, that the defendant was liable; because the making of a representation which a party knows to be untrue, and which is intended, or is calculated from the mode in which it is made, to induce another to act on the faith of it, so that he may incur damage, is a fraud in law; and that the defendant must be considered as having intended to make such representation to all who received

the bill in the course of its circulation. The acceptance by procuration amounted to a statement by the defendant that he had authority to accept, a statement which was false in fact. *[CRESSWELL, J. It was false also to his own knowledge.] It was the same as forging a bill with the intention of paying it; but that case has no analogy to the present. There is no false representation in this case—unless the defendants used the mark in question, with the intention that their iron should be taken for the plaintiff's. That might have amounted to a false representation; but that question was left by the Lord Chief Justice, and was negatived by the verdict. [*370

The declaration in this case, in fact, precludes any question on the subject. The plaintiff is bound to prove not all that he states, but so much only as is sufficient to give him a cause of action. The declaration contains three distinct allegations; two of which must at least be proved, if not all three. Omitting the intention of the defendant to injure the plaintiff, no cause of action is disclosed by the declaration. The declaration states, that the defendants did wrongfully, knowingly and fraudulently, and against the will, &c. of the plaintiff, prepare, manufacture and make certain bars of iron, and did wrongfully, knowingly and fraudulently stamp and mark the same with a certain stamp or mark, in imitation of the plaintiff's said stamp or mark. That allegation imputes intention; it does not mean that the defendants' mark was an accidental resemblance of the plaintiff's, but that it was intentionally a copy. The declaration, after describing the mark so used by the defendants, proceeds thus—"which last-mentioned mark the defendants then well knew, and intended, to be in imitation of, and similar in appearance to, the mark used by the plaintiff, and was by the defendants so used, in order to denote that such bars of iron by them prepared, &c., were of the genuine manufacture of the plaintiff, and prepared, &c. by him." So far there is no statement of any injury; but the declaration proceeds to allege, that "the defendants did knowingly, wrongfully and fraudulently, *and against the will of the plaintiff, and without his license, &c., sell, for their own lucre and gain, the bars of iron so by them prepared and marked, as and for, and under the false colour and pretence that the same were, respectively bars of iron of the genuine manufacture of the plaintiffs." No cause of action is shown before this. It is impossible to separate the intention of the defendants from the fact of their selling their iron, as and for the plaintiff's iron. This is the only injury to the plaintiff. The action is brought to recover compensation for this specific injury, viz., the sale of their goods, as and for the plaintiff's goods; all the rest is merely introductory. An allegation that the defendants had sold their goods, as and for the plaintiff's, to his damage, might perhaps have disclosed a sufficient cause of action; but a mere allegation of a sale of goods resembling the plaintiff's, would not have sufficed. The questions therefore that were left by the Lord Chief Justice were precisely those which were pointed out by the plaintiff on the record. The mere interference by the defendants with the plaintiff's mark would clearly give no right of action, unless such mark were used by him in the nature of an advertisement to the public that the goods were of his manufacture. There is no case in which an action has been held to be maintainable, for using the mark of another tradesman, unless it has been shown that it was so used for the purpose of deceit. The declaration in this case is not proved by showing that the letters W O might possibly in Asia Minor be mistaken for W C; no witness having proved that there was any such mistake in point of fact. [*371

With respect to the notice, the plaintiff says in effect in his letter, "you

have copied my mark;" and this is denied by the defendant *Thompson* in *372] his answer. Such *a notice clearly cannot affect the defendants with any liability which had not previously attached to them.

Shee, Serjt., in support of the rule. First, as to the misdirection. The defence set up was, that the defendants did not use the mark in question, with the view of imitating the plaintiff's mark, but in pursuance of orders received from abroad; and it was as to the sufficiency or insufficiency of this defence that the jury needed the direction of the judge. No objection is taken as to the first point that was left, namely, whether the defendants' mark bore so much resemblance to the plaintiff's as to deceive the unwary, or persons of ordinary skill. The direction, however, should have stopped there, and the second point left for the consideration of the jury ought to have been omitted. This point was, as to the intention of the defendants in using the mark,—whether it was adopted for the purpose of supplanting the plaintiff, or in the usual course of trade and in the execution of orders. But it is submitted, that the motive or intention of the defendants in using the mark was immaterial, if the resemblance in fact existed, and the defendants were aware of it. If the defendants had received orders in express terms to mark their iron similarly to the plaintiffs, or in such a way as was calculated to make their iron pass for the plaintiff's, and if they had executed such orders, they would have been liable to this action, no matter from what motive they might have acted. The declaration charges that the defendants sold "for their own lucre and gain the said bars of iron so by them prepared &c., and marked as aforesaid, as and for and under the false colour or pretence that the same were respectively bars of iron of the genuine manufacture of the plaintiff." If they manufactured them to please *373] their correspondents, still it was "for their own lucre *and gain;" and *Sykes* v. *Sykes*, 3 B. & C. 541; 5 D. & R. 292, is an authority that, if these correspondents sold the iron as the plaintiff's, the allegation in the declaration, that it was sold by the defendants, is supported. It was not necessary to show that the defendants had been actuated by any dishonest or immoral intention; it was sufficient to maintain the action, if they knew that the mark they were using would deceive others, or was calculated so to do. In the allegation "which last-mentioned mark the said defendants then well knew, *and intended*, to be in imitation of, and similar in appearance to, the said mark so used by the plaintiffs," the words, "and intended," might be omitted. So also might the words "in order to denote" in the following passage, which might be read thus: "and was by the said defendants so used &c., *denoting* that such bars of iron so by them prepared &c., were of the genuine manufacture of the plaintiff." The material allegation is, that the defendants knowingly sold the iron, as and for the plaintiff's. [MAULE, J. If that be left in, how can it be said that the direction was wrong? How could the defendants knowingly sell their iron, as the plaintiff's iron, without an intention to deceive the purchaser?] The defendants, possibly, may have originally used the stamp, not with the intention of deceiving any one, but only to gratify their correspondents; but still if they knew that their act would deceive customers, the plaintiff would have a right of action against them. It is contended on the other side, that the allegation, that the defendants' mark was used "in imitation" of the plaintiff's mark, includes an imputation of intention to deceive. But it does not do so more than the allegation in *Polhill* v. *Walter*, 3 B. & Ad. 114, that 374] the defendant "did falsely, fraudulently and deceitfully *represent* and **pretend* that he was duly authorised" to accept the bill. Here, the

defendants have knowingly done that which will deceive the plaintiff's customers; and the same erroneous impression is produced by their acts, as was created in *Polhill* v. *Walter*, by the defendant accepting the bill as by procuration, when he had no authority to do so. The two cases are parallel, supposing that here the defendants put a mark upon their iron so like the plaintiff's that they knew it would deceive others; for that would show that they intended to pass off their iron as his. [COLTMAN, J. It might be evidence that they did so, but it would be no more.] Fraud in law would be sufficient. [MAULE, J. Would that be so, without an actual intention to deceive on their part?] The law will infer intention from the acts of a party. In *Foster* v. *Charles*, 6 Bing. 396; 4 Moo. & P. 61, TINDAL, C. J., said, "It has been urged that it is not sufficient to show that a representation, on which a plaintiff has acted, was false within the knowledge of the defendant, and that damage has ensued to the plaintiff, but that the plaintiff must also show the motive which actuated the defendant. I am not aware of any authority for such a position, nor that it can be material what the motive was. The law will infer an improper motive if what the defendant says is false within his own knowledge, and is the occasion of damage to the plaintiff." And when the case came before the court, after a second trial, 7 Bingh. 105; 4 Moo. & P. 741, his lordship said, "The question, therefore, is, whether if a party make representations which he knows to be false, and occasions injury thereby, he is not liable for the consequences of his falsehood? It would be most dangerous to hold that he is not. The confusion seems to have arisen from not distinguishing between what is *fraud in law, and the motives for actual fraud. It is fraud in law if a party makes representations which he knows to [*375 be false, and injury ensues, although the motive from which the representations proceeded may not have been bad; the person who makes such representations is responsible for the consequences." To apply that doctrine to the present case—the defendants have relied upon the honesty of their motives in using this mark; and that was left to the jury as a substantive defence; whereas it was really immaterial. [CRESSWELL, J. In *Foster* v. *Charles* the defendant had made a false statement, knowing it to be false; and that could hardly be said to be done by him in the ordinary course of business.] In considering the two points left to the jury in connection with the verdict, the plaintiff may assume that the resemblance proved was considered by them as calculated to deceive, and that the verdict was given upon that ground; and if so, what difference would there be between using the mark in question on the iron and putting W. C. on it or stamping upon it—"This is Crawshay's iron?" [MAULE, J. Supposing the defendants had done so, would it not have been necessary to show they had intended to sell it as the plaintiff's iron?] That, it is submitted, would not have been requisite, provided they did in fact sell their iron so stamped, knowing it would deceive others. There was an injury here to the plaintiff's right; and that, as was observed by LITTLEDALE, J., in *Blofield* v. *Payne*, 4 B. & Adol. 410, 411; 1 Nev. & M. 353,(a) is sufficient to enable him to maintain the action. [COLTMAN, J. You appear to admit that there must not only be a probability that deception would be practised, but that there must also be a probability that parties would be deceived; but was not that a question for the jury?] It was not properly left to them. The complaint on the part of the plaintiff is, *that, in the way the case was left to [*376 the jury, they must have considered that the motive with which the

(a) Sed vide *Williams* v. *Mostyn*, 4 M. & W. 145.

defendant acted was material; but *Corbett* v. *Brown*, 8 Bingh. 33; 1 Moo. & Sc. 85; 1 Moo. & Rob. 108; 5 C. & P. 363, shows that is not so.

But whether the intention was material or not, it was important that the jury should have been directed to consider the effect of the notice given by the plaintiff, that the mark used by the defendants was calculated to deceive others. In cases for uttering base coin, the *animus*, with which the act is done, is the most important. So, if a party charged with receiving stolen goods give a false account of the manner in which he became possessed of them, it is an important fact for the consideration of the jury. Here, the defendant *Thompson* has given a false account of the origin of the use of his mark. It is not easy to say, upon the facts left to the jury, what they have really found. [CRESSWELL, J. Their attention was drawn to two questions. Suppose the twelve could not agree as to both questions, but six were agreed as to one, and six as to the other—having been told that the decision of either question, according to the view which six of them in fact took of it, would authorize a verdict for the defendants—would not that support a general verdict?] That may be doubtful. There is no valid distinction between the use of two identical marks, and of two that are so like, that they may, by casual observers, be mistaken for each other. In *Sykes* v. *Sykes* the parties bore the same name, and the marks used by the defendant were not identical with those used by the plaintiff. So, in *Blofield* v. *Payne*. [TINDAL, C. J. There the defendant had taken the plaintiff's own wrappers to enclose his hones in.] *Millington* v. *Fox* (*a*)
*377] shows that an act not unlawful in *itself may become so by a notice that it is injurious to another. In Com. Dig. tit. *Action upon the case for negligence* (A. 5), it is said, "if a dog has once bit a man, and the owner, having notice, keeps him and lets him go about or lie at his door, action lies against him by a person bit, though it happened by his treading on the dog's toes;" and, again, "if a dog chases sheep, &c. without setting on, *or notice before, to the master*, an action does not lie." These authorities show that if a party be affected with knowledge of the injurious tendency of certain acts, he is liable for their consequences. [TINDAL, C. J. That is so in a large class of cases as to nuisances.]

Assuming, then, that a resemblance has been found to exist between the defendants' mark and the plaintiff's, after notice of the resemblance, and of the injurious effects to the plaintiff by the defendants' using the mark, it was a wrong to the plaintiff that the defendants continued to use it.

COLTMAN, J. I am of opinion that there has been no misdirection in this case. The declaration alleges in substance that the defendants made certain bars of iron bearing a mark in imitation of that, used by the plaintiff, and that they sold those bars, with the intention that they should pass in the market as bearing the plaintiff's mark. That allegation gives rise to the questions left by my lord to the jury. First, whether there was such a resemblance of the plaintiff's mark as was calculated to impose on ordinary persons; and secondly, if there was, whether the mark was used by the defendants with the intention to deceive. It appears to me that an intention to deceive is a necessary ingredient in this case. The intention is for the jury; and fraud must be made out by proof of an intention existing in the mind of the party, that the iron should pass as the iron of the plaintiff.
*378] If *there was such a similarity as might impose on ordinary persons, and it was shown that the defendants were aware of the resemblance, and that it was calculated to mislead, the plaintiff would have been

(*a*) 3 Myl. & Cr. 338.

entitled to the verdict, for the intention to deceive would have been manifest. Evidence was offered to the jury in support of the allegation which the plaintiff had to make out; but it appears to me that there was nothing in that evidence to show the jury that the defendants had such a knowledge as alleged, or that the mark used by the defendants was so calculated to deceive as stated by the plaintiff.

There was a good deal of evidence to show that persons might possibly be imposed upon by the mark used by the defendants; but there was none to show that the defendants really believed that such would be the consequence of their using the mark in question. The plaintiff, indeed, told the defendants that such was the effect of their using the mark; but it does not appear that the defendants gave credence to the plaintiff's statements upon this point. On the contrary, the defendant *Thompson* represented—and we have no reason—contrary to the finding of the jury—for saying it was *not* so,—that the mark they used would pass for a Russian mark in the Turkish market. I think, therefore, that the two points were properly left to the jury by the Lord Chief Justice.

The next question is, was there any thing withdrawn from the consideration of the jury?—or, in other words, was there any miscarriage as to the manner in which the effect of the letters between the parties was left to the jury? It does not appear to me that it can be said, they were in any manner withdrawn from the jury. They were received in evidence, and fully commented upon by the defendant's counsel. The Lord Chief Justice reserved the question as to the effect of the notice contained in one of the letters for the *consideration of the court; and it does not appear that he was asked by counsel to comment upon the letters to the [*379 jury. And it appears to me, that, as far as those letters had any bearing upon the case, they were fully in evidence, and that their general effect was left for the consideration of the jury. I do not think, therefore, that there is any fault to be found with my lord's direction.

With regard to the point of law that was reserved for the consideration of the court, as to the effect of the notice from the plaintiff to the defendants, I agree that my brother *Shee*, in this view of the case, was warranted in assuming that the jury found there *was* a resemblance between the mark used by the plaintiff and that adopted by the defendants; and that such resemblance was calculated to mislead ordinary persons—or, in other words, that the jury had found in the affirmative of the first question left to them by the Lord Chief Justice. Now, it is to be observed that this notice is somewhat equivocal in its terms. If it mean that the defendants must have known, that injury would necessarily result to the plaintiff from the continued use of the mark in question, that would give some colour to the argument which has been urged on the part of the plaintiff; but I think that is not so. A charge is made on the one side, which is not assented to on the other. And it amounts, therefore, to no more than a circumstance in the case upon which it was properly within the province of the jury to determine.

Upon the whole, I think the rule for a new trial should be discharged.

MAULE, J. I also think this rule should be discharged. The first question is, whether there has been any misdirection. Now, I agree with what has been said at the bar, that, in order to see whether or *not there has been a misdirection, we must look at the pleadings and to the [*380 course of the evidence at the trial. The declaration alleges that the defendants fraudulently sold certain bars of iron "as and for, and under the

false colour and pretence that the same were, respectively, bars of iron of the genuine manufacture of the plaintiff." I rather think that the gist of the action is the selling iron of the defendants' manufacture as and for iron of the plaintiff's manufacture; and that this allegation would have been sustained if it had been shown that the defendants had sold their iron to their correspondents for the purpose of being retailed, as of the plaintiff's manufacture. But there is a preceding allegation in the declaration, that the plaintiff having used a certain mark in the manufacture of his iron, the defendants knowingly manufactured their iron with a mark, in imitation of that used by the plaintiff, in order to denote that such iron was manufactured by the plaintiff. Now, I think the declaration might have been good without that allegation; and if that be so, then the question arises whether, that allegation having been inserted in the declaration, it would be necessary to prove it; and I think such proof would be necessary; for it is an allegation of a particular mode of effecting the wrong complained of, and ought therefore to be proved as alleged. In an action on the case for diverting a water course, the plaintiff may declare generally; but if he state a particular mode of diversion, he is not at liberty to prove any other.

The first question that was left by my Lord Chief Justice was, in effect, whether the iron made by the defendants was made so as to imitate the iron of the plaintiff's; and I think that this was a material question, for the reasons just stated; and that, from the course of the evidence, that question would have been properly raised, even if the allegation as to the
*381] particular mode of *imitation had not been contained in the declaration. The plaintiff's case is, that the defendants made iron, and marked it in such a manner, that it might be taken as the plaintiff's iron, and in that way represented it as the manufacture of the plaintiff; and this is, in effect, the same as an allegation that particular words had been used to convey such representation. The question whether the defendants sold their iron as the plaintiff's, depends upon whether the mark itself represented that the iron was manufactured by the plaintiff. The question for the jury was, whether such a representation was in fact made. It was left to them to say, whether the mark was used by the defendants with an intention to deceive. And that was a proper question to leave to them; for if the mark was not so used, there was no such representation on the part of the defendants as is alleged in the declaration, and consequently the declaration was not proved.

The next question submitted to the jury was, whether the defendants had sent the iron to Turkey for the purpose of supplanting the plaintiff in that market, or whether it was done in the ordinary course of business, and merely in the execution of foreign orders sent to their house; and his lordship added that, unless such a fraudulent intention existed, the defendants would not be liable, at least not before notice was given. Now, looking at the course of the evidence, that was equivalent to putting the question whether the defendants had sold their iron as and for the plaintiff's; because, if they had done so, it would have had a natural tendency to supplant the plaintiff in the market; and then the intention to defraud would follow as a matter of law, as well as of common sense. It is difficult to conceive what other object the defendants could have had in selling their iron as and for the plaintiff's, than that of supplanting the plaintiff.

*382] *Several cases were cited for the purpose of showing that it was not necessary to prove that the defendants intended to pass off their iron as the plaintiff's; but that, whatever may have been their motive in so

doing, if they executed the orders of correspondents, knowing that by so executing them, their goods would be calculated to pass as the plaintiff's, the substantial part of the declaration was proved, and the defendants would be liable. The argument in effect amounts to this,—if the defendants sold their iron as and for the plaintiff's, they are liable, whatever may have been their motive for so doing. And I agree that this may be so. But I think that the Lord Chief Justice did, in effect and substance, so direct the jury; for he told them to find for the plaintiff, if they considered that the defendants had sold their iron, as and for the plaintiff's. If a wrong be done by a false representation of a party who knows such representation to be false, the law will infer an intention to injure; that is the effect of *Polhill* v. *Walter*, 3 B. & Ad. 114. The matter complained of in that case was, that the defendant had knowingly made a false representation as to his authority to accept a bill of exchange for another party; and that fact having been proved, and it also having been proved that the plaintiff had sustained an injury by reason of such false representation, the action was held to lie. So, in this case, if it had been proved that the defendants had, by any means, falsely and knowingly represented their iron as of the plaintiff's manufacture, the plaintiff would have been entitled to the verdict: but that, in effect, was the question that was left to the jury. So, in *Foster* v. *Charles*, 6 Bingh. 396; 7 Id. 105; 4 Moo. & P. 61, 741, the wrong complained of was, that a false representation had been *knowingly [*383 made by the defendant as to the circumstances of a third party, whereby the plaintiff was induced to employ such party, and that an injury had resulted to the plaintiff therefrom; and these facts being proved, it was held that the action was maintainable, without reference to the defendant's motives in making the statement. So here, the complaint is, that a false representation has been made by the defendants, whereby the plaintiff has suffered an injury; and the action will lie if that representation was made knowingly by the defendants; and that was the question left by my lord to the jury.

But another point is insisted upon, namely, that after the letters had been given in evidence, showing a notice to the defendants that they were using a mark on their iron resembling the plaintiff's, the Lord Chief Justice was wrong in leaving the second question to the jury. It is argued that, supposing the defendants marked their iron in a way calculated to deceive other parties, although they had no intention of doing so, yet if they were told that such was the effect of using the mark, and they still continued to do so, they are liable to an action. But I cannot quite accede to that position. If a party is merely told that by continuing to do a certain thing he may deceive others, and he continues to do the thing without any intention to produce that effect, I do not think that an action will lie against him—at any rate, certainly not in this form of declaration. The effect of the decision in *Millington* v. *Fox*, 3 Myl. & Cr. 338, is, that the Lord Chancellor thought the defendants would have been in the wrong if they had continued to use the plaintiff's marks after they had received notice from the plaintiffs. But why was this? because it was clearly *shown, [*384 and was indeed admitted by the defendants, that the use of this mark would have been an injury to the plaintiffs; and therefore, if, after the notice, they had continued to use the mark, they must have known of the injury they were doing to the plaintiffs. But here the question is, whether the notice to the defendants was improperly excluded from the consideration of the jury; and it is contended that the first question left by

my lord should have been the only one submitted to the jury. But it appears to me that the second question was properly left both upon the letters and upon the rest of the evidence. Nothing was withdrawn from the jury. If his lordship had been desired to read the letters to the jury, he would probably have done so; though I do not think he would have been bound to do so, provided they were not withdrawn from the jury.

CRESSWELL, J. I quite concur in the opinion that this rule should be discharged. As to the question with regard to misdirection, it appears that two questions were left by my lord to the jury. The first was, whether there was such a close resemblance in the mark used by the defendants to that of the plaintiff as to be calculated to impose on the unwary, and injure the plaintiff's sale. Now it may be said that this perhaps was not a necessary ingredient in the proof to be given by the plaintiff. But it is to be observed, however, that there is a distinct allegation in the declaration, that the defendants "did wrongfully, knowingly and fraudulently stamp or mark the said bars of iron respectively with a certain stamp or mark, stamped or impressed on the said bars of iron respectively, in imitation of the plaintiff's said stamp or mark, and of a form, shape and appearance very much resembling the form, shape and appearance of the plaintiff's said stamp or mark, and which mark the defendants then well knew and
*385] intended to be in *imitation of, and similar in appearance to, the said mark so used by the plaintiff in that behalf as aforesaid, and was by the defendants so used and stamped or impressed on the said bars of iron respectively, in order to denote that such bars of iron so by them prepared, manufactured, made and marked as aforesaid, were respectively of the genuine manufacture of the said plaintiff, and were respectively bars of iron prepared, manufactured and made by the said plaintiff." Now, admitting that it was not necessary to prove the first allegation, still I think the direction to the jury was perfectly right; for there was nothing to support the declaration, and establish any representation by the defendants as to the iron being of the plaintiff's manufacture, but the evidence as to the similarity of the mark.

The other question left was, whether there had been any fraudulent intention on the part of the defendants to deceive customers by using this mark, or whether it was used innocently by the defendants in the course of the execution of orders without any intention to deceive; and I think it clear that the latter expression must have been understood as meaning without any fraudulent intention on the part of the defendants. This is in the nature of an action for deceit; and it is laid down in Com. Dig. tit. *Action upon the case for a deceipt* (F. 3), that "the declaration regularly ought to charge that the defendant was *sciens* of the matter by which he deceived; and that he did it *falsò et fraudulenter*." There is an early case in illustration of this principle, cited by DODERIDGE, J., in *Southern* v. *How*, to this effect, as stated in Popham, pp. 143, 144: "An action upon the case was brought in the Common Pleas by a clothier,—that, whereas he
*386] had gained great reputation for his making of his cloth, by *reason whereof he had great utterance, to his great benefit and profit; and that he used to set his mark to his cloth, whereby it should be known to be his cloth: and another clothier perceiving it, used the same mark to his ill-made cloth on purpose to deceive him; and it was resolved that the action did well lie." The same case is cited also in Cro. Jac., p. 471; but it is there said that the action was brought by him who bought the cloth; whereas in Popham, the action is said to have been brought by the

manufacturer, and the gist of the action appears to have been the use of his mark "on purpose to deceive."(a)

In *Polhill* v. *Walter*, 3 B. & Ad. 114, and that class of cases no intention to deceive was proved; but there we find falsehood in fact, with knowledge on the part of the defendant. Now what falsehood in fact is there in this case? Did the defendants falsely represent their iron *to be of the plaintiff's manufacture? That is the very question in the [*387 cause; and that was left to the jury. Lord TENTERDEN, in giving the judgment of the court in *Polhill* v. *Walter*, observed, "If the defendant had had good reason to believe his representation to be true,—as, for instance, if he had acted upon a power of attorney which he supposed to be genuine, but which was, in fact, a forgery,—he would have incurred no liability, for he would have made no statement which he knew to be false: a case very different from the present, in which it is clear that he stated what he knew to be untrue, though with no corrupt motive." The cases may be considered to establish the principle that fraud in law consists in knowingly asserting that which is false in fact, to the injury of another.(b)

Can it be contended that the mere use of a similar mark will give a right of action? I do not know that a man can have an abstract right to use any particular mark; but long user in a trade of a mark may produce a general impression that goods bearing such mark are of a particular manufacture. The notice here,—although it was argued that it ought to have determined the case in favour of the plaintiff,—cannot alter the legal rights of the parties. *Millington* v. *Fox*, which was relied upon, does not establish that doctrine. What is the notice here? It is to the effect that the defendants were using a mark similar to that used by the plaintiff. But such a notice is not equivalent to knowledge; as the defendants might dispute the resemblance; or they might *admit the resemblance, and yet insist that [*388 they had no intention of passing off their goods as the plaintiff's.

As to the withdrawal of the letters from the jury, I do not think there is any reason for disturbing the verdict upon that ground. If they were commented upon by the counsel for the plaintiff as being evidence of facts, the Lord Chief Justice certainly did not tell the jury that they were not such evidence; if they were used to establish a proposition of law, their effect was reserved for the consideration of the court.

TINDAL, C. J., concurred. Rule discharged.

(a) The statement in Cro. Jac. is as follows:—"A clothier of Gloucestershire sold very good cloth; so that, in London, if they saw any cloth of his mark, they would buy it without searching thereof; and another, who made ill cloth, put his mark upon it without his privity; and an action upon the case was brought by him who bought the cloth for this deceit, and adjudged maintainable." In Popham this decision is said to have taken place in 22 Eliz., and in Cro. Jac. in 33 Eliz.; but it is clearly the same case. In Com. Dig., *Action on the case for deceipt* (A 9.) the case is thus referred to:—"So, (*i. e.* an action will lie) if a clothier sell bad cloths, upon which he put the mark of another, who made good cloths." Comyns does not say *by whom* the action may be maintained; but as he cites from Cro. Jac. only, it may be inferred that he considered the case as establishing the right of action *in the purchaser*, which it certainly would, supposing that report to be accurate. The report in Popham would appear more likely to be a true version of Doderidge's statement; since the case, as represented by Croke, would not have been very apposite to that of *Southern* v. *How*, in which it was cited by the learned judge. Lord Rolle, however, expressly states, that Doderidge *did not say* whether the former action was brought by the clothier or by the vendee, but adds—"*Semble que gist pur le vendee.*" 2 Roll. Rep. 28.

(b) Vide *Pasley* v *Freeman*, 3 T. R. 51; *Eyre* v. *Dunsford*, 1 East, 318; *Haycraft* v. *Creasy*, 2 East, 92; *Tapp* v. *Lee*, 3 B. & P. 367; *Ames* v. *Millward*, 2 B. Moore, 713; *Adamson* v. *Jarvis*, 4 Bingh. 66; *Lyde* v. *Barnard*, Tyrwh. & G. 250, 1 M. & W. 101; *Freeman* v. *Baker*, 5 B. & Ad. 797, 2 Nev. & M. 446; *Haslock* v. *Ferguson*, 7 A. & E. 86, 2 N. & P. 269; *Swann* v. *Phillipps*, 8 A. & E. 457, 3 N. & P. 447. And see antè, Vol. II. 475, n., Vol. III. 82, n.

TAYLOR v. Lord STUART DE ROTHESAY.

Where a distringas to proceed to outlawry could not be had by reason of the defendant being a peer, the court granted it to compel an appearance, although the defendant was abroad.

Gaselee, Serjt., applied for a distringas to proceed to outlawry against the defendant, a peer of the realm, upon affidavits stating that he was abroad. [TINDAL, C. J., referred to *Cassiday* v. *Steuart*.(a) MAULE, J. The distringas may be taken to enter an appearance. At least I have made orders to that effect at chambers, under similar circumstances.]

Per curiam. Rule accordingly.(b)

(a) Antè, Vol. II. p. 437.

(b) Vide the uniformity of process act, 2 & 3 W. 4, c. 39, s. 3, which, in cases where the defendant cannot be served with a writ of summons, authorises the awarding of a writ of distringas "directed to the sheriff of the county wherein the dwelling-house or place of abode of such defendant shall be situate, *or to the sheriff of any other county, or to any other officer.*"

*389] ## *TUGMAN v. HOPKINS the Younger.

Certain stock in the long annuities was, by a marriage settlement, vested in trustees for the separate use of the wife, for life, and after her death they were to pay over the principal sum, together with the interest and dividends then due and growing thereon, to such person as she might by will appoint. By her will (reciting the settlement) she appointed executors, and directed them to sell the principal stock. "The proceeds thereof" she bequeathed to different parties. At her death (for some time previously to which she had lived apart from her husband,) a sum of money was found at her lodgings, which was taken possession of by the defendant, the son of one of the executors, at the request of his father, to whom he immediately paid it over.

Held, that (assuming the money in question to consist of the accumulations of the wife's dividends,) the will did not dispose of it.

Quære whether, under the terms of the settlement, she had power to dispose of it.

Held also, that, as the executors did not take *jure representationis*, they were not entitled to the money.

Held also, that the money vested in the husband at her death, without his taking out administration.

Held also, that, as the defendant was a wrong-doer in taking the money, he was liable in an action for money had and received at the suit of the husband.

DEBT, for money had and received to the use of the plaintiff. Plea. never indebted.

At the trial, before TINDAL, C. J., at the sittings for London after last Michaelmas term, the following facts appeared in evidence. In April, 1829, the plaintiff married a widow named Mary Ann Truscoat, who was possessed of a sum of 81*l.* per annum, long annuities. By an antenuptial deed of settlement (dated the 11th of that month), the above sum of 81*l.* long annuities was vested in the trustees of the settlement, upon trust to pay the dividends, interest and income of the same to her for life, to and for her sole and separate use and benefit, independent of her husband. A power was given to the trustees, during her life, at her request to sell, assign and transfer any part of the same, not exceeding in value the sum of 300*l.*, and to apply the money arising from such sale or transfer to her sole
*390] use and benefit, or to that of any other person whom she *might, by deed or will, appoint; and, after her decease, to pay, assign and transfer the said principal sum of 81*l.* long annuities, or so much thereof

as might remain undisposed of at the time of her death, together with the interest and dividends then due and growing thereon, to and for the use of such person as she might, by deed or will, appoint.

In the latter end of the same year, the trustees of the settlement, at the request of Mrs. Tugman, and under the power above mentioned, sold out 16*l.*, part of the 81*l.* long annuities, and paid over the proceeds, amounting to 300*l.*, to her; but what became of this money did not appear. In 1831 the plaintiff and his wife separated, and they continued to live apart till the time of her death, which occurred on the 17th of December, 1840. Her will, dated the 29th of October, 1829, after reciting the deed of settlement, proceeded thus:—"Now, in execution of the said power so given to me by such indenture, or by any other power or authority enabling me in that behalf, I do hereby direct my executors hereinafter named to sell or dispose of, or otherwise call in, the said sum of 81*l.* long annuities, or so much thereof as shall remain undisposed of at the time of my decease; and as to the proceeds thereof, I do hereby give and bequeath the same in manner and form following; that is to say, first, I give and bequeath unto my executors, Robert Scantlebury and Thomas Hopkins hereinafter named, the sum of 50*l.* each; and as to all the rest, residue and remainder of the proceeds of the said 81*l.* long annuities, I hereby give and bequeath the same and every part thereof unto my two nieces Emma F. and Eliza F., to be equally divided among them." The testatrix then appointed the said R. Scantlebury and T. Hopkins (the father of the defendant) her executors. Soon after the death of Mrs. Tugman, the defendant, by the direction of his father, who was in an infirm state of *health, went to her lodgings, and took from a bureau the sum of 84*l.* 3*s.* 6*d.* in bank notes, [*391 gold and silver, which he claimed to belong to his father, as executor, and which he paid over to him the same day. This money had been laid out by the executors in the payment of the funeral and testamentary expenses, and a portion of the debts of Mrs. Tugman. There was no evidence that she had any other source of income than the stock in the long annuities. The executors had taken out probate of the will "limited so far only as concerns all the right, title and interest of her, the said deceased, in and to the said sum of 65*l.* long annuities, and the dividends and interest now due and to grow due thereon; and the furniture and effects purchased by the said Mary Ann Tugman, with the dividends and interest of the said 65*l.* per annum, long annuities, and all savings and accumulations arising therefrom, which she, the said deceased, by virtue of the said indenture of settlement, had a right to dispose of, and hath by her said will disposed of, accordingly, but no further or otherwise," &c.

It was objected at the trial, on behalf of the defendant, that Mrs. Tugman's will was a valid appointment, under the settlement, of the 84*l.* 3*s.* 6*d.*, which must be considered as the accumulations of her dividends; but that, even if it did not pass to the executors, the plaintiff could only be entitled to it upon taking out administration; that the fund was, at any rate, answerable to the funeral and testamentary expenses of the deceased; and, lastly, that the defendant was not liable, as he acted merely as agent for his father, one of the executors, to whom he had paid over the money, and against whom only, if at all, the action could be maintained.

These objections were overruled by the Lord Chief Justice, and the plaintiff obtained a verdict for the sum *in question; leave being [*392 reserved to move to enter a verdict for the defendant.

Channell, Serjt., in last Easter term, having obtained a rule nisi accordingly,

Talfourd, Serjt., (with whom was *Montague Chambers*,) now showed cause. The first question is, whether the money found in the lodgings of Mrs. Tugman after her death, belonged to her husband, the plaintiff; the second is, whether, supposing it did belong to him, the defendant is liable in this form of action.

The first question depends on the terms of the marriage settlement and of Mrs. Tugman's will. Even assuming that the sum of money under consideration consisted of accumulations derived from the dividends payable to the deceased under the marriage settlement, still her will did not profess to dispose of that money, neither had she any power of disposition over it by the settlement. All that the trustees were empowered by the settlement to do, was, to pay the dividends to her during her life, and after her death to pay the principal sum, "together with the interest and dividends *then due and growing thereon*" to any person to whom she might appoint it, by will. This power is confined, in terms, to the stock itself, and to such dividends as might be due or growing due at the time of her death; it does not apply to dividends previously due, which had been paid over to her. The will follows the power contained in the settlement, and contains no residuary clause. The testatrix desires her executor to sell the long annuities; and "as to the proceeds thereof" she makes certain bequests; but that can only mean the proceeds of the sale of the stock, not the dividends previously received by her. She had no power to pass any
*393] property to her executors except the *particular stock comprised in the marriage settlement. As soon as the trustees paid over the dividends to her, the money became absolutely the property of her husband. If a burglary had been committed in Mrs. Tugman's house, and property belonging to her had been stolen from it, the house and property must have been described in the indictment as those of her husband; *R.* v. *French*, Russell & Ryan, C. C. 491.(a) By the twenty-fifth section of the statute of frauds, 29 Car. 2, c. 3, explaining the statute of distributions, 22 & 23 Car. 2, c. 10, the rights of the husband over the estate of the wife are expressly reserved. [MAULE, J. But the husband must take out administration.] He undoubtedly must do so where he wants to recover a chose in action belonging to his wife; otherwise he cannot sue for it; but this was a chose in possession. If the wife had purchased even wearing apparel for herself out of this money, it would have vested by law in the plaintiff, so as to have been liable to be taken in execution for his debts; *Carne* v. *Brice*, 7 M. & W. 183. The cases of *Jarman* v. *Woolloton*, 3 T. R. 618, and *Haselinton* v. *Gill*, Ib. 620, n., S. C. more fully, 3 Dougl. 415, will be relied on by the other side; but they are clearly distinguishable from this case. In *Jarman* v. *Woolloton* it was decided that if a woman, before marriage, with the consent of her intended husband, conveys all her stock in trade and furniture to trustees to enable her to carry on her business separately, and the husband does not intermeddle with them, and there is no fraud, the furniture and the stock (although fluctuating) are not liable to his debts. In that case the property never belonged to the husband; and the wife was considered to have been in possession of it, as
*394] agent for the trustees. *Haselinton* v. **Gill* is to the same effect. These cases form, in fact, no exception to the general rule—that all personal chattels of the wife, not in possession at the time of the marriage, if they are reduced into possession during the coverture, are vested in the husband. Com. Dig. *Baron and Feme*, (E. 3.) There are undoubtedly

(a) See also *Farre's* case, Kel. 43; *Rex* v. *Smyth*, 5 C. & P. 201.

cases in the ecclesiastical courts to show that the wife may dispose of the accretions of her separate property; but by the canon law husband and wife are, for some purposes, considered separate persons. The rule of law is clear, that the right to take out administration belongs to the husband, exclusively of all other persons; and the ordinary has no power or election to grant it to any other; 1 Wms. Executors, 242, 243, 1st edition; 3d edition, 315, &c.; but although entitled, he is not bound, to take out administration. In the present case he is under no liability to make any distribution, or to render any account. *Molony* v. *Kennedy*, 10 Sim. 254, is precisely in point, and shows that the plaintiff was entitled, in his marital right, to the money in question. [MAULE, J. Suppose there had been a debt on bond due to Mrs. Tugman before her marriage, and remaining due at the time of her death, the defendant must go the length of contending that the executors could recover the money due on the bond.] That they clearly could not do; nor indeed could the husband until he had taken out administration, as the bond would be a chose in action.

As to the second point—if this money was the property of the plaintiff, the defendant, who was a wrongdoer in taking it, cannot discharge himself from responsibility by saying that in so doing he acted as agent for his father. This case is distinguishable from *Stephens* v. *Badcock*, 3 B. & Ad. 354, where an attorney who was accustomed to receive certain dues for the plaintiff, his client, went *from home leaving his clerk at the office. [*395 The clerk, in the absence of his master, received money on account of those dues for the plaintiff (which he was authorized to do), and gave a receipt in his own name for his master. The attorney was in bad circumstances when he left home, and he never returned; but it did not appear that his intention not to do so, was known to the clerk at the time of the payment. The clerk afterwards refused to pay over the money to the plaintiff; and on assumpsit being brought against him for money had and received, it was held that the action did not lie; for the clerk had received the money as the agent of his master, and was accountable to him for it; the master, on the other hand, being accountable to the client for the sum received by his clerk(*a*); and there was no privity of contract between the plaintiff and defendant. In the present case the plaintiff waives the tort and considers the money as received by the defendant to his the plaintiff's use. Even if the defendant were the agent of his father, he could not justify the commission of the wrongful act, on the ground that he had paid over the money to his principal.(*b*) [MAULE, J. Supposing that such payment would have discharged the defendant, he ought to have pleaded it.]

Channell, Serjt., in support of the rule. It may be admitted that it would be necessary to plead the payment over if it was set up by way of answer to the action. But the fact is used for the purpose of showing that if the defendant received the money as agent for his father, it was not received to the use of the plaintiff.

The first question in this case is, as to the right of Mrs. Tugman to dispose of this money by her will. *The case of *Molony* v. *Kennedy*, 10 Sim. 254, does not show that a wife has not the power of disposing of the [*396 accretions of her property, where she has power to dispose of the property itself. On the contrary, the Vice-Chancellor in giving judgment said, "Mrs. Molony's annuity of 800*l*. and every thing that arose from it, was exempt from the control of her husband during her life;(*c*) and as the cash

(*a*) See *Bamford* v. *Shuttleworth*, 11 A. & E. 926. (*b*) See *Calland* v. *Loyd*, 6 M. & W. 26.
(*c*) But see *Carne* v. *Brice*, ubi supra.

and bank-notes which were found in her possession at her death, arose from that annuity, they were part of her separate property, and *she might have disposed of them either by deed or by her will.*" But not having disposed of them by will, it was considered in that case that the husband was entitled to them in his marital right. In *Gore* v. *Knight*, 2 Vern. 535, it was held, that where a woman, on marriage, had reserved a power to dispose of her personal estate, all that she died possessed of was to be taken to be her separate estate, or the produce of it, unless the contrary could be made appear; and as she had power over the principal, she might dispose of the interest. The principle of the rule is stated in *Williams on Executors*, vol. i. p. 43, 1st. ed., p. 47, 2d. ed., p. 48, 3d. ed., where,—after referring to the case of *Fettiplace* v. *Gorges*, 1 Ves. jun. 46, 3 Bro. C. C. 8, in which it was held, that where personal property is actually given or settled, or is agreed to be given or settled, to the separate use of the wife, she may dispose of it as a feme sole, to the full extent of her interest, although no particular form to do so is prescribed in the instrument by which the settlement or agreement was made,—the author proceeds; "the principle upon which that decision was founded is this: that when once the wife is permitted to take personal property to her separate use as a feme sole, she
*397] must take it with all its privileges and incidents, one of *which is the *jus disponendi.*"(a) [TINDAL, C. J. Suppose the wife had laid out the accumulations of her dividends in the purchase of furniture, would not that have belonged to her husband at her death. I am speaking of the strict legal interest of the parties; it might be different in equity.] Assuming that the wife had the power to dispose of her separate property and its accretions, it is submitted that it would not belong to the husband. In such a case the wife would be treated, as in equity, as a feme sole; and the property held answerable for her debts.

Assuming that she had the right to dispose of the money, the next question is, whether Mrs. Tugman did dispose of it, by her will; and it is submitted that the term "proceeds" in the will may certainly be understood to mean the proceeds of the dividends previously received.

This being an action for money had and received, which is of an equitable nature, the court will look at all the circumstances of the case; and if it appear that in equity the wife's executors would be liable to pay her funeral expenses out of her property, they will be entitled to the money in question; at any rate till the husband takes out administration. [COLTMAN, J. If the husband is liable for the funeral expenses, would he not be so whether he had taken out administration or not?] Perhaps he might; but in this case, the executors, persons appointed by the testatrix, have paid all the testamentary expenses. In *Molony* v. *Kemble* the vice-chancellor deducted the funeral expenses from the sum to which the husband was declared to be entitled. In this case, therefore, the plaintiff cannot be entitled to the whole of the money, which being the accretion of the wife's separate property goes to the executors in the first instance—for the purpose
*398] of *meeting the debts and testamentary expenses of the deceased; and after they have been paid, the executors may be trustees of the residue for the husband.

If, on the other hand, the disposition exercised by the wife in her will extended to the stock only, then she died intestate as to the accumulations, and the husband was bound to take out administration *cæterorum*, as would have been done in *Ledgard* v. *Garland*, 1 Curtis, 286, if there had not been

(a) See the cases referred to, *loc. cit.*

a question upon the construction of the will, which was left for the decision of the court of equity. The cases bearing on this point are collected in *Williams on Executors*, Vol. i. pp. 321—327, 1st ed., p. 280, 2d & 3d edd. [TINDAL, C. J. A *cæterorum* grant would probably relate to choses in action only.] In *Salmon* v. *Hays*, 4 Hagg. Eccl. Rep. 382, 386, a *feme covert* having made a will of her separate property, but having appointed no executor, the court refused to grant a limited administration with the paper annexed, to the legatees therein named; but according to the course of office, granted a general administration, *cum testamento annexo*, to the husband; and Sir JOHN NICHOLL in his judgment gives this reason for so doing; "What would be the effect of the court rejecting him (the husband)? It might lead to two distinct grants—the one limited to the two daughters (the legatees,) the other, to the husband; because, if the wife has left any other property than that over which she had, and has exercised, a disposing power, the husband will be clearly entitled to have a *cæterorum* grant." [TINDAL, C. J. Sir JOHN NICHOLL merely says, that the husband *might* have such a grant, not that it was absolutely necessary. MAULE, J. Suppose the defendant had taken the money in the lifetime of the wife, in whose name must an action have been brought to recover it?] The wife would probably *have joined with the husband for conformity. [*399 [MAULE, J. Could not the husband have sued alone?] *Carne* v. *Brice*, 7 M. & W. 183, is certainly in favour of that proposition; but equity would probably decide differently. [MAULE, J. But we must decide according to law. Equity would look to all the circumstances of the case, such as whether the husband had supported the wife, whether they had lived together, and so forth. We have no means of instituting such an inquiry.]

The last question is, whether this action will lie against this defendant The executor is clearly entitled to some of the property of the deceased. He is prevented from going himself to her house, and he sends his son, who takes the money, and hands it over to his father. How can he, receiving this money as agent for his father, be said to have received it to the use of the plaintiff? It is not denied, that if a servant does a wrongful act by order of his master, either the master or the servant may be liable in trespass; but this is an action upon an implied contract. Suppose the father had brought an action for money had and received against the defendant to recover the money, could the latter have set up the right of a third party as a defence? [MAULE, J. Perhaps not; but a person may, by his own conduct, render himself liable to two parties. As if he receives a chattel from A., and agrees to return it to him, he will be liable to him if he does not return it; and he may be liable also to the true owner.] But in such a case the double liability would not arise from one and the same act; neither would the party be responsible in the same form of action. He would be liable, on his contract, to A., and would be liable in trespass or trover, to the true owner. The taking of the money by the defendant is only one act, and he cannot be liable in respect thereof to two different parties.

*TINDAL, C. J. I think this rule must be discharged. [*400

The first question is,—who had the right to the money, in respect of which the action is brought, at the time of the death of the plaintiff's wife? It appeared that she had been living apart from her husband, having an interest in some funded property, which was secured to her separate use and which she had the power of disposing of by her will. She had made

a will and appointed the father of the defendant one of her executors. After her death, the sum of money in question was found locked up in a drawer in her lodgings; and the defendant went to the house and obtained possession of it for his father, who was one of her executors. Of what did this money consist?—of accumulations of dividends of her separate estate, or of savings derived from other sources? If of the latter, no further question could arise, as the plaintiff would clearly be entitled to recover. But admitting that the money was the produce of the dividends, the question is, whose property it was at the time of the wife's death.

Without entering into the question, whether or not the wife had the power of disposing by will of the accumulations of these dividends, it is enough to say that no such disposition appears to have been made in this case; as the will is limited to the proceeds of the long annuities when sold, and leaves the prior accumulations untouched. But then it is said, that although these accumulations were not disposed of by the wife, yet, executors having been appointed, the law vested the money in them. But the authority of these executors is only co-extensive with the power given by the will; for the executors here do not take *jure representationis*, but under the *power* which the wife was authorized to exercise by making a will as to this particular property. They are therefore not entitled to this money.

*401] The next question is as to the right of the husband *to the money. In Com. Dig., tit. *Baron and Feme* (E. 3), it is laid down that "all chattels personal which the wife has in possession in her own right, are vested in her husband by the marriage, though he do not survive. So, chattels personal, not in possession at the time of the marriage, if they are reduced into possession during the coverture."(a) It has been admitted, in the course of the argument, that if this money had been taken away during the lifetime of the wife, the action must have been brought by the husband alone. Perhaps in such case he would have been considered in equity as a trustee for the wife; but, at law, the action must have been brought by him. The case of *Carne* v. *Brice* is a strong authority in favour of the husband's right to the money; and *Molony* v. *Kennedy* shows that he was entitled to the possession of it without taking out administration to his wife. These authorities, therefore, dispose of the first part of the case, and establish that the husband was, at law, entitled to the money sought to be recovered in this action.

Another point which has been insisted upon is, that this money was received by the defendant to the use, not of the plaintiff, but of the defendant's father, as executor; and that the money having been paid over to the father, the action ought to have been brought against him as the principal. The answer to this is, that the defendant was a wrong-doer in taking the money, and would have been liable to the plaintiff in trespass. The plaintiff however waives the tort, and sues the defendant for money had and received; and the defendant cannot relieve himself from liability, by paying over the money to another party, as he might have done if the original taking had been lawful.(b) This circumstance distinguishes the present
*402] *case from *Stephens* v. *Badcock*, 3 B. & Adol. 354; for there the defendant received the money as agent for a party who was entitled to receive it; whereas here the receipt was altogether wrongful, and it must be taken with all its consequences. I am of opinion, therefore, this rule must be discharged.

(a) Citing Co. Litt., 351, b.
(b) And see *Edwards* v. *Hodding*, 5 Taunt. 815, 1 Marsh. 377.

COLTMAN, J. I am of the same opinion. The case of *Carne* v. *Brice* appears to me to go the whole length of the present, and to establish that, although the wife may be entitled to separate property, the dividends arising therefrom, when received, vest in the husband. That is the principle of this case. The rule of law is, that in order to protect property from the husband, it must remain in the hands of the wife's trustees. Courts of equity seem to think that if the wife dispose of the property by will, it is still affected with the trust. Here, however, the property in question was *not* disposed of; and the case of *Molony* v. *Kennedy* shows that the property passes to the husband without administration; and I think that even if it had been disposed of, the rule at law, would still have been the same.

It is said that this is an equitable action, and therefore that the same equities are to be considered as would prevail in a court of equity; and it is argued that the husband would be liable in equity to pay the expenses of his wife's funeral. But I think there is nothing inequitable in allowing this action. The defendant, as agent for the wife's executor, claims a sort of equitable set-off for the funeral expenses; but if the executor has made such a payment, it was a payment in his wrong; for he is not a general executor, but an executor for a specific purpose only, and has therefore but a limited interest in the property of the deceased.

*The remaining point is, that the money was received by the defendant as an agent, and has been paid over by him to his principal. [*403 The answer to that is, that in taking the money the defendant was a trespasser. In *Stephens* v. *Badcock* the receipt was rightful; whereas here, though innocent in fact, it was wrongful in point of law; and a party is bound to know the law. Under such circumstances it is no justification to an agent that the money has been paid over.

MAULE and CRESSWELL, JJ. concurred. Rule discharged.

PHILLIPS v. EMILY ANN BIRCH.

A summons before a judge at chambers, taken out after judgment in the cause, does not operate as a stay of proceedings.

Although it is the entry of the judgment of record on the judgment-roll, and not the entry of the minute of the judgment in the master's book, that constitutes the judgment itself, yet a summons taken out after the entry of such minute is not a summons taken out in the cause.

In debt, the plaintiff having signed judgment by *nil dicit*, the minute of the judgment was entered in the master's book, mentioning the whole amount demanded by the declaration. A *fi. fa.* was then issued for the amount really due, and costs. A summons having been taken out to set aside the *fi. fa.* for irregularity, by reason of its not corresponding with the judgment, the plaintiff, before the summons was attendable, perfected the roll by entering up judment for the amount mentioned in the *fi. fa.*, and entering a *remittitur* for the residue of the sum demanded by the declaration. At the hearing of the summons, the record so perfected was produced before the judge, who nevertheless made an order to set aside the *fi. fa.* This order was rescinded by the court.

Channell, Serjt., in last Easter term, April 18th, obtained a rule calling upon the assignees of the defendant to show cause why an order made in this cause by Lord DENMAN, C. J., at chambers, should not be rescinded.

The following facts appeared from the affidavits. The *action was brought in debt on two promissory notes; the declaration contained three counts, and the aggregate sum demanded was 1500*l*. The [*404

real debt sought to be recovered was 514*l.* 16*s.* On the 28th of February, the plaintiff signed judgment for want of a plea.(*a*) A writ of *fieri facias* was, on the same day, issued upon the judgment, and the sheriff thereby was commanded to cause to be made of the goods of the defendant 514*l.* 16*s.*, which the plaintiff then lately had, &c. recovered against her, and 8*l.* 4*s.* for costs, with interest upon these two sums at 4 per cent. On the 1st of March the sheriff levied upon the goods of the defendant under this writ, and sold them on the 9th, and two following days. On the 7th of March a fiat in bankruptcy issued against the defendant, under which she was declared a bankrupt; and (the petitioning creditor under the fiat having set up a claim to the goods seized) the sheriff applied for relief under the interpleader act; and thereupon an order was made that the sheriff should pay the proceeds into court, and that an issue should be tried to ascertain the right to them. On the 15th of March the plaintiff's attorney was served with a summons to show cause why the *fi. fa.* and all proceedings thereon, should not be set aside for irregularity, with costs, on the ground that there was no judgment to warrant the execution, and that the writ did not correspond with the judgment signed in the cause.

The affidavit of the plaintiff's attorney, upon which the present rule was obtained, stated "that the alleged irregularity urged in support of such summons was, that by the entry made by the clerk of the judgments(*b*) in
*405] his book, on the said plaintiff so signing *judgment in this cause in manner aforesaid, it appeared that the said plaintiff had so taken judgment for the aforesaid penal sum of 1500*l.*, whereas, in truth and in fact, the said plaintiff had only taken judgment for her aforesaid real debt of 514*l.* 16*s.* and costs of suit; such erroneous entry arising from the general practice of merely entering an incipitur on the judgment-paper at the time of signing judgment, and consequently the clerk of the judgment does not see the award of judgment entered or completed on such judgment-paper or on the roll, the roll being usually afterwards completed and filed and docketed with the proper officer; and that in consequence of its appearing that the said plaintiff had taken judgment for such penal sum of 1500*l.* and the mandatory part of the aforesaid writ of *fi. fa.* not corresponding therewith, inasmuch as such writ of *fi. fa.* only directed the said sheriff to levy the real debt of 514*l.* 16*s.*, such variance was argued to be a sufficient irregularity for the said writ of *fi. fa.* and all proceedings under the same being set aside."(*c*)

*406] *The summons was returnable on the 16th of March, but the plaintiff's attorney did not attend on that day. The summons was renewed and made returnable on the 17th. On that day the plaintiff's attorney completed the judgment on the roll, entering a *remittitur* for 985*l.* 4*s.* parcel

(*a*) Vide post, p. 405 (c)

(*b*) In point of fact, there is now no such officer as the clerk of the judgments; the office was abolished by the statute, 1 Vict. c. 30. The business is transacted at present in one of the master's offices

(*c*) Some discussion arose in the course of the argument as to whether the amount for which judgment was signed, would appear, except upon the roll. The course of practice in the master's office has been ascertained to be as follows:—The attorney, who signs judgment, produces a judgment-paper, that is, a paper on which is transcribed the *commencement* of the declaration (hence called the *incipitur*) down to the words "For that whereas" inclusive, (with the exception that the date at the heading is the day on which judgment is signed, instead of being that on which the declaration was filed or delivered.) At the foot of this (in ordinary cases) the master writes—

"Allowed £——" (leaving a blank for the costs.)

"Signed" &c. (the date on which judgment is signed.)

No entry is made of the amount for which judgment is signed; but where the action

of the said sum of 1500*l.*, and a prayer of judgment for the residue (514*l.* 16*s.*), together with costs; and on the same day it was filed and docketed.

On the 19th of March, the summons was heard before Lord DENMAN, C. J., at chambers, when the judgment-roll was produced in conformity with the writ of *fi. fa.* His lordship, however, made the order, now sought to be rescinded, in the terms of the summons.

Sir *T. Wilde*, Serjt., now showed cause. Under the circumstances, the order of Lord DENMAN was quite correct. The entry in the master's book was, in fact, the entry of the judgment, and it could not afterwards be altered. The costs of perfecting the roll are allowed in practice, although only the *incipitur* is entered. The amount for which the judgment is signed being stated, in the entry made in the master's book, to be the whole sum mentioned in the declaration, viz., 1500*l.*, and the *fi. fa.* having issued for 514*l.* 16*s.*, which was therein stated as the sum recovered by the plaintiff, there was clearly *a variance between the judgment and the writ, and consequently the latter was irregular. While things were in this state, a summons was taken out before the judge to set aside the *fi. fa.* for this irregularity; but before the summons came on to be heard, the plaintiff, behind the defendant's back, entered a remittitur on the roll, so as to make the judgment-roll correspond with the *fi. fa.* The case of *King* v. *Birch*, 2 Gale & Dav. 513, decided by the Queen's Bench last term, will be relied on by the other side, where, under somewhat similar circumstances, that court rescinded an order like the present. That judgment appears to have proceeded upon the ground that the *incipitur* is merely a warrant to enter judgment for the sum stated in the declaration, and not for more. But, unless under particular circumstances, the *incipitur* is the only judgment entered, the judgment-roll being, in practice, but rarely carried in. At any rate, after the summons had been taken out to set aside the *fi. fa.* for the irregularity, it was too late to make an entry on the roll for the purpose of making the judgment correspond with the writ; as the summons would operate as a stay of proceeding from the time it was *attendable*, even though it were not, in fact, attended. Although, between the original parties to the suit, the court might have allowed an amendment of the writ, they will not do so where the rights of assignees have intervened, as in this case; *Hunt* v. *Pasman*, 4 M. & S. 329; *Webber* v. *Hutchins*, 8 M. & W. 319. [*407

Channell, Serjt. (with whom was *Pashley*,) in support of the rule. The facts in this case are nearly the same as those in *King* v. *Birch*, the sole difference being in the figures. The court there decided, that the only thing that could be looked at was the judgment-roll; *and the roll having been perfected before the order was made at chambers to set aside the writ for irregularity, the court rescinded such order with the [*408

is in *debt*, as in the present case, the sum demanded would of course appear in the commencement of the declaration so transcribed. The master then makes a minute in the *day-book* to this effect:—

"1500*l.** *Middlesex.*† *Phillips* v. *Birch* (*Emily Ann*) D.‡ *King*"§, and the judgment-paper is returned to the attorney. Subsequently, a transcript of the above minute is made in the jugdment-book, but omitting the sum, and commencing with the venue.

Another question raised was,—whether or not it appeared by the judgment-roll that judgment had been signed on a different day from that stated in the affidavits. The roll was examined by the court; but it appeared there was no entry upon it of the day when the judgment was signed.

* The sum demanded, in debt; the amount of the damages laid in the declaration, in actions which sound in damages.

† The venue. ‡ i. e. *Debt.* § The name of the plaintiff's attorney

full concurrence of Lord DENMAN, by whom it had been made. There, the court adopted the argument, that the *incipitur* was the mere leave of the court, by its officer, to enter up judgment for the sum mentioned, or any smaller sum. The first summons in this case not having been attended, would not operate as a stay of proceedings, so as to prevent the party from perfecting the roll. Under the old practice, three summonses were necessary; but now, by the new rules, T. 1 W. 4. r. 9, the second summons is peremptory. There is no general rule that there is to be a stay of proceedings from the return of the first summons. In Lush's Practice, page 803, it is laid down that, "as a general rule, a summons does not operate as a stay of proceedings, unless it be a part of the application, 'why in the mean time all further proceedings should not be stayed;' nor does an order, unless it so expresses. The exceptions are, where the applicant has to take the next step, and the application relates to the time or mode of taking that step; as where the summons is for time to plead; for leave to plead several matters; to strike out a count, &c.; cases where a stay of proceedings is necessarily implied." This case, certainly, does not fall within the principle of those exceptions. [MAULE, J. In Archbold's Practice, page 1201, 7th ed., by Chitty, it is said, "When the object of the summons is collateral to the time for pleading, as to discharge the defendant out of custody on filing common bail, it will not, in general, operate as a stay of proceedings. A summons to tax an attorney's bill, though served, does not operate as a stay of proceedings from its return, so as to prevent
*409] the attorney issuing a writ, *the defendant not having signed an undertaking to pay the amount of the taxation."] The same rule is laid down in Tidd's Practice, page 470, 9th ed.; and see Tidd's New Prac., 256.

TINDAL, C. J. I think this rule must be made absolute. At the time when Lord DENMAN made the order in question, a roll of court was in existence, and was produced before him, which sanctioned the writ that had been issued; showing that the judgment was not for the whole sum of 1500*l*., but only for 514*l*. 16*s*. This record of the judgment was therefore, at that time, among the rolls of the court. If the defendant had any ground of complaint that the entering up of judgment on the roll was irregular, as having been done behind his back, he should have made some application to vacate such roll, and to be placed in the same condition in which he was before; but no such application has been made.

I am not satisfied that the summons was to be considered as a stay of proceedings. The authorities that have been cited, rather show that a summons does not of itself in all cases operate in that manner, but only whilst a cause is going on. After judgment, however, there is an end of the proceedings in the ordinary sense of the words; and this summons, therefore, cannot be said to have been taken out in the cause.

The other judges (*a*) concurred. Rule absolute.

(*a*) Coltman, Maule, and Cresswell, JJ.

*410] *HALL *v.* BETTY.

The declaration stated that it was agreed between the plaintiff and the defendant that the plaintiff should purchase two houses of the defendant for the residue of a term of years, &c.; that the defendant should paper them, &c.; that the plaintiff should pay part of the purchase-money, on the completion of the conveyance of the houses; and

further, that the defendant should make a good title. At the trial, an agreement was produced as follows:—"Mr. H. (the plaintiff) *having agreed* to purchase of Mr. B. (the defendant) two leasehold houses, &c., Mr. B. *hereby agrees* to paper, &c.; Mr. H. to pay, &c., at the time of the conveyance," &c. Nothing was said in the agreement as to making a title.

Held, that the agreement to purchase, though recited as an existing agreement, was to be considered as forming part of the agreement produced.

Held also, that there was no variance between the agreement stated in the declaration and the one produced in evidence, on the ground that the latter was silent as to the title, inasmuch as the contract to make a title was implied.

ASSUMPSIT. The declaration stated that heretofore, to wit, on, &c. by a certain agreement then made by and between the plaintiff and the defendant, it was by the plaintiff and the defendant agreed as follows, that is to say, that he, the plaintiff, should and would purchase of the defendant, and that he, the defendant, should and would sell to the plaintiff, certain premises, to wit, two houses, situate, &c. for the then residue of a certain term of years then unexpired of and in the said houses, to wit, for the then residue of a term of fifty years, at and for the price or sum of 250*l.* to be paid, &c. And it was by the said agreement further agreed (then followed stipulations as to the defendant's papering and painting the premises, &c.), and that the plaintiff should and would pay to the defendant the sum of 250*l.*, the purchase money of and for the said two houses in manner following, that is to say, the sum of 230*l.*, parcel thereof, on the completion of the conveyance of the said houses to the plaintiff, and the sum of 20*l.*, other parcel and residue of the said sum of 250*l.*, on the fulfilment, by the defendant, in all things, of the said agreement on his behalf. And it was by the said agreement further agreed by and between the *plaintiff [*411 and the defendant, that the defendant should and would make to the plaintiff a good title to the said two houses for the residue of the said term within a reasonable time then next following. Mutual promises. Averment of performance on the part of the plaintiff. Breach: that the defendant had not, although a reasonable time for that purpose had elapsed before the commencement of the suit, and although after such reasonable time, and before, &c., to wit, on, &c., he, the defendant, was requested by the plaintiff so to do, as yet made to the plaintiff a good title to the said houses for the residue of the said term, but had hitherto wholly neglected, &c. Concluding by alleging special damage incurred by the plaintiff in endeavouring to procure such title, &c.

Plea: first, non assumpsit; secondly, a discharge; (which the court thought was not supported by the evidence.)

The replication added the similiter to the first plea, and traversed the discharge.

At the trial before the Lord Chief Justice, at the sittings at Westminster, after last Hilary term, an agreement was given in evidence, which commenced thus: "Mr. *Hall* having agreed to purchase of Mr. *Betty*, for the sum of 250*l.*, the two leasehold houses situate, &c. Mr. *Betty* hereby agrees to paper and paint, &c. Mr. *Hall* to pay 230*l.*, at the time of the conveyance, and the remaining 20*l.* on the completion of the painting," &c.: but the agreement contained no contract to make a good title.

On behalf of the defendant it was insisted that there was a variance. The plaintiff's counsel applied to the Lord Chief Justice to amend. This his lordship declined to do; but the above facts were endorsed on the nisi prius record, with liberty to the plaintiff to move for judgment, under the 3 & 4 W. 4, c. 42, s. 24. The damages were assessed, conditionally, at 6*l.* 7*s.* 8*d.*

*412] *Bompas*, Serjt., in last term, obtained a rule nisi accordingly, to enter judgment for the plaintiff on the whole record, upon the verdict found at the trial, for 6*l.* 7*s.* 8*d.* damages.

Talfourd, Serjt., now showed cause. The question is, whether the allegation in the declaration, that the defendant agreed to make a good title to the premises, is supported by proof of an agreement in which nothing whatever is said about the title. It will be argued on the other side that the agreement has been set out according to its legal effect; but that is not so. This is not an agreement for the sale of the freehold of the houses, if it were, possibly a covenant for title might be implied. But it is an agreement in writing, as required by the statute of frauds, for a chattel interest in lands; and there is nothing on the face of the agreement from which any implication can arise that the parties were contracting with respect to the title. *Non constat*, but that the title may have been previously inspected and approved. Under such an agreement there is undoubtedly an implied contract that the vendor has title to sell whatever interest he has in the premises, but nothing more; and the implication rather would be, that all matters of title had been previously investigated. If any inference is to be drawn from the language of the agreement as to making a title, it would be—not that the title was to be made within a reasonable time—but "at the time of the conveyance," when the bulk of the purchase money was to be paid; for it might be that at that time the defendant could produce a good title. Besides, the agreement given in evidence is not one for the purchase of the lease; for it recites that such an agreement *had been* entered into between the parties. If this former agreement was in writing, it is not the contract declared upon; if not, it would
*413] be *void by the statute of frauds. [TINDAL, C. J. Although it is put in the preter-pluperfect tense, is it not, in fact, all one transaction? COLTMAN, J. Is there any case to show that a contract to sell implies a contract to make a good title? But that seems to be admitted.] Perhaps that is too large an admission.

Bompas, Serjt., in support of the rule. There is no doubt that where a party sells property, he impliedly contracts that he has a good title; and that rule applies to the sale of a lease. In *Ogilvie* v. *Foljambe*, 3 Meriv. 53, the master of the rolls (Sir W. GRANT,) in giving judgment, observed, "The right to a good title is a right, not growing out of the agreement between the parties, but which is given by law. The defendant insists on having a good title, not because it is stipulated for by the agreement, but on the general right of a purchaser to require it," Meriv. 64. [MAULE, J. In *George* v. *Pritchard*, Ry. & Moo. 417, which was an action by the purchaser against the vendor of a lease, for the deposit, it was ruled by Lord TENTERDEN at nisi prius, that a vendor was not bound to produce his lessor's title without an express stipulation to that effect.] That case was expressly overruled in *Souter* v. *Drake*, 5 B. & Ad. 992; 3 Nev. & M. 40, where it was held that, unless there be a stipulation to the contrary, there is, in every contract for the sale of a lease, an implied undertaking to make out the lessor's title to demise, as well as that of the vendor to the lease itself, and that such implied undertaking is available at law as well as in equity.

TINDAL, C. J. I do not think my brother *Talfourd* can get over that case.

Per curiam, Rule absolute.

*SPENCER v. HANDLEY and BURGESS, Executors of RICHARD HEALD. [*414

Debt on bond. Plea, that the bond was obtained by fraud and covin. At the trial it appeared that C., being about to purchase a medical business, consulted H. on the subject, who was of opinion that it was worth 300*l*., and consented to be security for C. to that amount. A., the party having to dispose of the business, through his attorney R., required the sum of 425*l*., and it was ultimately agreed that C. should give his separate bond for 125*l*., and that H. should join him in a joint and separate bond for 300*l*., (being the bond in suit.) H. was ignorant of the existence of the agreement as to the separate bond at the time he executed the other. C. was called as a witness, and stated that it was agreed between himself and R. that the bond for 125*l*. should be concealed from H.; but this was contradicted by R. The judge told the jury, that it was not sufficient to show that C. had committed a fraud on H., but that they must be satisfied that the plaintiff or his agent was a party to it. *Held*, a correct direction.

The verdict having been returned for the plaintiff, the court refused to disturb it, the existence of fraud being a question for the jury. (*a*)

DEBT, on the bond of Richard Heald (the testator,) dated January 31st, 1835, conditioned for the payment by one John Carpenter, and the testator Heald, or either of them, their or either of their heirs, &c., to one George Bass Billson, since deceased, and the plaintiff, or either of them, of the sum of 300*l*., before or upon the the 31st of January, 1842, with interest in the mean time at 5*l*. per cent. The declaration assigned a breach in the non-payment of interest by Carpenter, or Heald, during his life, or the defendants as executors of Heald, to Billson, during his life, or to the plaintiff.

Plea; that the said supposed writing obligatory was obtained from the said Richard Heald, in his lifetime, and he was induced to execute and enter into the same by the plaintiff, and the said G. B. Billson, and others in collusion with them, by and by means of the fraud, covin, and misrepresentation of the plaintiff and the said G. B. Billson, and the said others in collusion with them. Verification.

*Replication, traversing the fraud, &c.; and issue thereon. [*415

At the trial before COLTMAN, J., at the sittings for Middlesex after last Hilary term, it appeared that some years ago Mr. Carpenter, a general practitioner in medicine, at Rothwell, in Northamptonshire, sold his practice to one Abraham Billson, and entered into a bond not to practise again at Rothwell. In January 1835 A. Billson died, having appointed his brother, George Bass Billson, and the plaintiff, his executors. Carpenter soon afterwards wished to resume his practice at Rothwell, but the executors of A. Billson contended, he had no right to do so, and a treaty was entered into, between the executors and Carpenter, for the repurchase of the practice by the latter. This treaty was carried on chiefly through Mr. Robinson, the attorney to the executors. Carpenter, who, as a witness for the defendants, (*b*) proved all these facts, also stated that Robinson required, in the first instance, 450*l*. as the purchase-money, but that the demand was reduced to 425*l*.; that he, Carpenter, had had a previous interview with his friend Dr. Heald, the testator, on the subject; and that he told Robinson, that he was not prepared to give the sum required, as Dr. Heald thought 300*l*. sufficient; and that Dr. Heald would join him in a bond for

(*a*) See *Pitcairn* v. *Ogbourne*, 2 *Vez.* sen. 375, *Green* v. *Gosden*, *antè*, Vol. III. 446.

(*b*) He was objected to at the trial, as being the co-obligor with the testator in the bond in suit, on the authority of *Slegg* v. *Phillips*, 4 A. & E. 852, 6 N & M. 360; but the learned judge ruled that he was an admissible witness, on the authority of *Russel* v. *Blake*, antè, Vol. II. p. 374. He was examined, however, on the *voir dire*, and stated that he had been released by the executors.

that amount, if that was considered enough, but that he would do no more. The witness then stated that Robinson had asked him if he could get other parties to join him for the remainder, and that he answered he could not;
*416] that Robinson then asked him if *he would give his own bond for 125*l*. more, which he agreed to do; but said he thought if Dr. Heald knew it, he would not join in the bond for 300*l*.; and that Robinson replied that there was no necessity for Dr. Heald's knowing it; that ultimately it was agreed that two separate bonds should be given, one by Carpenter alone for 125*l*., and the other for 300*l*., in which Dr. Heald was to join: that the two bonds were executed accordingly (the separate bond being executed three days after the joint bond,) and that the witness never mentioned the bond for 125*l*. to Dr. Heald. It appeared also that Carpenter had been sued on the last-mentioned bond (which was the first time that Dr. Heald knew of its existence,) and a judgment had been recovered in the action, to satisfy which Carpenter's goods had been taken in execution. Since that time Dr. Heald had paid interest on the joint bond.

Robinson was called as a witness on the part of the plaintiff, for the purpose of contradicting Carpenter. He was objected to as directly interested in the event of the suit, inasmuch as in case of the defendants' obtaining a verdict, he would be liable to the plaintiff in an action for negligence in preparing the securities. The learned judge, however, thought the case fell within the twenty-sixth section of the 3 & 4 W. 4, c. 42, and having endorsed Robinson's name on the record under the provisions of that section, admitted him as a witness. Robinson, in his examination, positively denied the statement made by Carpenter, as to there having been any agreement or proposal that the bond for 125*l*. should be kept secret from Dr. Heald.

The learned judge, in summing up the case, told the jury that to support the plea it would not be sufficient to show that a fraud had been committed by Carpenter alone: that they must be satisfied that the plaintiff or his agent
*417] was a party thereto; that if they thought Dr. *Heald was induced to execute the bond for 300*l*. by the concealment of the other bond, and that Mr. Robinson was a party to such concealment, they should find for the defendants; and that this would turn materially on the credit they gave to the witnesses on either side. The jury returned a verdict for the plaintiff.

Sir *T. Wilde*, Serjt., in last Easter term, 18th April, before TINDAL C. J., COLMAN, ERSKINE, and CRESSWELL, JJ., moved for a new trial upon the ground, first, that Robinson was not an admissible witness (even under the stat. 3 & 4 W. 4, c. 42);(*a*) secondly, that there had been a

(*a*) The argument on this point is not reported, as it ultimately became unnecessary for the court to pronounce any judgment upon it.

Sir T. Wilde, on obtaining the rule, cited the following authorities:—*Morish* v. *Foote*, 8 Taunt. 454, 2 B. Moore, 508, *Boorman* v. *Brown*, 9 A. & E. 487, 1 P. & D. 364, *Miller* v. *Falconer*, 1 Campb. 251, *Groom* v. *Bradley*, 8. C. & P. 500, *Steers* v. *Carwardine*, ib. 570, *Pickles* v. *Hollings*, 1 Moo. & Rob. 468; *Creevey* v. *Bowman*, ib. 496, *Yeomans* v. *Legh*, 2 M. & W. 419, *Mitchell* v. *Hunt*, 6 C. & P. 351, *Faith* v. *M'Intyre*, 7 C. & P. 44.

Merewether, Serjt., on showing cause, referred to *Green* v. *The New River Company*, 4 T. R. 589, and *Bent* v. *Baker*, 3 T. R. 27; see also the cases collected and commented upon, 1 Phill. Ev. 101—118, 9th edit. He argued that if Robinson was ever liable to the plaintiff for negligence, such liability had ceased at the time he was called as a witness, inasmuch as the remedy would be barred by the statute of limitations, the bond in question having been executed in January, 1835, and the trial of the principal cause having taken place in February, 1842.

Sir T. Wilde, on the authority of the case of *Short* v. *M'Carthy*, 3 B. & Ald. 626, showing that an action against an attorney for negligence must be brought within six years after the act of commission or omission complained of, admitted that this was an answer to the objection raised against the admissibility of the witness.

misdirection. Upon this latter point he contended that the question presented by the learned judge, as to Robinson's being a party to the fraud, was calculated to mislead them; inasmuch as it was not necessary that he should have been an active party therein, but that it would have been suffi- *cient if he was aware that Carpenter concealed from Dr. Heald the [*418 fact that he was to pay more than 300*l.* for the practice; as that would have been an acquiescence in the fraud so as to avoid the bond; and also that the jury must have understood they had to decide whether Carpenter's evidence or Robinson's was true; whereas, there had been fraud, even on the latter's own showing.

A third ground upon which the rule was moved for was, that the verdict was against the evidence.

The court granted a rule on the first(*a*) and third points; but refused it on the second point, observing that the direction of the learned judge amounted to saying, that if the jury thought Robinson was cognizant of the fraud, he would be a party to it; and that the jury could hardly have understood the direction otherwise.

Merewether and *Channell*, Serjts., on a former day showed cause. The verdict can only be set aside on the ground that there had been a fraud committed on Dr. Heald; but even the evidence of Carpenter, supposing it to be true to the letter, would not establish legal fraud. The case is distinguishable from *Stone* v. *Compton*, 5 N. C. 142. In that case there had been, on the face of the security, a positive misrepresentation of a fact, by which the party had been misled. The court in giving judgment lay down the rule thus:—"Now the principle to be drawn from the cases to which reference has been made in the course of argument we take to be this; that if, with the knowledge or assent of the creditor, any material part of the transaction between the creditor and his debtor is misrepresented to the surety, the misrepresentation being such, that but for the same having taken place, either the suretyship would not have been entered into at all, or, being entered into, the extent of the surety's liability might be thereby increased, *the security so given is void at law, on the [*419 ground of fraud." *Pidcock* v. *Bishop*, 3 B. & C. 605, 5 D. & R. 505, is to the same effect. [TINDAL, C. J., referred to *Jackson* v. *Duchair*, 3 T. R. 551. Fraud is sought, in this case, to be inferred from the form of the bond; but it was a mere money bond, from which no such inference can legitimately be drawn.

Sir *T. Wilde*, Serjt., in support of the rule. It is clear that a fraud was practiced upon Dr. Heald; and the plaintiff is effected with it, through his agent, Robinson. There is nothing to show that, at the time he executed the bond, Dr. Heald knew the true state of facts; and these were purposely concealed from him. It was in evidence that he thought the business was worth only 300*l.* The form of the bond is material; for it keeps out of sight the amount of money that was really to be paid for the business. *Pidcock* v. *Bishop* resembles the present case. There, no communication between the creditor and the surety appears. That case establishes that a party ought to have full information on all the material facts in connection with which he is about to incur liability. The whole of the arrangements ought to be communicated to him. If he is prevailed upon to enter into the contract by a belief—whether induced by the form of the security or otherwise—that the principal will have a certain benefit, any collateral bargain between the principal and the creditor, varying the

(*a*) See the last note.

amount of the benefit, ought to be communicated to him. At any rate, there was enough in this case to make Robinson suspect that Heald thought the bond for 300*l.* was the only one that was to be given. [MAULE, J. Is there any case of such a defence as the present succeeding in an action on *420] a bond? The cases cited were on *parol guarantees.] There was a similar plea in *Raphael* v. *Goodman*, 8 A. & E. 565, which was an action on a bond to the sheriff. [MAULE, J. There is no doubt that some sort of fraud might formerly have been given in evidence under *non est factum.* TINDAL, C. J. In former times there appears to have been no such plea as the present. MAULE, J. Selwyn, in the last edition of his *Nisi Prius*, does not mention it.(*a*) *Channell*, Serjt., referred to *Mason* v. *Ditchburn*, cited 2 C. M. & R. 720 n.] In that case, as also in *D'Aranda* v. *Houston*, 6 C. & P. 511, which, like the present, was an action given on a bond to secure the payment of the purchase-money for a medical business, there was a plea of fraud and covin. *Cur. adv. vult.*

TINDAL, C. J., now delivered the following judgment.

In this case, which we required some time yesterday to look into, it appears that there was some evidence on both sides; and as it was a question undoubtedly and peculiarly for the consideration of the jury—namely, whether any fraud had been committed—we think we ought not to interfere with their finding. If the court had been in the situation of the jury, we are not prepared to say that we should have decided as they have done; but, at the same time, we cannot say the jury are wrong in the conclusion at which they have arrived. The court, therefore, think there ought to be no new trial. Rule discharged.

(*a*) That it is competent to an obligor to plead and to prove the real nature of the, transaction, for the purpose of avoiding his bond, see *Collins* v. *Blantern*, 2 Wils. 347, *Paxton* v. *Popham*, 8 East, 408, *Greville* v. *Atkins*, 9 B. & C. 462, 4 Mann. & Ryl. 378. And see *Buckler* v. *Millerd*, 2 Ventr. 107, *Mason* v. *Watkins*, Ib. 109.

(*b*) Cited 2 C. M. & R. 720, n.

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*421] *ALBON and Others *v.* PYKE.

The loan societies act, (5 & 6 W. 4, c. 23,) authorized the trustees to lend money under certain circumstances, and to take promissory notes in the name of the treasurer as security for repayment. The act (s. 8,) authorized a justice of the peace upon complaint of the treasurer, to summon such party and award payment to be enforced by distress. *Held*, that the jurisdiction of the superior courts was not thereby taken away; especially in an action brought upon a promissory note, which did not appear, from the pleadings, to have been given in respect of a loan. (*a*)

DEBT, by the plaintiffs, described in the declaration as trustees of a certain society, called The City of London Loan Society, the rules and regulations of which said society were, previously to the making of the promissory note thereinafter mentioned, duly certified, deposited, and enrolled, pursuant to the provisions of the statute in that behalf made and provided. The declaration (filed the 25th of October 1841), then stated: That on the 22d of April, 1840, the defendant made his promissory note in writing, and thereby promised to pay to the treasurer of the society 5*l.*, for value received, by weekly payments of 2*s.* each; that the defendant then delivered the said promissory note to the said society, and agreed with the said society to pay them the same, according to the tenor and effect thereof; and the plaintiffs, suing as such trustees as aforesaid, averred, that although the

(*a*) Vide post, 426 (*a*).

time for payment of the whole of the said sum of 5*l.* had elapsed, and the said note had become due and payable long before the commencement of the suit, yet the defendant had not paid the amount of the said note, or any part thereof; whereby, &c.

Demurrer; and joinder.

The causes of demurrer were stated to be, that the plaintiffs were not enabled to sue or maintain the action as trustees of the society, called The City of London Loan Society, upon the promissory note mentioned and set forth in the declaration in the cause, by the provisions of the statute 5 & 6 W. 4, c. 23, or of any other act relating to loan societies.

**Bompas*, Serjt., in support of the demurrer. The question in [*422] this case is, whether, upon the proper construction of the statute 5 & 6 W. 4, c. 23, the plaintiffs, as trustees of a loan society, were not bound to proceed against the defendant for the debt, which is the ground of the present action, in the manner pointed out by the eighth section of the act,(*a*) instead of suing him in a superior court. The recital to that act (*b*) shows that it was intended for the benefit of the labouring classes. By the fourth section,(*c*) the property of the *society is vested [*423] in the trustees thereof, and all actions and other proceedings are to be conducted in their name. By the seventh section, no note or security for the repayment of any loan made under the act, is to be liable to stamp duty; and by sect. 8,(*d*) all such notes, &c. are to be made payable to the treasurer or *clerk of the institution; and in default of payment after demand, it is expressly enacted, that a justice of the peace [*424]

(*a*) Vide infrà, p. 423.

(*b*) "Whereas certain institutions for establishing loan funds have been, and may be, established in England, &c., for the benefit and advantage of the labouring classes of His Majesty's subjects, and it is expedient to give protection to the funds of such institutions, and to afford encouragement to the formation of other institutions of a like kind," &c.

(*c*) Sect. 4 enacts, "that all moneys, goods, chattels and effects whatsoever shall be vested in the trustee or trustees of such institution for the time being, for the use and benefit of such institution and the respective members thereof, their respective executors and administrators, according to their respective claims and interest; and, after the death, resignation or removal of any trustee or trustees, shall vest in the succeeding trustee or trustees for the same estate and interest as the former trustee or trustees had therein, and subject to the same trusts, without any assignment or conveyance whatever; and also shall for all purposes of action or suit, as well criminal as civil, in law or in equity, in anywise touching or concerning the same, be deemed and taken to be and shall in every such proceeding (where necessary) be stated to be the property of the person or persons appointed to office of trustee or trustees of such institution for the time being, in his or their proper name or names, without further description; and such person or persons shall and they are hereby respectively authorized to bring or defend, or cause to be brought or defended, any action, suit or prosecution, criminal as well as civil, in law or equity, touching or concerning the property, right, or claim aforesaid of such institution, and to sue and be sued, plead and be impleaded, in his or their proper name or names, as trustee or trustees of such institution, without other description; and no suit, action or prosecution shall be discontinued or abate by the death of such person or persons, or his or their removal from the office of trustee or trustees as aforesaid, but the same shall and may be proceeded in by the succeeding trustee or trustees in the proper name or names of such person or persons commencing the same, any law, usage, or custom to the contrary notwithstanding; and such succeeding trustee or trustees shall pay or receive like costs as if the action or suit had been commenced in his or their name or names for the benefit of, or to be reimbursed from the funds of such institution."

(*d*) Sect. 8, enacts, "that all notes and securities entered into for the payment of such loans shall be made payable to the treasurer or clerk for the time being of the said institution; and if the party or parties liable to pay the same shall fail to make full payment in money of the sum in the note or security mentioned, or any part thereof, for seven days after demand made on each party, or left at his usual place of abode, by or on behalf of the treasurer or clerk for the time being of the said institution, it shall and may be lawful for any one or more of His Majesty's justices of the peace for the county, riding, city, division or place where the person, &c. respectively so refusing to pay any of such notes or securities as aforesaid shall or may happen to be or reside; and such justice or

may summon the party making default, and award payment to the treasurer, which may be enforced by distress. The subsequent statute, 3 & 4 Vict., c. 110, was passed after the making of the note on which this action is brought; (a) but having the same object in view as, and beng *in pari materiâ* with, the 5 & 6 W. 4, c. 23, the two acts may be considered in conjunction. The 5 & 6 W. 4, c. 23, is repealed by the 3 & 4 Vict., c. 110, which, however, enacts, that the provisions of the former statute shall be in force for the recovery of all sums lent previously to the passing of the 3 & 4 Vict., c. 110. The sixteenth section is similar to the eighth section of the 5 & 6 W. 4, c. 23; and the seventeenth section (b) enacts, that notwithstanding these provisions, the treasurer or clerk may proceed to enforce payment of a note in any county court, or court of requests, where the amount is within their jurisdiction. This shows that the legislature considered that, by the former act, the jurisdiction of the courts at Westminster had been taken away. [TINDAL, C. J. The general rule undoubtedly is, that the jurisdiction of the superior courts is not taken away, except by ex-
*425] press words or necessary implication.(c) MAULE, J. By the *eighth section of the 5 & 6 W. 4, c. 23, no execution is given but by a *quasi fieri facias*. There is no power to send the party making default to prison; and it might be argued that such a power cannot be implied.] In *Cates qui tam* v. *Knight*, 3 T. R. 442, the general rule was recognized, that the jurisdiction of the superior courts is not ousted but by express words. In that case the question turned upon the construction of the 25 G. 3, c. 51; which, having created penalties of 50*l.* and of 10*l.*, enacted that the former should be sued for in any of the courts at Westminster, and provided that it should and might be lawful for justices of the peace to hear and determine the latter penalties, with a power to them to mitigate &c., and it was decided that such proviso, by implication, ousted the jurisdiction of the superior courts as to the 10*l.* penalties.(d) [MAULE, J. The jurisdiction of the superior courts seems to be reserved by the express words of the fourth section of the 5 & 6 W. 4; for it authorizes the trustees "to

justices is and are hereby required, upon complaint made by such treasurer &c., to summon the person &c., against whom such complaint shall be made; and after his appearance or in default thereof, upon due proof upon oath of such summons or warning having been given or left as aforesaid, such justice &c. shall proceed to hear and determine the said complaint, and award such sum to be paid by the person &c. respectively liable to the payment of any such note or security to such treasurer &c. as shall appear to such justice &c. to be due thereon, together with such a sum for costs not exceeding the sum of 10*s.*, as to such justice &c. shall seem meet; and if any person &c. shall refuse or neglect to pay or satisfy such sum of money as upon such complaint as aforesaid shall be adjudged, upon the same being demanded, such justice &c. shall, by warrant under his hand and seal &c., cause the same to be levied by distress and sale of the goods of the party so neglecting or refusing as aforesaid, together with all costs and charges attending such distress and sale, and returning the overplus, if any, to the owner; and no such proceedings shall be removed by certiorari or otherwise into any of his Majesty's superior courts of record."

(a) The statute received the royal assent on the 11th of August, 1840.

(b) Sect. 17, declares and enacts, "that notwithstanding the provisions hereinbefore contained, the treasurer or clerk of such society, for the time being, may proceed for recovery of the sum due on such note against the party or parties liable to pay the same, in any county court, or court of conscience or request, having jurisdiction to the amount so due, according to the course and practice of such courts; and in such case the act or acts, and all provisions therein relating to such court and the powers thereof, shall be applicable to the recovery of the sum so due on such note."

(c) See *Agard* v *Candish*, Sav. 134, Cro. El. 326. S. C. in error, Sir F. Moore, 564; 2 Anderson, 127. And see *Cates qui tam* v. *Knight*, 3 T. R. 442; *Shipman* v. *Henbest*, 4 T. R. 109.

(d) See also *Fleming* v. *Bailey*, 5 East, 313; *Ex parte Langston*, 1 Mont. & Bligh, 142, S. C. *per nom. Ex parte Benson*, 1 Dea. & Chitt. 324; *Dundalk Railway Company* v. *Tapster*. 1 Q. B. Rep. 667.

bring or defend any action, suit or prosecution, criminal as well as civil, in law or equity, touching or concerning the property, right or claim aforesaid of such institution." Suppose the society were possessed of a chattel and sold it, and the purchaser gave a promissory note to secure the payment, that would not be a case for proceeding before a magistrate, not being a case of a loan. There is nothing in this declaration to show that the note sued upon was given in respect of a loan.] It is certainly not so stated expressly; but it is to be collected from the whole of the declaration.

Talfourd, Serjt., *contrà*, was not called upon.

*TINDAL, C. J. I do not think that last objection can be got over. Besides, there are no exclusive words in the statute under consideration; and it is perfectly clear, therefore, that the jurisdiction of the superior courts is not taken away. The proceedings under the eighth section must be before a justice of the peace for the county where the party making default resides; so that if such a party lived in Northumberland, and the treasurer in London, according to the construction contended for, the latter would be compelled to go to Northumberland to lay his complaint before the magistrates. [*426

Bompas prayed leave to amend; but the court intimated, it would be better for the defendant that they should not accede to the request.

Judgment for the plaintiff.(*a*)

(*a*) In *Timms* v *Williams*, 2 G. & D. 621, which was decided a few days subsequently to the above case, the court of Queen's Bench held that no action is maintainable at the suit of the treasurer of a loan society upon a note given to the trustees to secure the repayment of a loan from the society. The declaration there stated that the note was given for securing the payment of 10*l*. *lent* by the society. The court seem to have decided the case principally upon the ground that, by the fourth section of the 5 & 6 W. 4, c. 23, (antè p. 422, (*c*) the note would vest in the *trustees* of the society, and that the *treasurer* could only recover payment of it by a summary proceeding before a magistrate, under the provisions of the eighth section, (antè, p. 423. (*d*)

Lord Denman, C. J. and Patteson, J., appear to have considered also that by the statute the jurisdiction of the superior courts was taken away, Patteson, J., observing, "I think the remedy upon these notes is confined to the summary proceedings before a magistrate. Not that the jurisdiction of the superior court is taken away without express words, but that the statute enacts an instrument of such a nature, that express words were necessary to enable the treasurer to sue upon it, and such words are not to be found. Even with regard to the trustees, there is no power given to them to sue upon these securities."

Neither this, nor the principal case, can perhaps be considered as an express decision upon the point whether the jurisdiction of the superior courts is taken away by the 5 & 6 W. 4, c. 23, in an action by the *trustees* of a loan society on a note expressed to be given for money *lent* by the society.

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*JOSEPH HOWARTH v. TOLLEMACHE, Esq. [*427

Trover against the sheriff. Plea, that a *fi. fa.* was delivered to the defendant at the suit of A. against B; that the goods in the declaration were the goods of B., and that before the time when, &c., B. fraudulently delivered to the plaintiff possession of the goods under colour of a feigned, covinous and fraudulent conveyance, to the intent to delay A. contrary to the form of the statute; and that whilst the goods were so in possession of the plaintiff, and whilst the writ was in force, the defendant, as sheriff, did seize, &c. *Held*, that the plea was bad, as amounting to an argumentative denial that the plaintiff was possessed, as of his own property.

THIS was a special action of trover. The declaration recited that the plaintiff before, &c., was a publican and beer-seller, and the trade of a publican and beer-seller had used and carried on in a certain messuage of the plaintiff, parts of which said messuage he was then in the habit of letting out as furnished lodgings for certain rents or sums of money, to him payable on that behalf. And that the plaintiff, on, &c., was lawfully pos

sessed, as of his own property, of certain goods and chattels, used and employed by him as furniture and necessaries in his said messuage, and his said trade of a publican and beer-seller, to wit, twenty tables, &c. After stating the conversion in the usual form, the declaration proceeded to allege special damage as follows; whereby and by reason of the premises, the plaintiff's said messuage had become, and was wholly destitute of the said necessary articles for furnishing the same, and the plaintiff had been wholly prevented from carrying on his said trade as a publican and beer-seller, and from procuring tenants for his said lodgings; and the plaintiff had lost and been deprived of, not only, all the profit and advantages which would have accrued to him in respect of the exercise of his said trade, but had also lost, and been deprived of, all the profits and advantages which otherwise might and would have accrued to him in respect of his said lodgings; and also, by reason of the premises, the plaintiff had incurred divers
*428] charges and expenses, to wit, to the amount of 50*l.*, *in and about procuring lodgings at other houses for himself and servants for a long space of time, to wit, &c.

Fourth plea, that before the said time when, &c., to wit, on, &c., a certain writ of *fieri facias* at the suit of one T. B. against the said J. H., was duly issued out of the court of, &c., and was endorsed, &c., and was duly delivered to the now defendant, being sheriff, to be executed according to law. And, further, that before the said time when, &c., to wit, on, &c., the said goods, &c., were respectively the goods, &c. of the said J. H., and of right belonged to him; and that afterwards, and before the said time when, &c., to wit, on, &c., the said J. H. fraudulently and collusively gave and delivered to the plaintiff possession of the said goods, &c. under colour of a feigned, covinous and fraudulent alienation, bargain and conveyance thereof from him to the plaintiff then made, to the end, intent and purpose, to delay, hinder and defraud the said T. B. and the other creditors of the said J. H. of their respective just and lawful actions, debts and demands against the said J. H., contrary to the form of the statute in such case made and provided. And further, that the plaintiff afterwards, to wit, at the said time when, &c., well knowing the last mentioned premises, claimed title to the said goods, &c., (the same then being in the possession of the plaintiff as last aforesaid and not otherwise,) under colour of the aforesaid feigned covinous and fraudulent alienation, bargain and conveyance thereof. And further, that afterwards and whilst the said goods, &c. were so in the possession of the plaintiff as last aforesaid, and whilst the said writ was in full force, to wit, at the said time when, &c., he, the defendant, as such sheriff as aforesaid, within his said bailiwick, did, by virtue of the said writ and endorsement thereon, seize and take the said goods
*429] and chattels *for the purpose of levying thereout the moneys so directed to be levied by the said endorsement on the said writ as aforesaid; as it was lawful for him to do for the cause last aforesaid; which is the supposed conversion in the declaration mentioned. Verification.

Demurrer to the fourth plea; for that the defendant had, by his same plea in an indirect and argumentative manner, attempted to traverse and deny the allegation in the declaration, that the plaintiff was possessed of the goods therein mentioned as of his own property, the same plea showing facts establishing that the plaintiff's possession was fraudulent, and therefore insufficient to give him even a *primâ facie* right to sue in trover; and also for that the same plea should have concluded to the country, and not with a verification. Joinder.

Bompas, Serjt., in support of the demurrer. The fourth plea amounts to nothing more than an argumentative statement, that the plaintiff was not possessed as against the defendant. It is, therefore, bad, as neither traversing, nor confessing and avoiding, the allegation of possession in the declaration. In *Nicolls* v. *Bastard*, 2 C. M. & R. 659, Tyrwh. & Gra. 156, there was a precisely similar plea; but the plaintiff, instead of demurring, took issue on the fraudulent sale. PARKE, B. there observed, "The whole defence stated in the last plea, would, in truth, have been admissible under the second," (which denied that the goods were the property of the plaintiff); "the plea of no property in the plaintiff, means no property as against the defendant; which the plaintiff could not have, if the sale was fraudulent." In *Rowe* v. *Ames*, 6 M. & W. 747, which was an action on the case against the sheriff for neglecting to sell the goods of R. W. that had been seized by him in execution, the defendant, among other pleas, pleaded *that [*430 R. W. became a bankrupt, and that within two months after the issuing of the writ in the declaration mentioned, and the delivery thereof to the defendant, and of the seizure of the goods, and before the passing of the 2 & 3 Vict. c. 29, and before the defendant could or ought to have sold the said goods, a fiat issued, and the said R. W. was declared a bankrupt; and that, before the commencement of the action, an official assignee was appointed, in whom the said goods so taken in execution became and were vested; and this plea upon demurrer was held bad. [MAULE, J. It may be a question, whether, in the present case, the deed set out in the plea, is good even as between the parties.]

Channell, Serjt., was then called upon to support the plea. First, as to the deed not being good as between the parties. The difficulty arises from the statement in the plea, that John Howarth gave the plaintiff possession "under colour of a *feigned*, covinous and fraudulent alienation, &c." But the word "feigned" is used in the statute 13 Eliz. c. 5, which, in sec. 1., is declared to be passed "for the avoiding and abolishing of feigned, covinous and fraudulent feoffments, gifts, grants, alienations, &c.; which feoffments, &c. have been and are devised and contrived of malice, fraud, covin, &c., to the end, purpose and intent to delay, hinder or defraud creditors and others of their just and lawful actions, &c." And then by sect. 2, it is enacted, that "every feoffment, gift, grant, &c., to or for any intent or purpose before declared and expressed, shall be deemed and taken (*only as against that person* or persons, his or their heirs, &c., whose actions, &c., by such guileful, covinous or fraudulent devices and practices, as is aforesaid, are, shall, or might be in any wise disturbed, hindered, &c.,) to be clearly and utterly void, &c." So that it is clear, the "feigned alienation" mentioned in the plea would *under the [*431 statute be void only as against creditors, and would be valid as between the parties themselves. The plaintiff complains of the conversion of his goods. The object of the plea is to give colour to him, by showing that he was in possession of the goods with certain rights; the deed of alienation being valid as between himself and John Howarth though it would be "*feigned*, covinous; and fraudulent" as against the creditors, whom the plea alleges that the deed was given "to delay, hinder, and defraud, contrary to the form of the statute." The deed would be valid under the statute, not only as between the parties, but as against all the world but the creditors of John Howarth.

It is extremely doubtful, whether the defence raised by the plea could have been given in evidence under the plea of "not possessed," notwith-

standing what was said by PARKE, B. in *Nicolls* v. *Bastard*, which appears to have been the expression of an opinion formed at the moment, and certainly was not the point decided in the case. In *Howell* v. *White*, 1 Moo & Rob. 400, PATTESON, J. ruled that, under the plea of "not possessed," the defendant could not show that a sale of the goods to the plaintiff had been fraudulent. So, in *Samuel* v. *Duke*, 3 M. & W. 622, which was an action of trover against the sheriff and the execution creditor, it was held, that it was not competent to the sheriff, under that plea, to give in evidence certain facts justifying the seizure, which distinguished his case from that of the other defendants; but that such a defence should have been specially pleaded. Here, the defendant admits possession and some property in the plaintiff, as against all but certain parties who put him, the defendant, in motion. [TINDAL, C. J. The defendant is sheriff; he stands in the shoes of the creditors, against whom the deed is void: it is void, therefore, for
*432] the purpose of *this action.] The sole object in this case, is to comply with the rule that requires pleadings in confession and avoidance to give colour. The leading authority on that doctrine is *Leyfield's case*, 10 Co. Rep. 88a, which is thus stated and commented on in *Stephen on Pleading*, pp. 229, 230, 4th ed. "To an action of trespass for taking the plaintiff's corn, the defendant may plead, in confession and avoidance, that he was rector, and that the corn was set out for tithe, and that he took it as such rector. Now it is to be observed that this is not an absolute confession, that he took *the plaintiff's* corn as alleged in the declaration. The defendant asserts, on the contrary, a title to the corn in himself. But still he admits that the plaintiff was the original owner, and entitled against all the world, except the defendant. There is, therefore, a confession so far as to admit some sort of apparent right or *colour* for the action; and the plea consequently complies with the terms of the rule now under consideration, and is sufficient." The rector there alleged the goods were his; and in the same manner the defendant here says, the goods belonged to the creditors. [*Bompas*, Serjt. The statute of Elizabeth speaks of "feigned, covinous *and* fraudulent conveyances; they need not be the same thing; "feigned" means "pretended," and has a different signification from "fraudulent."] The plaintiff cannot set up his own fraud to avoid his own deed; *Doe dem. Roberts* v. *Roberts*, 2 B. & A. 367. See also *Prole* v. *Wiggins*, 3 N. C. 230; *Reed* v. *Thoyts*, 6 M. & W. 410. [MAULE, J. He is not doing so; he merely says the defendant has used the word "feigned" in a particular sense. TINDAL, C. J. The only point upon which the court feel any difficulty is, whether the plea is rightly framed for the purpose of giving colour.]

*433] *Bompas*, Serjt., in reply. The defendant in giving colour, was bound to show that which would have amounted to a good conveyance to the plaintiff; but he has shown that which is null against him the defendant, and, which, indeed, is no conveyance at all; for he pleads that the plaintiff was put in possession under colour of a *feigned* conveyance. The case of *Howell* v. *White* was decided at nisi prius very soon after the new rules came into operation, and there might have been some difficulty as to their application.(*a*) It was argued in that case, by the counsel for the plaintiff, that under the plea of not possessed, it was not competent to

(*a*) R. H. 4 W. 4, reg. 1, No. 3, directs, that "all matters in confession and avoidance, including not only those by way of discharge but those which show the transaction to be either void or voidable in point of law, *on the ground of fraud* or otherwise, shall be specially pleaded." This rule is, in terms, confined to actions of assumpsit, but by r. IV. (which applies to actions on the case, including trover) No. 2, "all matters in confession

the defendant to do more than show that no sale *in fact* had taken place; and this reasoning appears to have been assented to by the learned judge; but if the defendant might show no sale in fact, why might he not show no legal sale—the sale not being expressly in issue? *Samuel* v. *Duke* is in truth an authority for the plaintiff. PARKE, B., in giving judgment, says, "if the conversion had been the sale of the goods, then the sheriff must have previously seized; and probably it would have been competent to him, under the denial of the plaintiff's right of possession, to show that, at the time of the sale of the goods, the plaintiff had no possessory right, but that the sheriff had a right to seize them."

*TINDAL, C. J. I think the plea is bad for one or the other of the causes of demurrer assigned. Either the plea consists only of a statement of evidence, that the plaintiff was not possessed as of his own property against the defendant, and is therefore bad as an argumentative traverse of that allegation; or if it is to be taken as a direct traverse, it is informal in concluding with a verification. It seems to me that the plea states matter which might have been given in evidence under the plea of "not possessed." [*434

COLTMAN, J., concurred.

MAULE, J. I also think the plea is bad, as being an argumentative denial of the plaintiff being possessed as of his own property. If the facts could be pleaded at all, they should have been pleaded with a traverse of that allegation; but, I think, they might have been given in evidence under the plea of "not possessed." A defendant in such a case may have no notice of the existence of the instrument under which the plaintiff claims; it may be started upon him at the trial, and it seems hard that he should be put to the necessity of pleading a plea like the present. The statute of Elizabeth(*a*) avoids several things, viz.: fraudulent feoffments, gifts, grants, alienations, bargains and conveyances, as well as fraudulent bonds, suits, judgments and executions. A plaintiff might set up a claim under any one of these—an execution for instance—for which the defendant might not be prepared, but which I think he certainly ought to have the liberty to contest under the plea of "not possessed."(*b*)

Judgment for the plaintiff.

and avoidance shall be pleaded specially, as in actions of assumpsit. In trover, the plaintiff states that he is possessed of certain goods as of his own property; and that is a material allegation. The defendant in the principal case seeks to show that although the plaintiff is possessed of the goods in question, he is not possessed as of his own property, by reason that the possession is fraudulent.

(*a*) 13 Eliz. c. 5. (*b*) Cresswell, J., was absent.

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*ELIZABETH O'CONNOR and Another, Administratrixes of GEORGE GARROW, dec., v. MARJORIBANKS and Others. [*435

In trover by the personal representatives of A., his widow is not admissible as a witness for the purpose of showing that she pledged the goods with the defendants by her husband's authority.

TROVER, by the plaintiffs, as administratrixes of George Garrow, deceased, for a chest of plate; laying the possession in the intestate, and the conversion after his death.

Pleas; first, not guilty; secondly, that the intestate was not possessed as of his own property, &c.; upon both of which issue was joined.

Thirdly; that before any of the times in the declaration mentioned, to

wit, on, &c., the said G. G. then being lawfully possessed of the said goods, &c., as of his own property, delivered the same to one John Hodgson, to be possessed by him or his bankers for the time being, on his behalf, as a security for certain advances of money then, at his request, agreed to be made to him by the defendants, at the request and on the responsibility of the said J. H.; and thereupon, with the consent of the said G. G., the same goods, &c. then were, by the said J. H., delivered to and deposited with the defendants, who then and thenceforth were and have been the bankers of the said J. H.; and it was thereupon then agreed by and between the said G. G. and the said J. H., that the said goods, &c. should remain and continue in the possession of the said J. H. or his bankers, until the advances to be made as aforesaid, should be fully repaid and satisfied. The plea then stated that the money had been repaid by G. G., but that other advances were made by the defendants to him, at the request and on the responsibility of J. H., upon an agreement that the
*436] said goods, &c. should continue and *remain in the possession of the defendants, or other the bankers of the said J. H., and be subject to his control, and stand and be charged in his favour with the lien until the advances to be made as last aforesaid should be fully paid and satisfied by the said G. G. The plea then averred that the sums of money so advanced as last aforesaid, still remained wholly unpaid and unsatisfied by or for the said G. G. or his representatives; wherefore the defendants, as the bankers of the said J. H., and at his request, and according to the terms of the said last-mentioned agreement, had retained and kept, and still did retain and keep, the said goods, &c. in respect of the aforesaid lien; as they lawfully might, &c.; and in so doing, and not otherwise, had converted, &c. Verification.

Replication to this plea, that it was not agreed by and between the said G. G. and the said J. H., *modo et formâ*. Whereupon issue was joined.

The cause was tried before Maule, J., at the sittings for Middlesex in last term, when the following facts appeared. Mr. Garrow the intestate was, in the year 1836, residing in India; his wife remaining in England. A letter was given in evidence, written by Mr. Garrow to his wife, towards the close of that year, authorising her to draw on him for money, or to sell his plate and some other property. She applied to the defendants (Coutts and Co., through whom her husband had been in the habit of making remittances to her), for an advance of 600*l.*; and they advanced her that sum, upon her draft on her husband being endorsed by Mr. Hodgson, a customer of theirs; the chest of plate in question being deposited by Mrs. Garrow with the defendants as a security for Mr. Hodgson. The draft was accepted and paid by Mr. Garrow; and, in 1838, his wife obtained a further advance of 250*l.* from the defendants upon another draft on her husband, and a written *guarantee given to them by Mr. Hodgson; it
*437] being agreed that the plate should remain with the defendants on the same terms as before. This latter draft was accepted by Mr. Garrow, but he died before it fell due. The learned judge intimating an opinion, that the evidence to establish the wife an agent for the purpose of depositing the plate was very weak, the defendants tendered an examination of Mrs. Garrow taken after her husband's death, upon interrogatories under a commission in Canada, where she had resided since that time. This was objected to on the part of the plaintiffs, but was received by the learned judge, who, however, reserved the point. In the examination in question, Mrs. Garrow, deposed that her husband had, previously to 1837, authorized

her to sell and dispose of any articles of plate or furniture belonging to him, as well as to manage his affairs generally while she remained in England. His lordship left it to the jury to say, whether Mrs. Garrow had authority from her husband to pledge the plate in question; and if so, to find a verdict for the defendants on the second and third issues; which they accordingly did.

Talfourd, Serjt., in the same term, obtained a rule nisi to enter a verdict for the plaintiffs on these issues, or for a new trial, on the ground that Mrs. Garrow's evidence was inadmissible in an action by the representatives of her late husband, in a matter touching his estate. He cited *Monroe* v. *Twisleton*, Peake, Add. Ca. 219, and *Doker* v. *Hasler*, Ry. & Moo. 198.(*a*)

**Bompas*, Serjt., (with whom was *J. Henderson*,) now showed [*438 cause. The question is, whether Mrs. Garrow could not be called as a witness after her husband's death, in any matter affecting his estate, whether she had an interest in the suit or not. The interest of a widow must be taken to be, to increase her late husband's estate; but here the evidence of Mrs. Garrow went to decrease it. Although, therefore, she would not have been a competent witness for the plaintiffs, she was, for the defendants. In *Monroe* v. *Twisleton*, Lord ALVANLEY held, that a woman who had been divorced by act of parliament, was not competent to prove a contract made by her husband previously to the divorce; but the ground upon which his lordship so ruled, was, that it could not be permitted that occurrences intrusted to the wife, while the most perfect and unbounded confidence existed between her and her husband, should be divulged in a court of justice; in other words, that confidential communications between husband and wife should be held sacred. *Doker* v. *Hasler* was decided upon the same principle. But the object of the widow's evidence in this case is, not to disclose any thing of a confidential character, but merely to prove that she was authorized, as her husband's agent, to make a certain contract. In *Aveson* v. *Lord Kinnaird*, 6 East, 188, 2 J. P. Smith, 286, Lord ELLENBOROUGH put the principle on the right footing. Upon *Monroe* v. *Twisleton* being referred to, from Peake's Evidence (App. lxxxix. of 4th ed.), his lordship said, "That goes on the ground, that the confidence which subsisted between them at the time, shall not be violated in consequence of any future separation. And again, "I doubt whether, what Lord ALVANLEY there said, was meant to be applied to the circumstances of that *case,(*b*) for it is generally considered that matters of domestic con- [*439 cern are intrusted to the wife. I rather consider him to have mentioned it as a general doctrine, that trust and confidence between man and wife shall not be betrayed; and as such, it is sound doctrine." A wife may be a witness in an action for goods sold between third parties, to prove that the goods were sold on the credit of her husband, though such evidence operates against his interest; *Williams* v. *Johnson*, 1 Str. 504. In *Henman* v. *Dickinson*, 5 Bingh. 183, which was an action by the endorsee against the acceptor of a bill of exchange, the wife of the drawer was ad-

(*a*) The rule nisi was also obtained upon another point, reserved at the trial, viz., that as the guarantee by Hodgson was not given in evidence, there was no proof that he had made himself responsible for the second advance. But Bompas, Serjt., on showing cause, observed that the guarantee was not in issue, inasmuch as the plea stated that "the defendants, at the request, and upon the responsibility of the said J. H., did advance the money," which allegation was not traversed; and Talfourd, Serjt., abandoned the point.

(*b*) It was an action for the board and lodging of the defendant's infant child, and the wife was called to prove the contract. It does not appear whether the contract had been made by her.

mitted by BEST, C. J., at the trial, to prove that her husband had altered the amount of the bill before he endorsed it; and the court were disposed to uphold the decision of the Chief Justice, but the case was determined upon another point. In *Rex* v. *The Inhabitants of Bathwick*, 2 B. & Ad. 639, upon a question as to the settlement of E., the wife of C., the respondents proved, by the testimony of C., his marriage with the pauper in 1829. The appellants, in order to prove such marriage void, upon the ground that C. had been married in 1826 to M. B., called the latter; who stated that she, in 1826, went with C. before a reputed clergyman of the established church, in Ireland, who, in his private house, there read to them the marriage ceremony; and it was held that M. B. was a competent witness to prove the first marriage, although her husband had been before examined, and proved the second marriage. The case of *Beveridge* v.
*440] *Minter*, 1 C. & P. 364,(a) however, is a decisive *authority in favour of the defendants. It was there held, that the widow of a deceased person was a competent witness for the plaintiff, in an action brought against the executors of such person, on a promise made by him in his lifetime.(b) The broad principle laid down in the old authorities has been very much narrowed by the recent cases; and it must now be considered to be only applicable to cases where the evidence of the wife would directly charge the husband, or where the husband is directly interested.

Talfourd, Serjt., (with whom was *Bramwell*) *contrà*. The admission of such evidence might have the worst consequences, if a widow were actuated by hostile feelings towards her husband's representatives; and it would violate the sacredness of conjugal communications. [MAULE, J. The rule can hardly stand upon that ground. If the question had arisen between third parties, the widow might clearly have been called to prove she had pledged the plate with her husband's consent, or by his authority. That puts an end, therefore, to the sacredness of conjugal communications as the foundation of the rule contended for.] *Rex* v. *Bathwick* only shows that the evidence of a wife may be admitted, although it raise an imputation against her husband, which may possibly be made the ground of a charge against him. But it goes no further. In Buller's Nisi Prius, 286, the rule is laid down, with the reason for it: "Husband and wife cannot be admitted to be witness for each other, because their interests are abso-
*441] lutely the same; nor against each other, because *contrary to the legal policy of marriage." [TINDAL, C. J. In an action against the husband, you might prove the *agency* of the wife *aliundè*, and then give her admissions or acts in evidence against the husband. The argument now insisted upon would, in every case, preclude the wife from proving her agency, and giving effect to her husband's intentions. The argument must certainly go to that extent. In an action against the husband, acts and admissions of the wife must be proved *aliundè*, not by herself. The common law principle of not allowing the wife to be a witness for or against the husband was recognised by the legislature, in passing the old

(a) The verdict being for the defendant, the objection could not be brought before the court.

Peake's Additional Cases had not then been published.

(b) In *Humphreys* v. *Boyce*, 1 Moo. & Rob. 140, declarations by a woman, during coverture, of the non-payment of money lent to her *before marriage*, were held by Lord Tenterden, C. J., to be admissible in evidence for the plaintiff, in an action against her husband as her administrator. And see *Barker* v. *Dixie*, *Cas. T. Hardw.* 264, *Pedley* v. *Wellesley*, 3 C. & P. 558.

bankrupt act, 21 Jac. 1, c. 19; in sect. 5, of which it is recited that, whereas "the commissioners have power to examine the bankrupt himself and such persons as are suspected to have or detain any of the estate, goods or chattels of the bankrupts; but some doubt hath been made, whether the commissioners have power to examine the wives of the bankrupts touching the same;" and then by sect. 6, it is enacted that the bankrupt's wife may be examined by the commissioners.

The authorities at nisi prius, on this subject, appear to be pretty evenly balanced. *Beveridge* v. *Minter* is certainly an authority in favour of the competency of the witness; but it appears the widow was there called to prove a promise made by her deceased husband to the debtor, not any communication to herself. Here, the whole transaction to be proved was a communication between husband and wife alone. In *Aveson* v. *Lord Kinnaird*, Lord Ellenborough, C. J., clearly recognized the principle laid down in *Monroe* v. *Twisleton;* and though in the subsequent passage, which has been cited on the other side, he seems to doubt the application of that principle to the particular facts of that case, it was upon the ground that matters which are in the ordinary scope of the wife's authority, stand on a very different *footing from those that rest upon any extraordinary authority; which is the present case; and the inference is, that [*442 statements by the wife as to matters in the former class of cases may be admissible, but that they are not admissible as to the second class. In *Aveson* v. *Lord Kinnaird*, the admissions of the wife as to the state of her health, were considered in the nature of acts, as part of the *res gestæ*, like the exclamations of a party when suffering pain. [Maule, J. They may be considered as statements accompanying a fact; but here the question is, whether the wife is an admissible witness to prove the fact. In that case, Lord Ellenborough referred to *Thompson* v. *Trevannion*, Skin. 402, where, in an action by the husband and wife for wounding the wife, Holt, C. J. allowed what the wife said immediately on the hurt being received, and before she had time to devise any thing for her own advantage, to be given in evidence as part of the *res gestæ;* and his lordship said that the case then under consideration fell within the principle of that decision, 6 East, 193, 196. [Tindal, C. J. It seems clear that if the husband were alive and were the plaintiff in this suit, the wife could not be called as a witness for the purpose in question; and this is an action brought by his personal representatives.] The exclusion therefore still exists after the death of the husband.

Tindal, C. J. It is impossible to gain much light from the cases decided at nisi prius relative to this subject, as the two principal ones appear to be in direct opposition to each other. We must see, therefore, which of them best accords with the general principles of law. And it appears to me, that of the two, *Monroe* v. *Twisleton*, Peake, Add. Ca. 219, is the sounder; and that the doctrine therein laid down is built upon the general rule of law, which, *subject to certain well-known exceptions, is this; that a wife never can be admitted as a witness either for or [*443 against her husband; she cannot be a witness for him, because her interest is precisely identical with his; nor against him, upon grounds of public policy, because the admission of such evidence would lead to dissension and unhappiness, and possibly to perjury. There are cases to show that this intimate relation subsisting between the parties is not to be considered as dissolved by death, so as to let in the evidence of either party as to transactions occurring during their joint lives; but we are asked to confine

the rule to cases where the communications between the husband and wife are of a confidential nature. But such a limitation of the rule would very often be extremely difficult of application; and would introduce a separate issue in each cause as to whether or not the communications between husband and wife were to be considered of a confidential character. Upon the whole, I think it better to adopt Lord ALVANLEY's rule in *Monroe* v. *Twisleton;* and to hold therefore that the evidence of the widow was improperly admitted in this case. Consequently, the rule must be made absolute for a new trial.

COLTMAN, J. In the argument in this case a distinction has been taken; and it has been contended that, as to some things, a wife may be examined after the death of her husband, though not as to such matters as were in the nature of confidential communications between them. But undoubtedly that is not the rule during the life-time of both parties; for the rule then is, that, with the exception of certain well-known instances, neither husband nor wife can be admitted as a witness for or against the other; and I think that no such distinction as that now attempted to be set up, arises
*444] upon the death of one of the parties. With respect to the *authorities we are obliged to make our election between conflicting cases; and I agree that the doctrine laid down in *Monroe* v. *Twisleton* is the sound one,—that, although the relation of husband and wife may have ceased to exist, by the divorce of the parties, the objection, as to the admissibility of the evidence of either, still subsists; and I think it makes no difference that the relation has been put an end to by death. There must be a new trial; and if the parties think the question of sufficient importance, they may put it on the record and carry it up to a court of error.

MAULE, J.(*a*) I also am of opinion that this evidence was inadmissible. *Beveridge* v. *Minter*, 1 C. & P. 364, is favourable to the admissibility of the witness; but the previous case of *Monroe* v. *Twisleton* is the other way. I certainly think that more weight is due to the latter case; for it appears to have been more considered and more fully argued, and it does not seem to have been cited(*b*) in *Beveridge* v. *Minter*. In *Monroe* v. *Twisleton*, Lord ALVANLEY lays down the rule with clearness and precision: "To prove any fact arising *after* the divorce, this lady is a competent witness, but not to prove a contract or any thing else, which happened during the coverture. She was at that time bound to secrecy; what she did might be in consequence of the trust and confidence reposed in her by her husband." This shows that the presumption was, not so much that there was confidence in the particular case, but that there might have been. In *Beveridge* v. *Minter*, where the evidence of the widow was objected to in a case which certainly bore a close resemblance to the present, ABBOTT, C. J. said, "She is appearing against her own interest. This is an action brought
*445] against her *husband's executors. If you (that is the executors) had called her, the other side would have asked if she took any benefit under the will." The sole ground therefore of the Lord Justice's opinion seems to have been, that the widow was appearing against her own interest; and when his lordship was pressed by the counsel for the defendants with the observation that if the husband had been alive, and the action had been brought against him, she could not have been a witness, it is stated that he merely replied, "At present I do not see any objection:" so that there does not appear to have been much discussion in that case.

Upon principle, however, I think we ought to decide against the admis-

(*a*) Erskine, J., had left the court.

(*b*) Vide antè, 439. (*a*)

sion of this witness. The text-books generally give, as the reason for the rule as to excluding the testimony of husband or wife, the necessity of preserving the confidence of the conjugal relation;(a) and that may be so. But it by no means follows that the rule is co-extensive with the reason given in support of it; and indeed it would be very inconvenient if it were so; as the question would frequently be raised as to whether or not some particular communication or fact occurring between husband and wife was of a confidential character; which would give rise to endless embarrassment and distrust. A rule may be a very good rule, though the reason on which it is founded may not be applicable to every case which is governed by the rule. For instance, the statute of frauds, 29 Car. 2, c. 3, was passed to prevent, amongst other things, the setting up of fraudulent agreements; but if it had laid down the rule that no instrument obtained by fraud should be valid, it would have left the question in every case open to great difficulty as to whether there had been fraud or not. Instead of that, a clear and simple rule is established—that the agreement must be in *writing, and signed by the party to be charged therewith. And so [*446 the policy of the law (in order to ensure conjugal confidence) has laid down a definite rule, that, in no case, shall husband and wife be allowed to give evidence for or against each other. That rule extends to this case; for, though the husband is dead, the reason for the rule applies as strongly as if he were alive. It would just as much embarrass married persons if they knew their communications might be divulged after the death of either party. I think, therefore, Mrs. Garrow was as much prevented by the rule of law from giving evidence in this case as she would have been if her husband had been alive and plaintiff in the action; and, consequently, that her examination ought not to have been received.

Rule absolute.(b)

(a) See 1 Phil Evid. 69, et seq. 9th ed.

(b) On the second trial, the defendants having again obtained a verdict, a motion was made to set it aside as being against evidence, but the court refused to grant a rule.

BELL, Public Officer, &c., v. FRANKIS.

Where, in an action by the endorsee against the drawer of a bill of exchange, the defendant had told a witness he expected to receive by post a notice of its dishonour, and afterwards gave him a letter he received by post, and requested him to negotiate a renewal of the bill; and the letter, which had found its way to the plaintiff's hands, was not produced at the trial: *Held*, that the jury were warranted in finding no notice of dishonour had been given.

ASSUMPSIT, by the plaintiff, one of the public officers of the National Provincial Bank of England, against the defendant as drawer of a bill of exchange, endorsed by him to the bank. The declaration alleged presentment, non-payment and notice in the usual form.

Pleas: first, that the defendant did not draw the bill; secondly, that he had not due notice of non-payment; *concluding to the country. [*447 Upon both of which issue was joined.

At the trial before MAULE, J., at the sittings for London in last term; it appeared that the bill, which fell due on the 22d July, 1841, was on the day following returned dishonoured to the house of management in London. On the same day it was forwarded to the branch bank at Worcester, and arrived there on the 24th; on which day the manager of that branch bank

forwarded it to Ledbury, where it arrived on the morning of the 25th, on which day the manager of the Ledbury bank wrote a letter to the defendant. This letter was not produced at the trial, nor was any evidence given of its contents. But a witness was called, who stated that he met the defendant in Gloucester on the morning of the 25th of July, and was asked by him to go with him to the post-office, as he expected to find a letter there respecting the dishonour of a bill. That they went together to the post-office, where the defendant received a letter which he handed to the witness, and desired him to take it to one of the other parties to the bill, to endeavour to get it renewed. That the witness did accordingly see the party in question, but the bill was not renewed, and the letter was ultimately handed over to the plaintiff's attorney.

The learned judge having left it to the jury to say whether due notice of the dishonour of the bill had been given, they answered in the negative; and a verdict was accordingly entered for the defendant.

Bompas, Serjt., had applied for a rule for a new trial, on the ground that it should have been left to the jury, that the defendant's admission dispensed with direct evidence of notice; and also that the verdict was against the evidence. The court intimated that it was a proper question
*448] for the jury; and that it had been *properly left to them; but they granted a rule nisi on the second point.

Talfourd, Serjt., now showed cause. It was formerly considered that a promise to pay a bill amounted to an admission of the receipt of notice of its dishonour. But it is now properly considered a question for the jury, whether notice has or has not been given, although undoubtedly they may infer it from such a promise. *Hicks* v. *Duke of Beaufort*, 4 N. C. 229; *Brownell* v. *Bonney*, 1 Q. B. Rep. 39. Here, the evidence falls far short of a promise to pay. In *Cumming* v. *French*, 2 Campb. 106n., the drawer of a bill, having been arrested in an action brought upon it, was asked by the clerk to the plaintiff's attorney, what he had to propose by way of settlement, and the defendant said he was willing to give his bill at two or three months; but Lord ELLENBOROUGH ruled that the offer was neither an acknowledgment, nor a waiver, so as to obviate the necessity of proving notice of the dishonour of the bill. Here, the jury have expressly found that there was not notice. After *Solarte* v. *Palmer*, 7 Bingh 530, due notice of dishonour can hardly be inferred. [COLTMAN, J. If the inference is to be drawn that there had been notice, the defendant might show that the notice given was an insufficient notice.]

Bompas, Serjt., in support of the rule. Many things relating to bills of exchange, that originally were considered as matters of fact, have now become matters of law: such as whether a notice is within reasonable time. Where a party distinctly acknowledges his liability on a bill by applying to have it renewed, that is a sufficient admission that he has received due no-
*449] tice of its *dishonour. It is very important that there should be a fixed and general rule upon the subject.

TINDAL, C. J. The jury have found, there was no notice of dishonour; and under the circumstances of the case I do not think that there is any ground to disturb their verdict.

COLTMAN, J. concurred.

MAULE, J. At the trial I had at first some doubt whether there was any evidence at all of a notice of dishonour having been given to the defendant: but on consideration I thought that there was some evidence upon the point; and the case was accordingly submitted to the jury. If they had

found for the plaintiff, I do not say that they would have done wrong; but I think they have done quite right as it is. I am not dissatisfied with their verdict. The plaintiff might have proved the letter containing the notice, if any such notice was in fact given. By not doing so he justified the jury in coming to the conclusion at which they arrived upon the subject.

CRESSWELL, J. was of the same opinion. Rule discharged.

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*ASHCROFT and Others *v.* MORRIN and Another. [*450

An order for goods "on moderate terms," is a sufficient memorandum within the seventeenth section of the statute of frauds.

ASSUMPSIT for goods sold and delivered. Plea: non-assumpsit.

At the trial, before CRESSWELL, J., at the London sittings after last Hilary term, it appeared that the plaintiffs were coopers in London, and the defendants were storekeepers at St. Vincent's. The action was brought to recover 80*l.* 7*s.* 9*d.* for porter sold by the plaintiffs to the defendants. To prove the order, the following letter, addressed to the plaintiffs and signed by the defendants, was put in:—

"*St. Vincent, April* 3*d*, 1840.

"Messrs. W. Ashcroft and Son,

"Gentlemen—In our line of business we dispose of a good deal of malt liquor, &c., and Captain Neilson of the ship Emerald, has recommended us to try your house for this article. We therefore annex you an order for what we will require just now, which please send by return of the Emerald. Let the quality be fresh and good, and on moderate terms. The Emerald will only be in London about ten days. The amount of invoice we will either pay to Captain Neilson or remit you in a bill, payable in London, as soon as we know the amount. We are, &c.

John and *Samuel Morrin.*"

To this letter the following order was annexed:—

"Order for porter, &c.

"$\frac{1}{4}$ 4 Hhds. porter.
$\frac{5}{8}$ 4 Barrels ditto.
$\frac{9}{12}$ 4 Punchns. or butts brown stout ditto.
$\frac{13}{4}$ 2 Hhds. ale or beer, not the weakest, but a good body.

John and *Samuel Morrin.*"

*The goods were shipped on board the Emerald, which vessel was wrecked on her voyage out. [*451

On the part of the defendants it was contended that there was no sufficient note or memorandum of the bargain, within the seventeenth section of the statute of frauds, 29 Car. 2, c. 3, inasmuch as no price was mentioned in the order; and also that the acceptance by the captain of the Emerald was not an acceptance by the defendants within that section; *Hanson* v. *Armitage*, 5 B. & Ald. 557, see also *Astey* v. *Emery*, 4 M. & S. 262. The plaintiffs were nonsuited; but leave was reserved to them by the learned judge to move to set aside the nonsuit and to have a new trial.

Channell, Serjt., obtained a rule nisi for a new trial on the first point, contending that the defendants' letter was a sufficient note within the statute.

Bompas, Serjt., now showed cause. The alleged contract was only an order for goods, without naming any price. It cannot, therefore, amount to a contract, for a contract to be valid must be binding on both sides

[CRESSWELL, J. A written proposal accepted by parol has been held sufficient.(a) This case resembles *Elmore* v. *Kingscote*, 5 B. & C. 583, 8 Dowl. & R. 343, where no price was mentioned.]

TINDAL, C. J. The order here is, to send certain quantities of porter and other malt liquor, on "moderate terms." Why is not that sufficient? This is the contract between the parties.

*452] *The other judges concurring, Rule absolute.(b)

(a) In *Boydell* v. *Drummond*, 11 East, 142, it was held, that, although a contract may be collected from several different documents, provided the connexion appear on the face of them, such connexion cannot be supplied by parol evidence.

(b) If a specific price be agreed upon, it must be mentioned in the contract; *Elmore* v. *Kingscote*, ubi suprà. See also *Kain* v. *Old*, 2 B. & C. 627. 633, *Acebal* v. *Levy*, 10 Bingh. 376. 383. But if no price be agreed upon, the contract will be understood to be for a reasonable price; and in a declaration upon such contract no price need be stated; *Hoadly* v. *M'Laine*, 10 Bingh. 482.

MAUND *v.* THE MONMOUTHSHIRE CANAL COMPANY.

Trespass lies against a corporation aggregate for an act done by their agent within the scope of his authority.

TRESPASS, for breaking and entering locks on a canal, and seizing and carrying away barges and coal.

Pleas: not guilty (by statute) 36 G. 3, c. cii., and payment of money into court.

At the trial, before CRESSWELL, J., at the last assizes for Monmouthshire, it was proved that the trespasses in question had been committed by one Cooke, who was the agent of the company, which was incorporated by act of parliament, 36 G. 3, c. cii.; and that the barges and coal had been seized for tolls claimed to be due to them. The only question raised was, whether trespass would lie against a corporation aggregate for an act done by their agent within the scope of his authority. A verdict was taken for the plaintiff, damages 50*l.*, leave being reserved to move to enter a verdict for the defendants.

Talfourd, Serjt., in last term, obtained a rule nisi accordingly, or to arrest the judgment. He cited the case of *Sutton's Hospital*, 10 Co. Rep. 32,
*453] *Anon*, 12 Mod. 559; *Morgan* v. *The* **Corporators of Carmarthen*, 3 Keb. 350; *Thusfeild* and *Jones'* case, Skin. 27, Com. Dig. tit. Franchises (F. 19,) 6 Vin. Abr. tit. Corporations (B. a.)

Ludlow, Serjt., now showed cause. The act of parliament by which the company is incorporated provides that they may sue and be sued: it also empowers them to enter on lands. If they enter improperly, it would seem, that they may be sued for the trespass. The whole doctrine that a corporation cannot be sued in trespass rests on one passage in Bro. Abr. Corporations, 43;(a) where the reason given is, that neither capias nor exi-
454*] gent can go against them. A distringas, *however, may be issued against a corporation. It has been decided that trover will lie

(a) "*Nota, per Thorpe,* that trespass lies not against commonalties, to wit, by the name of corporation, but against the persons who did it, by their proper names; for neither *capias* nor *exigent* lies against a commonalty; nor shall a commonalty implead or be impleaded but with the mayor or bailiffs, if they have mayor or bailiffs; and there by him (*i.e.* according to Thorpe) there may be a corporation by name of a commonalty, without mayor, bailiff, or other head." Citing 22 Ass., p. 67, (22 Ass. fo. 100, pl. 67.)

In Bro. Trespass, pl. 239, Lord Brooke abridges the same case thus: "*Nota, per Thorpe,*

against a corporation; *Yarborough* v. *The Bank of England*, 16 East, 6; where Lord ELLENBOROUGH, C. J., in giving the judgment of the court, reviews all the authorities upon the subject. [TINDAL, C. J. That case was after verdict. It was a motion in arrest of judgment; no leave appears to have been reserved.] But the broad doctrine is laid down that trover would lie; and there is no difference in principle between that action and trespass. The payment into court in this case admits that the action is rightly brought. An indictment will lie against a corporation, although all the ordinary consequences cannot follow.(*a*) Various instances are collected in Kyd on Corporations, vol. i., pp. 223—225, where trespass has been brought against a corporation.(*b*) Other authorities are mentioned in *1 Wms. Saund., 340, n. The principle that a corporation is liable in tort for the tortious act of its agent, done in its ordinary service, is further carried out in *Smith* v. *The Birmingham Gas Company*, 1 A. & E., 526. [TINDAL, C. J. The process is the same, both in case and in trespass—namely, by attachment, distress, capias and outlawry. If case will lie, it is difficult to see why trespass should not lie also.] [*455

Talfourd, Serjt., was then called upon to support the rule, and admitted that he had nothing to rely upon but the old authorities: and that in *Regina* v. *The Birmingham and Gloucester Railway Company*,(*c*) the court of Queen's Bench had, in this term, refused to quash an indictment against a corporation. The doctrine in Bro. Abr., however, is imported into Com. Dig. tit. Franchises (F. 19.)(*d*)

that trespass lies not against a commonalty, but shall be brought against the persons by their own names; for neither *capias* nor *exigent* lies against a commonalty."

In the Book of Assizes, the case is thus reported at large:—

"*Nota*, by Thorpe," (Chief Justice of the King's Bench,) "that a writ of trespass lies not against a commonalty; but it is necessary in such writs that the persons be named *in certain*; for he said that a man shall never have a *capias* or *exigent* against a commonalty; *et hoc patet* in a bill of trespass brought by J. A. W. against certain persons and the commonalty of the town of J. Also he said that the commonalty of any town shall never be named in any action, defendant or plaintiff, unless the mayor or bailiff be named, if there be a mayor or bailiff, &c., and if there be no mayor or bailiff, then the commonalty may be solely named," &c.

In the case of The Mayor, Sheriffs, and Commonalty of Norwich, M. 21 E. 4, fo. 12, pl. 4, Catesby J. (fo. 14,) says, "It cannot be denied that the mayor, sheriffs, and commonalty are one entire body, which cannot be severed, *and which cannot do any corporal wrong*." But a writ of trespass for disturbance in taking the profits of liberties against a corporation (sued jointly with an individual) was held to be maintainable; *Archbishop of York* v. *Mayor and Commonalty of Hull and Another*, H. 45 E. 3, fo. 2, pl. 5. So, for disturbance in holding a court-leet; *Prior of Merton* v. *Mayor of New Windsor and Others, Burgesses of the said Town*, T. 18 H. 6, fo. 11, pl. 1.

And see The Mayor and Commonalty of Winchester's case, 31 Ass. fo. 188, pl. 19, M. 8 H. 6, fo. 1, pl. 2, M. 9 H. 6, fo. 36, pl. 9; Great Yarmouth case, M. 20, H. 6, fo. 9, pl. 19; Kedwelly's case, M. 15 E. 4, fo. 2, pl. 2, T. 4 H. 7, fo. 13, pl. 11.

(*a*) See 1 Kyd. Corp. 225.

(*b*) The author nevertheless draws this conclusion:—"Notwithstanding these examples, however, it may well be doubted whether, at this day, such an action could be maintained against a corporation aggregate; the action supposes a *personal* act, of which the corporation is incapable in its collective capacity: the act therefore, which is the foundation of the action, must be done by some individual in order to assert the right of the corporation, and the action being brought against that individual, will answer the purpose of bringing the right to a judicial determination.

"It is accordingly decided that a *replevin* cannot be maintained against a corporation aggregate, because it is founded on a distress, which the corporation cannot take but by its bailiff." Citing Brownl. 175, Bac. Abr. tit. Corporations, (E. 2.)

(*c*) Since reported, 2 Q. B. Rep. 47, 1 G. & D. 457, 2 G. & D. 236.

(*d*) Where it is also said that "process of outlawry does not lie against a corporation aggregate; 45 E. 3. 2, 3. (The reference is to *The Archbishop of York* v. *Mayor and Commonalty of Hull and Another*, H. 45 E. 3, fo. 2, pl. 5,) antè, 454, n., nor a subpœna; for it has no conscience, D. 2 Bul. 233." (The reference is to The Company of Shipwrights of Redderiffe's case.)

It is observable, that the dictum of Thorpe, C. J., in the Book of Assizes, does not, in terms, apply to all coporations aggregate, as such, but to municipal corporations only

TINDAL, C. J. The process in case and trespass being the same; it is impossible to see any distinction between the two actions.

Per curiam, Rule discharged.

*456] *NICHOLLS *v.* STOCKBRIDGE.

The venue was laid in Middlesex, and the time for pleading expired on the 30th of May. On that day, the defendant obtained a rule to change the venue to Surrey, which was served on the plaintiff before ten o'clock, A. M., on the 31st. On that day the plaintiff signed judgment. *Held*, that as the change of the venue made the cause a country cause, the defendant had further time to plead, and the judgment was irregular.

Semble, that if the plaintiff had brought back the venue on the usual undertaking, as the time for pleading would have been out, he might then have signed judgment.

IN this case the venue was originally laid in Middlesex, and the time for pleading expired on the evening of the 30th of May. On that day the defendant obtained a rule to change the venue to Surrey, upon the usual affidavit that the cause of action arose in that county. This rule, which was drawn up with a stay of proceedings, was served on the plaintiff before ten o'clock on the morning of the 31st of May. Upon the same day he signed judgment for want of a plea.

Gaselee, Serjt., had obtained a rule nisi to set aside this judgment, and all subsequent proceedings, for irregularity.

Channell, Serjt., now showed cause. This is, in fact, a new method of obtaining time to plead. The rule to change the venue is made absolute in the first instance, on the common affidavit; and the plaintiff could have restored the venue directly on giving the usual undertaking to give material evidence arising in Middlesex. [TINDAL, C. J. We must assume that the defendant's affidavit is true. Perhaps the plaintiff was not in a situation to give the requisite undertaking to bring back the venue. By the change of venue, the cause is in another county, where the defendant would have eight days to plead.] In *Archbold's Practice*, p. 960, 7th ed., it is said, "a rule, or order, to change the venue does not, in general, operate as a stay of proceedings; and the parties are *bound to take the next step as if no such order had been made." *457]

Andrews, Serjt., in support of the rule. When the venue was changed it became the duty of the plaintiff to amend his declaration accordingly. If he had done this, all the incidents would have attached as though the action had been originally brought in Surrey. He referred to Tidd's Practice, page 468, 9th ed.

TINDAL, C. J. It appears to me that the plaintiff has been too rapid in his proceedings. The effect of the rule to change the venue was, to turn the action and declaration brought in Middlesex into an action and declaration in Surrey, with all concomitant circumstances. The rule laid down in the books of practice is, that a copy of the rule is to be served upon the plaintiff's attorney, who is thereupon to alter the declaration, 2 Arch. Pr. 821, 4th ed. The plaintiff in this case might, if it was in his power to do so, have immediately given the usual undertaking, and so have brought back the venue; and then the action being in Middlesex, and the time of pleading then having expired, he might have signed judgment.

The rest of the court concurred. Rule absolute.

*BLUNT v. COOKE. [*458

An action was brought for work and labour in 1837, in which year particulars of the plaintiff's demand were delivered. In 1841 the cause was referred. After several meetings had taken place under the reference, the court allowed the plaintiff, on payment of costs, to amend his particulars by the insertion of other items, in respect of services during the period covered by the former particulars; it not being suggested that the defendant wished to have the option to abandon the reference or to plead *de novo*.

THIS was an action for work and labour brought against the defendant as one of the directors of a projected railway company. The action was commenced on the 3d of July, 1837; and in November in that year the plaintiff delivered his particulars of demand under a judge's order, by which he claimed the sum of 2127*l.* 12*s.* 6*d.* The defendant had pleaded (*inter alia*) payment and a set-off. The cause came on for trial at the sittings after Michaelmas term, 1841, when a verdict was taken for the plaintiff, subject to a reference of the matters in difference in the cause.

Bompas, Serjt., in this term, had obtained a rule nisi, that the plaintiff might be at liberty to amend his particulars by adding certain items, amounting to 187*l.* 15*s.* It appeared from the affidavit of the plaintiff's attorney, on which the rule was grounded, that the additional sum was claimed in respect of services rendered during the period over which the original particulars extended; that the plaintiff, from having been in pecuniary difficulties, had been unable to communicate freely with the deponent, and that the deponent had framed the original particulars partly from the plaintiff's instructions, and partly from documents in the deponent's possession; that he had since been furnished with other documents, from which it appeared that the plaintiff was entitled to make the charges, now sought to be inserted in the particulars; and that the deponent believed that orders for the greater portion, if not all, of the work, &c., in question were inserted in the minute-book of the company; and, therefore, that the *defendant could not be taken by surprise by having the particulars amended as prayed. [*459

Talfourd, Serjt., now showed cause, upon an affidavit of the clerk of the defendant's attorney, stating, that there had been several meetings under the reference, and that, during the proceedings, he went through the books of the company with the plaintiff's attorney, and compared the same with the particulars of demand, to see whether it could be made appear that the particulars were supported thereby; that, at no time during such comparison, or during the proceedings under the reference, except at the last meeting, did the plaintiff's attorney suggest any alteration in, or addition to the particulars of demand; and that the deponent believed the same to have been an after-thought of the plaintiff's attorney, arising out of his not being able to prove some of the items in the particulars, at the last meeting.

The learned serjeant contended that the case was one entirely of the first impression. When the cause was referred, it was referred as it then stood; and the particulars could not have been amended at nisi prius. [TINDAL, C. J. The plaintiff fears, that if the particulars are not amended, he may lose his claim. At nisi prius, before the jury were sworn he might have withdrawn the record, and have amended his particulars.] But here the jury have been sworn, and a verdict has been taken. It is very doubtful from the affidavits whether the application is made *bonâ fide*. If the ori

ginal particulars had included the items now proposed to be inserted, the pleas, might possibly have been different.

Bompas, Serjt., was then called upon by the court, for some authority for the application. He argued that it rested rather on principle than authority. The bill of particulars is a mere description of the *cause
*460] of action. In *Staples* v. *Holdsworth*, 4 N. C. 144, the defendant, having acted as agent for the plaintiffs, left their employment in 1827, and gave in his accounts, in which he debited himself to a certain amount for moneys received for them. In the same year they commenced an action against him for that sum, and delivered particulars of demand, framed upon the accounts he had given in; but no further steps were taken till the early part of 1837, when they demanded a plea. They subsequently discovered that the defendant had received various other sums for which he had not accounted; and they were allowed to amend their particulars, by the insertion of these sums, the defendant having liberty to plead the statute of limitations to the new items of demand. And in *Jones* v. *Corry*, 6 N. C. 247, the plaintiff had, in 1835, sued the defendants as executors for work done to a house of their testator, and he had delivered his particulars in July, 1837, after commencing a second action against them in their personal capacity, for work done to the same house subsequently to the testator's death. Both actions being referred to arbitration, an award was made which was set aside in Hilary term, 1839. The plaintiff having abandoned his second action, was allowed, in Trinity vacation, 1839, to amend his particulars in the first, by adding certain items which had been contained in the particulars in the second action. [MAULE, J. Suppose the matter is allowed to lie by until the parties go before the arbitrator: it would be hard upon the defendant that the plaintiff after going into his case, should have liberty, unconditionally, to amend his particulars.]

TINDAL, C. J. The difficulty is to see upon what terms the application
*461] should be granted. The *amendment of the particulars will substantially enlarge the plaintiff's capability of recovery; and at nisi prius it would not have been made, as the cause would have been gone into *instanter*. It is not suggested that the defendant desires to have the option either to decline going on with the arbitration, or the liberty to plead *de novo*. A bill of particulars is undoubtedly a creature of the court; and it is not, regularly, part of the record. Under the circumstances, I think that the rule may be made absolute on payment of costs.

Per curiam, Rule absolute accordingly.

OUCHTERLONY *v.* GIBSON.

On the 8th of February, the defendant obtained a judge's order for time to plead, upon the terms that he should "try, at all events, at the adjourned sittings." The cause coming on for trial at these sittings, it was discovered, after the jury had been sworn, that no date had been inserted in the award of the process of *venire* and *habeas corporu*, as set out in the nisi prius record; and on this ground, an objection was taken on the part of the defendant to the authority of the judge to try the cause. The trial, however, proceeded, and the plaintiff obtained a verdict. The defendant afterwards brought a writ of error *coram vobis*, and the plaintiff made up the judgment-roll properly.

Held, upon cross motions, first, that the defendant's objection was against good faith; secondly, that it was waived by a writ of error; and, thirdly, that the plaintiff might be allowed to amend the nisi prius record.

THIS was an action of trover for books, &c., brought against the defendant, who had acted as provisional assignee under a fiat against the plaintiff,

which had been superseded. The venue was laid in London. The action was commenced in January last. On the 8th of February (the defendant having twice before obtained time to plead), the following order was made by CRESSWELL, J., at chambers:—

"Upon hearing the attorneys, &c., I do order that the defendant shall have, till Saturday next, (February *the 12th) time to plead; the defendant undertaking to plead only 'not guilty' and 'not possessed,' and to try, at all events, at the adjourned sittings; without prejudice to any application founded on the actual opening of the fiat of bankruptcy against the plaintiff."(a) [*462

The defendant delivered his pleas late in the evening of Saturday the 12th; and on Monday, the 14th, (the adjournment day,) issue was joined, and notice of trial was given for those sittings; but in consequence of the marshal's declining to set down the cause, as being too late for the sittings, the following memorandum was endorsed by the learned judge on his order:—

"This cause should be entered; the plaintiff having obtained time to plead on the express undertaking to try at the adjourned sittings."

And the following order was made by the Lord Chief Justice:—

"I order that the marshal be at liberty to enter this cause in the list of causes for trial at the present adjourned sittings in London. Dated the 14th day of February, 1842. N. C. TINDAL."

The clerk of the plaintiff's attorney, who passed the record, being in doubt, under the circumstances, how the jury process should be filled up, left the dates in blank, both in the award of the *venire* and in that of the *habeas corpora*.(b)

*The cause being called on, after the jury were sworn, and the plaintiff's counsel had begun to open his case, an objection was taken by the defendant's counsel, that the nisi prius record was defective in these particulars; and, therefore, that the trial could not take place, as being *coram non judice*. The Lord Chief Justice however said, that as the jury had been sworn, the cause must proceed; and that the objection ought to have been taken before they were sworn. The trial proceeded, and the plaintiff obtained a verdict. [*463

The defendant brought a writ of error *coram vobis*; whereupon the judgment-roll was properly made up.

In last Easter term cross rules were obtained, (which were enlarged,) one, on the part of the defendant, to set aside the trial and verdict; the other, on the part of the plaintiff, for leave to amend the nisi prius record.

Sir *T. Wilde*, Serjt., now showed cause against the rule that had been obtained by the defendant. First, the application is in contravention of the judge's order, and against good faith; the omissions in the record having been caused by the proceedings on the part of the defendant, who had asked for and obtained indulgence to the last moment. Secondly, the writ

(a) It appeared that another *fiat* was about to be issued against the plaintiff.

(b) At the trial the record was in this state. After the *similiter*, it proceeded thus:—
"Thereupon the sheriffs are commanded that they cause to come here on the day of twelve, &c., by whom, &c., and who neither, &c., to recognize, &c., because as well, &c.

"Afterwards on the day of , in the year 1842, the jury between the parties aforesaid is respited here until the day of , unless the Right Honourable Sir Nicolas Conyngham Tindal, Knt., shall first come on the day of at the Guildhall of the city of London, according to the form of the statute in such case made and provided for default of the jurors, because none of them did appear. Therefore let the sheriffs have the bodies of the said jurors accordingly."

of error brought by the defendant amounts to a waiver of all matters preceding the judgment, as it was brought upon the judgment itself. The defendant also waived the objection by appearing at the trial. Thirdly, the objections are cured by the statutes of jeofails.(a) Tidd's Practice, pp. 923. 925. 928. 712. 9th ed. [TINDAL, C. J. That would rather be
*464] an argument on the writ *of error.] At any rate, the court will grant the plaintiff's application for leave to amend.

Bompas, Serjt., was then called upon to argue the point of waiver by bringing the writ of error. The only authority the judge had to try the cause, was by the *nisi prius* clause under the statute of Westminster 2d; and that clause being imperfect, he had no authority to try at all. This, therefore, was not such an objection as could be waived. [TINDAL, C. J. You do not say that no writ was issued?] None ever is issued. [TINDAL, C. J. Yes, the nisi prius writ, and the writ of *habeas corpora*, which certainly issued in this case, as the jury were there, and were sworn before the objection was taken.] Still, the judge had no authority to try the cause without a sufficient award of the *venire*. In *Crowder* v. *Rooke*, 2 Wils. 144, the cause was at issue, and the record was made up for trial at a certain sitting. The trial did not take place then, but on a day subsequent to the day of *nisi prius* mentioned in the record. The plaintiff having obtained a verdict, cross motions were made to amend the *habeas corpora* and *jurata*, and to set aside the verdict. The court were clearly of opinion, that the trial had been *coram non judice;* but they awarded a *venire de novo*. The cases of *Child* v. *Harvey*, 1 Ld. Raym. 511 S. C., 1 Salk. 48, 12 Mod. 274, Carth. 506, and *Rogers* v. *Smith*, 1 A. & E. 772, 3 N. & M. 760, are to the same effect. In *Com. Dig.* tit. *Amendment*, (C. 1,) it is said, "A misprision in the *venire*, *distringas* or *jurata*, by which the judge has no authority to try the cause, shall not be amended after verdict: as, if a *distringas* be of a jury *tres Trin.* for *tres Mich. nisi J. Holt*, *27 Jun. prius venerit;* for it is impossible *quod judex* prius *venerit;* and then he has no authority." [CRESSWELL, J. When the case was be-
*465] fore me at chambers, an *application for time to plead was made on the ground of the illness of the petitioning creditor, which, it was said, prevented the opening of the fiat. It was then agreed that the defendants should go to trial forthwith unless the fiat were opened. It was certainly understood that the trial was to take place at that time. It appeared to me, that the delay arose on the part of the defendant.] The objection is, that there were no valid writs of *venire* or *habeas corpora*. [CRESSWELL, J. How does that appear? The nisi prius record is not the writ. The sheriff has the writ.] The nisi prius record was the only authority the Lord Chief Justice had to try the cause. [MAULE, J. It seems that the record contained too large an authority, rather than none at all. The judge may try on any day before the return. TINDAL, C. J. The two writs are generally pinned to the nisi prius record.] In the writs the day of return was equally a blank as in the nisi prius record.

TINDAL, C. J. I think that, under the judge's order, which was obtained in this case by the defendant, the present objection is made against good faith. The defendant put off the trial as long as possible; and the plaintiff's attorney being called upon at the last moment, may not have known how the blanks in the *venire* were to be filled up. I think, under the circumstances, the defendant ought not to be heard upon this objection. But, independently of the order, it seems to me that the writ of error brought

(a) See 8 Hen. 6, c. 12 and 15. See also 21 Jac. 1, c. 13.

by the defendant, which could only be brought upon a judgment, amounted to a waiver of this objection.

The other judges concurred. Defendant's rule discharged.

Sir *T. Wilde* then prayed that his rule to amend might be made absolute, as, the rule being perfected, there was something to amend by.

**Bompas*, Serjt., was heard *contrà*. [*466

Per curiam, Plaintiff's rule absolute.(*a*)

(*a*) See *Cheese* v. *Scales*, 10 M. & W. 488.

BROWN and Another *v*. LANGLEY.

A. borrowed a sum of money from a loan society, and the defendant joined him in a joint and several promissory note for the amount. At the time of the loan a printed book of the society's rules was given to the defendant. By these rules it was stated, that after default by the principal, notice would be given to the surety, and that if the money was not then paid, legal proceedings would be taken. The book was not signed.

Held, that these rules did not constitute an agreement in writing contemporaneous with the note, so as to be admissible to vary the contract on the note.

Semble, that if the rules had been admissible as such an agreement, they would not have sustained a plea, alleging "that if the money was not paid after notice to the surety legal proceedings would be taken, *but not before*."

DEBT, by the payees against the maker of a promissory note, dated the 18th of November, 1840, for 10*l*., payable at two months' date.

Pleas: first, *non fecit;* whereupon issue was joined. Secondly, that the note was made by the defendant, and delivered to the plaintiffs as trustees and agents to a society of persons whose names were to the defendant unknown, carrying on business, as a loan society, by the name of "The Holborn Loan and Investment Society," for the purpose of securing to the plaintiffs, as such trustees and agents, the repayment of a certain loan and sum of money, to wit, 9*l*. 4*s*., then lent and advanced by the said society to one Richard Thornton, together with certain interest thereon; that it was at the time of lending the said money, and of making the said note, to wit, on the 18th of November, 1840, agreed in writing between the plaintiffs, the defendant, the said R. Thornton, and the said society, that the said loan and interest, *amounting together to 10*l*. 4*s*., should be repaid to the said society by R. Thornton, by instalments of 4*s*. each; the first instalment to be paid on Thursday next after the said loan was granted, and to be continued on each succeeding Thursday until the whole of the said sum of 10*l*. 4*s*. should be repaid; and that if R. Thornton should make default in payment of two instalments, notice by post or otherwise should be sent to him; and that if he did not pay the arrears within the time therein specified, the defendants should be written to; and that if the money was not paid according to such letter or notice, legal proceedings should be taken upon the said note, *but not before;* that the defendant then made the said note and delivered the same to the plaintiffs, and the plaintiffs then received the same from the defendant upon the terms and conditions in the said agreement contained, and upon the faith and understanding that the same should be observed and performed. Nevertheless, the defendant never had any letter or notice of the default of R. Thornton at any time before the commencement of this suit, either from the plaintiffs or from the said society, as required by the said agreement. Verification. [*467

Thirdly, as to 5*l*. 4*s*., parcel, &c., payment before action brought.

Fourthly, as to 5*l.*, the residue due upon the note, payment after action brought.

The replication traversed the agreement set up by the second plea, and the payments alleged in the third and last pleas respectively. Whereupon issue was joined.

At the trial before COLTMAN, J., at the sittings at Westminster after last Hilary term, the following facts appeared.

The note upon which the action was brought, was a joint and several note of Thornton, (mentioned in the pleadings,) the defendant, and one *468] Orpwood. The *consideration for the note was a loan from a society, called "The Holborn Loan and Investment Society,"(*a*) to Thornton, of 10*l.* 4*s.*, the amount of the note; but of this sum Thornton only received 9*l.* 3*s.*; the difference being retained partly as discount and partly as the price charged for a book containing the regulations of the society. The loan was to be repaid by fifty-one weekly instalments of 4*s.* The defendant and Orpwood had joined in the note as sureties to Thornton. The latter had paid twenty-five instalments and then had made default; whereupon the present action was brought.

The book of regulations having been produced in evidence by the plaintiffs, the following rules were relied upon by the defendant in support of the second plea.

"Loans will be made in sums exceeding 10*l.*, upon approved surety, to be repaid by weekly instalments within twelve months, for which 2*s.* in the pound will be charged as discount, and must be paid at the time the loan is advanced, and security given for the repayment thereof by a joint promissory note of the borrower and two or more approved sureties; to be made only to persons whose character and circumstances afford a reasonable guarantee that the money will be usefully employed, so as to enable the borrower to meet the instalments regularly as they become due, to be made in the following manner:—

"On 10*l.* 4*s.*; for twelve months 4*s.* }
"On 15*l.* - - - 6*s.* } each week for which it is required, as may be agreed on:
&c. }

and so in proportion to the amount and length of time.

*469] "The repayments of the instalments to commence *the first Thursday after the loan is granted, and to be continued every succeeding Thursday, at the office, between the hours of ten in the morning and six in the evening, until the loan is repaid, at which time the borrower must produce his or her book, in which the repayment will be entered and the receipt acknowledged by the signature of the officer in attendance.

"A fine of 1*d.* on each shilling per week for forbearance will be charged on such instalments as shall be in arrear.

"Notice by post or otherwise will be sent after the second default to the borrower; and if the arrears be not paid by the time therein specified, the surety or sureties will be written to, for which 4*d.* will be charged for each letter to borrower, surety or sureties, post paid; and if the money be not paid according to such letter or notice, legal proceedings will be taken against the several parties for the amount remaining unpaid.

"In order to give the necessary information to borrowers, these rules and regulations, with leaves properly ruled for entering the repayments, shall be published at the charge of 1*s.*, to be purchased by every person to whom a loan shall be granted."

(*a*) The society was not enrolled under the statutes 5 & 6 W. 4, c. 23, and 3 & 4 Vict. c. 110.

It was contended, on the part of the plaintiffs, that as these rules were not signed, they did not constitute any such agreement in writing, as was alleged in the second plea; or that even if they did amount to such an agreement, the defendant could not avail himself of it to vary, by extrinsic evidence, the contract in the promissory note. The learned judge was of opinion that as the book was handed to the borrower at the time of the loan, it might be considered as evidence of the agreement under which all parties acted with reference to the note.

It was admitted that Thornton had paid 5*l.* 4*s.* before action brought; and it was proved that Orpwood (who *had also been sued) had since paid the residue, minus 1*s.*, which, by an arrangement between Orpwood and the plaintiffs, remained unpaid, in order that the latter might be able to proceed with the present action against the defendant, who had refused to pay the costs. The verdict, under his lordship's direction, was returned for the plaintiffs on the first and third issues, and for the defendant on the second and fourth, leave being reserved to the plaintiffs to move to enter a verdict for themselves also upon the second issue, if the court should be of opinion that the evidence was not sufficient to sustain the second plea. [*470

Talfourd, Serjt., in last Easter term, obtained a rule nisi accordingly. He cited *Hoare* v. *Graham*, 3 Campb. 57; *Rawson* v. *Walker*, 1 Stark. N. P. C. 361; *Moseley* v. *Hanford*, 10 B. & C. 729, 5 Mann. & Ryl. 607, and *Foster* v. *Jolly*, 5 Tyrwh. 239, 1 C. M. & R. 703, S. C. *per nom.*; *Foster* v. *Sibley*, Gale, Exch. Rep. 10. [TINDAL, C. J., at the time the rule was granted, referred to *Bowerbank* v. *Monteiro*, 4 Taunt. 844; and his lordship said that, although the general rule was that the absolute contract contained in a bill or note could not be varied by a parol agreement, the rule did not apply to a cotemporaneous agreement in *writing* between the parties; and that the present rule was only granted upon the question whether there was such an agreement in this case.]

Bompas, Serjt., now showed cause. The book of the rules of the society, which was given to Thornton at the time of the loan, may be considered as the real agreement between the parties, upon which they consented to act, and did in truth act, during the whole transaction. [TINDAL, C. J. The book is not signed by any one.] The absence of a formal signature will not defeat the *obvious intention. There is no case which shows that it is necessary that the contemporaneous written document should be signed. Signature is immaterial except where it is expressly required by statute. Although the note does not refer to the rules, the book refers to the note. It is clear that this is such a note as was contemplated by the rules. The book may, therefore, be considered as connected with the note. An inventory referred to in a deed becomes part of the deed, although not signed by the parties. [MAULE, J. Here the book is a sort of schedule to a verbal agreement.] Every thing here is in writing. [CRESSWELL, J. Except the connexion between the book and the note. MAULE, J. Suppose the parties had agreed in writing that they would be bound by the contents of the book. Would not that have been a material part of the contract between the parties? That you have not got in writing. COLTMAN, J. Suppose at the trial you had merely handed it in without connecting the parties with the book; it could hardly have been contended that the book would have controlled the effect of the note.] If a printed signature was used, you might show that the party adopted such signature by handing over the document so signed. [MAULE, J. Perhaps, [*471

if there were a printed agreement, purporting to contain the terms between the company and the surety, it might be sufficient. But that is different from the case supposed, of *this book* being handed over without any explanation. TINDAL, C. J. This rule was granted upon the question whether the agreement was such an agreement as is set up in the plea.]

Talfourd, Serjt., in support of the rule. This is a case in which the plaintiffs sue as the payees of a negotiable security. The contract evi-
*472] denced by the note *is express, and free from all ambiguity. When the motion was made, the court refused to grant a rule, on the ground that the contract to pay, according to the tenor of the note, could be controlled by any contemporaneous document; and the case then referred to by the court appears to be in point. But the very ground of that refusal shows that it is necessary to produce a contemporaneous agreement in writing between the parties, to the effect stated in the plea. The agreement, to be admissible, must be contained in an instrument complete in itself, and of equal validity and force with the written contract which is sought to be varied; for otherwise, parol evidence would be admitted to vary a written contract. But the rules in question constitute no agreement; they are not binding. In *Woodbridge* v. *Spooner*, 3 B. & A. 233, 1 Chitt. Rep. 661, which was cited at the trial, it is said to be an inflexible rule, not to admit parol evidence to contradict a written instrument unless the consideration be illegal. Therefore where a testatrix gave in her lifetime to the plaintiff a promissory note to pay him or order, on demand, the sum of 100*l*. for value received, and his kindness to me, with a verbal agreement on the part of the plaintiff, that the note should not be demanded till after her death; it was held, in an action upon the note, that parol evidence should not be received to show that it was not given for a valuable consideration. [MAULE, J. A party may contract without notice, if the case be not within the statute of frauds. Here, there is nothing to connect the book with the particular transaction. The book itself does not show that notes to be given to secure loans might be given in the absolute form in which this note is made. Nor is there any proof of what passed when this note was signed.]

*473] *TINDAL, C. J. It appears to me that the plea is not made out in the terms in which it is pleaded. First, the agreement is pleaded as being in writing, by which it must be understood that there was an express agreement in writing to the effect stated. But the link which is to bind the note and rules together is not in writing. Besides, if the book could be taken as the agreement between the parties I do not think that it would maintain the plea; which states that it was agreed that notice of non-payment by the principal should be sent to the sureties, and that if they made default, legal proceedings should be taken upon the note, *but not before*. But there are no such negative words in the rule in question. The plea, therefore, fails upon both grounds.

COLTMAN, J. I am of the same opinion. There is nothing in writing to connect the note and the rules with each other; and consequently there is no valid agreement to vary the express contract on the face of the note. For it is a well-established rule that a party to a bill or note shall not be allowed to contradict or vary the express engagement he has thereby entered into, except by a contemporaneous agreement in writing.

MAULE, J. I can discover nothing in the book given in evidence that purports to be any *agreement* between the parties. In order to show that the rules were to have that effect, it was necessary to resort to extrinsic

evidence; but that evidence not being in writing, there was no proof of any written agreement so as to support the plea in question.

CRESSWELL, J. concurred. Rule absolute.

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*KENNARD and Another v. KNOTT. [*474

To an action against the drawer of a bill, it was held to be no defence that the plaintiff, before the commencement of that suit, had consented to a judge's order in an action brought by him against the acceptor, that upon payment of the principal and interest on a certain future day, all further proceedings should be stayed, otherwise judgment; it not appearing that such future day was posterior to that on which judgment could have been obtained in the action against the acceptor. (a)

ASSUMPSIT, by the endorsees against the drawer of a bill of exchange for 15*l*. 16*s*. 7*d*., dated the 4th of March, 1841, payable at two months' date, drawn upon, and accepted by, one John Smith.

Plea: that, after the said bill had become due, to wit, on the 29th of May, 1841, the plaintiffs commenced an action upon the said bill against the said J. Smith in this court, and that whilst the said action was pending, and before the commencement of this suit, to wit, on the 8th of June in the year aforesaid, it was agreed between the plaintiffs and the said J. Smith, that in consideration that the said J. Smith then consented to the order hereinafter mentioned, the plaintiffs then consented to the same order, and then consented and agreed to stay proceedings in the said action, and to give the said J. Smith time to pay the said bill until the time in the same order mentioned; and thereupon, in pursuance of the said agreement, and upon hearing the attorneys or agents of the plaintiffs and the said J. Smith, and by consent, it was in due manner ordered by the Hon. Sir W. H. MAULE, Knight, one of the justices of the said court, that upon payment of 17*l*. 8*s*. 6*d*.,—being the amount due to the plaintiffs upon the said bill for which the action was brought, together with interest and costs to be taxed,—on the 20th of July, 1841, all further proceedings in the said action should be stayed; and that, in case default should be made in payment as aforesaid, the plaintiffs should be at liberty to sign final judgment for the damages in the declaration, and issue *execution or executions for the amount, with costs, &c.; and *the plaintiffs thereby then gave time to the said* J. Smith *for payment of the amount of the said bill*; and the said agreement was made between the plaintiffs and J. Smith, and the said time given by the plaintiffs to the said J. Smith, without the consent of the defendant. Verification. [*475

Special demurrer, assigning for causes—that the defendant had not alleged or shown in the said plea, nor could it be gathered therefrom, that more time was given to the said J. Smith for payment of the said bill by the consent and judge's order in that plea mentioned, than the said J. Smith would have had before judgment could have been obtained by the plaintiffs in the said action against the said J. Smith, had the same been duly prosecuted without such consent or judge's order as aforesaid; that the plea merely showed that *some* time was given by the plaintiffs to the said J. Smith by the said consent and judge's order; which did not discharge the defendant from his liability upon the said bill, unless more time was given than would have elapsed before judgment would, or could, have

(a) Vide tamen post, 476 c.

been otherwise obtained in the said action against the said J. Smith; which did not appear in or from any part of the said plea; and that, after action brought by the holder against the acceptor of a bill to enforce payment thereof, a judge's order made in such action, postponing the time of payment and judgment, was no discharge of the drawer's liability on the bill, though he did not consent to such order. Joinder in demurrer.

Channell, Serjt., in support of the demurrer. The plea does not show that any time was given by the judge's order to the acceptor, which he would not otherwise have had. [MAULE, J. It appears that the right of
*476] action had already accrued against the drawer.] That being *so, if time had been given to the acceptor it would not have discharged the drawer.(a) [CRESSWELL, J. I do not see that any time was given The action was going on.]

Talfourd, Serjt., was then called upon by the court; and the learned serjeant, after referring to *Hall* v. *Cole*, 4 A. & E. 577, 6 N. & M. 124, (to show that where time was given to an acceptor, after the dishonour of the bill, it operated as a discharge to all the other parties), admitted that *Price* v. *Edmunds*, 10 B. & C. 576, 5 M. & R. 287,(b) was a strong authority against him, and prayed leave to amend. Leave to amend granted.(c)

(a) Sed vide infrà. (c)

(b) In that case, B., principal, and C., surety, gave their promissory note to A. A. sued B., and took from him a cognovit payable by instalments, the first of which would become payable before the time at which A. could have signed final judgment had no cognovit been given. The court held that C. was not discharged, inasmuch as no longer time had been given to B., than he would have had if the suit had proceeded.

It is, however, observable that if the cognovit given by B. and accepted by A. did not discharge C., it would have been competent to A. to arrest C. on the very day on which the cognovit had been given, and if C. had paid the money, which it would be his interest as well as his duty to do, he might have arrested B. as soon as he could have issued a writ, and B., who had waived his defence to the action brought against him in order to purchase his liberty, at all events until the day appointed for the payment of the first instalment, might have found himself in custody at a much earlier period, precisely as if no cognovit had been given. It would therefore appear to be necessary, in order to enable A. to keep faith with B., that until the first instalment became payable, A.'s right of action against C. should be *suspended*; and a right of action, if suspended, is *destroyed*.

In *Price* v. *Edmunds*, B. and C., as joint-makers, were both *primarily* liable on the face of the note, though C. was, in fact, a surety; whereas in the principal case the drawer, being only liable in default of the drawee, was, *ex facie*, merely a surety.

(c) See *Jay* v. *Warren*, 1 C. & P. 532; *Lee* v. *Levi*, Ib. 555, 675, 4 B. & C. 390, 6 D. & R. 475; *Stevenson* v. *Roche*, 9 B. & C. 707; *Stevenson* v. *Crease*, 4 M. & Ryl. 561, Ibid. 563 a; *Hulme* v. *Coles*, 2 Sim. 12.

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*477] *SKINNER, Secretary, &c., *v.* LAMBERT.

By a private act, for enabling a joint-stock company to sue and be sued in the name of a director or secretary, it is provided, that all actions and suits against any person or persons indebted or who may hereafter be indebted to the company, and all actions, suits, &c., at law or in equity, upon or in respect of any present or future liability or liabilities to the company, or upon any bonds, *covenants*, bills of exchange, promissory notes, contracts, or agreements *which already have been or hereafter shall be given* or entered into with the company, or *to or with any person whatsoever in trust for the company, or to or with any person or persons for the use or benefit thereof*, and generally all other proceedings whatsoever, at law or in equity, to be carried on by or on behalf of the company, or wherein the company is or shall be concerned or interested, against any person or persons, &c., whether such person or persons, &c., is or are, or shall be, or shall have been, a proprietor or proprietors of the company or not, shall be carried on in the name of the secretary of the company for the time being, or in the name of any one of the elected directors for the time being of the company, as the nominal plaintiff, &c., on behalf of the company; and it shall be lawful for the company to sue and proceed against any person or persons, &c., notwithstanding such person or persons, &c.,

is, or are, or shall be, or shall have been, a proprietor or proprietors of the company, and that, solely or jointly with any other person or persons in respect of any claim or demand which the company may have against such person or persons, &c., either solely or jointly as aforesaid, the same as if such person or persons, &c., was, or were not, or had never been, a proprietor or proprietors of the company.

Held, that the enacting words were sufficiently large to authorize the company to sue the defendant, a proprietor of shares in the company, in the name of the secretary, for an instalment of the capital secured by a deed of settlement in which the defendant, and each of the other proprietors, had covenanted with certain trustees for payment of the instalments.

In debt at the suit of the secretary for an instalment, the declaration alleged that the defendant was the proprietor of sixty shares; that, by an indenture of settlement bearing date a certain day and year, *to wit*, the 25th of October, 1836, executed by the defendant, it was covenanted, amongst other things, that there should be a board of directors; that such board, when they should think proper, might resolve that the proprietors of shares in the capital of the company, (except the proprietors for the time being of certain shares by the said indenture exempted from the payment of calls,) should be called upon to pay, *at any time after the expiration of three calendar months from the date of the indenture, and after the expiration of three calendar months from the time appointed for the payment of any former instalment*, such further instalment not exceeding, &c., upon every share, (except as aforesaid,) as the board should from time to time think necessary; that certain notices should be given of calls; and that every present or future proprietor or holder of shares, (except as to the shares so exempted,) should pay every instalment that might be called for in respect of each of his or her shares on or before the day and at the place appointed for the payment thereof; provided that no further instalment should be payable until at least three calendar months should have elapsed after the day appointed for the payment of any previous instalment. The declaration then alleged that afterwards, and whilst the defendant was such proprietor of sixty shares, &c., *to wit*, on the 22d of December, 1840, the board of directors *duly* made a call according to the provisions of the deed of settlement, to wit, a call or instalment of 2*l*. 10*s*., upon every share in the capital of the company, (except the said exempted shares,) to be paid and payable on the 16th of January *then next following*, "the same not being so payable as aforesaid till more than three calendar months after the day appointed for the payment of any previous instalment:" that the proportion or instalment of the defendant so called for in respect of his said sixty shares in the capital of the said company amounted to a large sum of money, to wit, 150*l*.; that the defendant had due notice of the call, &c.; and that by reason of the premises, "the said defendant then became liable to pay the said company, *on the said* 16th of January, 1841, the sum of 150*l*., being the said amount of the said proportion or instalment in respect of the said sixty shares of the defendant as aforesaid."

Held, that the declaration showed, by necessary implication and intendment, that the defendant's shares were not exempted shares.

Held also, on special demurrer, that the declaration contained a sufficient averment that the call had not been made until after the expiration of three calendar months from the date of the deed of settlement, and that such call had not been made payable until after the expiration of three calendar months from the time appointed for the payment of any former instalment.

DEBT by the plaintiff as "the secretary for the time being, duly appointed and enrolled in that behalf, of a certain company, called 'The Monmouthshire Iron *and Coal Company,' being a company mentioned in a certain act made at a parliament holden in the 3 & 4 Vict. (c. cxxvi.) to enable the said 'Monmouthshire Iron and Coal Company' to sue and be sued in the name of any one of their directors, or their secretary, and to raise money for carrying on their works." [*478

The declaration stated, that before and at the time of the making of the call for money thereinafter mentioned, the defendant was the proprietor of divers, to wit, sixty shares in the said company; that a memorial of the name, residence, and description of the defendant as such proprietor as aforesaid, duly verified by the *declaration required in that behalf, had been and was duly enrolled in the High Court of Chancery according to the provisions (*s*. 11.) of the said act of parliament in that behalf made as aforesaid; that by a certain indenture of settlement, bearing date on a certain day and year therein in that behalf mentioned, *to wit*, the 25th of October, 1836, and made by and between the several persons whose names and [*479

seals were thereunto subscribed and affixed (except R. Hopkins, Rice Hopkins, T. Hopkins, and W. T. H. Phelps therein described, and R. Welsh, H. Marsh, and the Rev. W. Phelps) of the first part, the said R. Hopkins, &c. of the second part, and the said R. Welsh, &c. of the third part, it was and is provided and declared, and each of the persons parties to the said indenture (except the said R. Hopkins, Rice Hopkins, T. Hopkins and W. T. H. Phelps), did for himself and herself respectively, and his and her respective heirs, executors and administrators, covenant, promise, and agree to and with the said R. Hopkins, &c., their executors and administrators, and each of them the said R. Hopkins, &c., did for himself, his heirs, executors, and administrators, covenant, promise, and agree with the said R. Welsh, H. Marsh, and W. Phelps, their executors and administrators, amongst other things in manner following, that is to say, that there should be a board of directors of the said company, and that certain persons in the said indenture mentioned should be the first directors of the said company, and that every registered proprietor for the time being of forty or more shares in the capital of the said company, and who should either be a party to and have executed the said indenture, or have become or be and have been a registered proprietor of forty or more shares therein for the space of six calendar months, and who should not
*480] hold any office or place of emolument or profit in the *said company other than that of treasurer or trustee, and other than as thereinafter mentioned, should, so long as he should be the holder of forty or more shares in the said capital, be also a director of the said company; that the said directors should meet together at certain days and times, and at certain places in the said indenture in that behalf particularly mentioned; and that it should be lawful for the board of directors, when and so often as they should think proper, to come to a resolution that the proprietors and other holders for the time being of shares in the capital of the said company (except the proprietors for the time being of certain shares in the said indenture mentioned, and thereby exempted from the payment of calls) should be called upon to pay at any time *after the expiration of three calendar months from the date of the said indenture, and after the expiration of three calendar months from the time appointed for payment of any former instalment*, such former instalment, not exceeding 2*l*. 10*s*. upon every share in the said capital (except as aforesaid), as the board of directors should, from time to time, think necessary, until the whole amount of the said shares respectively should be paid up; that at least ten days before the time to be appointed for payment of any future instalment, the board of directors should cause a circular letter to be sent by the post to every proprietor or holder for the time being of shares, signifying the amount of such instalment, and the time and place appointed for payment of the same, and stating that if such instalment should not be paid within three days after the time appointed for the payment of the same, interest after the rate of 5*l*. per cent. per annum would be payable thereon from the time when the same became due, and that if such instalment, with such interest thereon, should not be paid within two calendar months after
*481] *the time appointed for payment of the same, the share or shares in respect of which such instalment should be payable, should be liable to be forfeited to the said company; that within twenty-one days after the day appointed for the payment of any future instalment, the board of directors should cause to be sent in like manner to every proprietor or other holder who should not have paid the instalment on his or her share or

shares, a circular letter containing a second application for the payment of the same, and setting forth the statements to be made in the first circular letter in regard to the payment of instalments and the liability to forfeiture; that subject and without prejudice to the powers thereinbefore given to the general meetings, the board of directors should have the entire management of, and superintendence over, the affairs and concerns of the company, and should, in all cases provided for by the said indenture, or thereafter to be provided for by the general meetings, act in strict conformity to the laws and regulations thereby established, or thereby to be established; that every present and future proprietor or other holder or holders of any of the shares in the capital of the company, (except as to the shares exempted from the payment of calls as thereinbefore provided as aforesaid,) should pay every instalment that might be called for in respect of each of his, her, or their shares, on or before the day, and at the place appointed for the payment thereof, and mentioned in the circular letters for calling the same; provided *that no further instalment should be payable until at least three calendar months should have elapsed after the day appointed for the payment of any previous instalment;* that if any instalment should not be paid within three days next after the day mentioned for that purpose in the circular letters for calling the same, then interest after the rate of 5*l.* per cent. per annum should be paid on such instalment by the *proprietor or proprietors, [*482 or other holder or holders of such share, from the time when the same ought to have been paid up to the time when the same should be actually paid; that in no case should the instalment for the time being required on any share exceed the instalment required on any other such share, and in no case should there be required in respect of any one share more than the sum of 50*l.* in full for the same, exclusive of the premium, when the same might have been sold at a premium, or more than the difference between the amount of the discount and the sum of 50*l.*, when the same might have been sold at a discount, and no instalment thereafter to be called for on any one of the said shares should exceed the sum of 2*l.* 10*s.*; as by the said indenture reference being thereunto had would, amongst other things, more fully and at large appear. Averment: that after the making of the said indenture and within twelve calendar months after the passing of the said act of parliament, a memorial of the names, residences, and descriptions of the secretary, and of the several elected directors for the time being of the said company, in the form and to the effect expressed in the schedule to the said act, was verified by a declaration in writing, in the form in and by the said act of parliament required, by the secretary for the time being of the said company, and the same, when so verified, afterwards, and within twelve calendar months from the passing of the said act, to wit, on the day and year aforesaid, was enrolled in the High Court of Chancery, according to the directions of the said act, and that proper memorials of the names, residences, and descriptions of such new secretaries and directors as had since from time to time been elected and appointed, and of such persons as had ceased and discontinued to be proprietors of the said company, had been duly verified and enrolled from time to time in the said High Court *of Chancery, at [*483 the times and in the manner in and by the said act mentioned and required; that afterwards, and whilst the defendant was such proprietor of sixty shares in the capital of the said company, and after the execution by the defendant of the said deed of settlement as aforesaid, to wit, on the 22d of December, 1840, certain persons then being proprietors and directors of

the said company, for the time being, duly enrolled in that behalf, as required by the act of parliament, and duly constituted, and being, a board of directors for the management of the affairs of the said company, according to the provisions of the said indenture of settlement, at a certain meeting held pursuant to the said indenture of settlement, at the office of the said company at Bath, duly made a call of money for the purposes of the said company, according to the provisions of the said indenture of settlement, of and from the proprietors, to wit, a call or instalment, of 2*l.* 10*s.* upon every share in the capital of the said company, (except the said exempted shares,) to be paid and payable by the said proprietors on the 16th of January then next following, such call or instalment not exceeding in respect of any one share the call or instalment required on any other such share, and not requiring in respect of any one share more than the sum of 50*l.*, exclusive of any premium or discount in respect thereof, and the same not being made so payable as aforesaid, till more than three calendar months after the day appointed for the payment of any previous instalment; that the proportion or instalment of the said defendant, so called for in respect of his said sixty shares in the capital of the said company, amounted to a large sum of money, to wit, the sum of 150*l.*, and that the said board of directors after the making of the said call, and at the distance of ten days and more from the time so appointed for payment thereof as aforesaid,
*484] to wit, on the 26th of *December, 1840, caused to be sent and delivered to the defendant a circular letter, signifying the amount of the said proportion or instalment, and the said time so appointed for the payment thereof as aforesaid, and also that the said amount thereof should and might be paid by the defendant to, &c. &c., and that if the said amount or instalment should not be paid within three days after the time so appointed for the payment thereof as aforesaid, interest at the rate of 5*l.* per cent. per annum would be payable thereon from the time when the same become due, and that if such amount or instalment, with such interest thereon, should not be paid within two calendar months after the time so appointed for payment of the same as aforesaid, the shares in respect of which the same was payable would be liable to be forfeited to the said company; by means of which said several premises respectively, the defendant then became liable to pay to the said company on the said 19th January, 1841, the said sum of 150*l.*, being the said amount of the said proportion or instalments in respect of the said sixty shares of the defendant as aforesaid; that no part of the said sum being paid by the defendant on the said day so appointed for the payment thereof as aforesaid, the said board of directors, within twenty-one days afterwards, to wit, on the 5th of February, 1841, caused to be sent and delivered to the defendant a second application for the payment of the said sum and setting forth the statements so made in the said first circular letter in regard to the payment of the said instalment and the liability to forfeiture: nevertheless the defendant had not paid to the company the said sum of 150*l.*, or any part thereof, but had hitherto wholly neglected and refused so to do; and the same, together with a farther large sum of money, to wit, the sum of 2*l.* 15*s.* 9*d.*
*485] for interest upon the same, after the rate aforesaid, from the *said 16th of January in the year last aforesaid, was still wholly due and unpaid to the said company; whereby an action had accrued to the plaintiff, as such secretary as aforesaid, for and on behalf of the said company and according to the form of the statute in that case made and provided as aforesaid, to demand and have of and from the defendant the said several

sums of 150*l.* and 2*l.* 15*s.* 9*d.*, amounting together to the sum of 152*l.* 15*s.* 9*d.*, being the said sum above demanded: yet the defendant had not paid the said sum above demanded, or any part thereof; to the damage of the said company of 10*l.*; and thereupon the plaintiff, as such secretary as aforesaid, and for and on behalf of the said company, and according to the form of the statute in such case made as aforesaid, brought his suit.

Special demurrer, assigning for causes—that the declaration did not show with sufficient or any certainty that the present action was brought for any injury or wrong done to any real or personal property of the company therein mentioned, or upon or in respect of any liability or liabilities to the said company, or upon any covenants, contracts, or agreements entered into with the said company, or to or with any person or persons whatsoever, in trust for the said company, or to or with any person or persons for the use and benefit thereof, or wherein the said company was interested; that it did not with sufficient or any certainty show a cause of action in respect of which the plaintiff was entitled to sue as secretary for the said company; that it did not show any cause of action existing before the suit commenced, and did not state the enrolment of the memorial therein mentioned with sufficient certainty and precision; that it did not with sufficient certainty state or show *that three months, or any time from the date of the said indenture had elapsed before the commencement of the suit*, or the time of payment of the alleged call at *all; that it did not state or show with sufficient or any certainty that the indenture therein mentioned was [*486 the indenture referred to in the act of parliament therein mentioned; and that it was in other respects uncertain, informal, and insufficient, &c. Joinder.(*a*)

The case was argued in last Hilary term.

Channell, Serjt., in support of the demurrer. One important question in this case is, whether, supposing the defendant is liable to be sued, the action can be brought in the name of the plaintiff as the secretary of the company. The deed set out is of a peculiar character. The parties thereto of the first part, including the defendant, enter into certain covenants with the parties of the second part, who are not described as *trustees or directors of the company. It will be contended on the [*487 other side that the defendant, being a party to the deed, has, in effect, contracted to pay any instalments that may become due on his shares. Even assuming the calls to have been properly made, the act does not apply to a case like the present, but is confined to cases where

(*a*) On the part of the defendant, the points marked for argument were,—"That it did not sufficiently appear from the declaration, that the action was carried on for the benefit of the company mentioned in the declaration. That, consistently with the declaration, the calls therein mentioned were not payable to the company, or to any person in trust for the company, and the company might not have any interest therein. That the declaration did not show with sufficient certainty any cause of action whereon the plaintiff is entitled to sue as secretary for the company. That it did not show any cause of action existing before the commencement of the suit. That it did not sufficiently, or at all show that three months, or any time from the date of the said indenture had expired. That it did not sufficiently show that three months from the date of the said indenture had expired at the time of the proprietors of the said company being called upon to pay the calls in the declaration mentioned."

The plaintiff's points were,—"The plaintiff, on the argument of this case, will maintain the affirmative of the six several points set down for argument on behalf of the defendant; and that, under the provisions of the statute 3 & 4 Vict. c. cxxvi., referred to in the declaration, he is entitled to sue as secretary for calls due to the company; and that the declaration, in its present form, is sufficient to entitle him to recover such calls, and discloses a good cause of action, as well under the statute aforesaid as under the deed of settlement set forth in the declaration."

the name of the secretary is to be used in order to avoid the necessity of suing in the names of the whole company. Here the four covenantees may sue the defendant. The deed of settlement is in the nature of a deed of copartnership, and the act could not be intended to apply to a case of a member of the company sued for calls. The enacting clause is to be construed with reference to the preamble, which is the key to the whole of the
*488] first section.(a) The principle laid down in the *various authorities is, that if the words in the enacting clause go clearly beyond the

(a) The 3 & 4 Vict. c. cxxvi., intituled "An act to enable the Monmouthshire Iron and Coal Company to sue and be sued in the name of any one of their directors or their secretary, and to raise money for carrying on their works," after reciting that a number of persons has some time since formed themselves into a company or co-partnership under the name or firm of "The Monmouthshire Iron and Coal Company," for the purpose of erecting and establishing iron and coal works on certain premises respectively situate at Bedweltye and Abercarne, in the county of Monmouth, comprised in a certain indenture of declaration of trust and covenant, bearing the date of the 25th of October, 1836, and made between Roger Hopkins, Rice Hopkins and Thomas Hopkins, and William Truman Harford Phelps of the first part, and R. Welsh, H. Marsh and W. Phelps, of the second part; and for the carrying on the iron and coal trade: (sic) and that the affairs and concerns of the company had been carried on and conducted and managed under and subject to the rules, regulations and provisions contained in a certain indenture also bearing date the 25th of October, 1836, and made between the several persons whose names and seals are thereunto subscribed and affixed (except the said Roger H., Rice H., T. H., W. T. H. P., and R. W., H. M., and W. P.) of the first part, the said Roger H., Rice H., T. H. and W. T. H. P. of the second part, and the said R. W., H. M. and W. P. of the third part, purporting to be the deed of settlement of the company, by which it was provided that the capital of the company might consist of 300,000*l*. to be raised or created in, and divided into, 6000 shares of 50*l*. each and no more; and further, that the board of directors of the said company should proceed to carry into effect the objects and purposes of the company, without delaying the same until the whole of the 6000 shares should have been subscribed for and appropriated, and notwithstanding that a part only of such shares should have been subscribed for and appropriated; and that the capital or joint stock of the company consisted of 204,400*l*. divided into 4088 shares and no more, of which capital the sum of 146,000*l*. had been actually paid up by the proprietors of shares in the company, and 450 were free shares; and that difficulties had arisen and might arise *in recovering debts and moneys due to the company*, and in maintaining actions for damages done to the company or to the property of the company, since, by law, all the members for the time being of the company must be named in every action or suit carried on for such purpose, and it would be convenient that persons having demands against the company should be entitled to sue the secretary of the company or any one of the elected directors thereof for the time being, and that prosecutions for embezzlement, robbery or stealing the property of the company, or for fraud, or for any other offence against the company, should be instituted and carried on in the name of the company, or name of the secretary or one of the elected directors thereof for the time being; and that it was expedient that certain powers should be granted to the company to raise a sum of money; and that the company should be regulated in other respects as thereinafter mentioned: enacts, "that all actions and suits whatsoever against any person or persons already indebted or who may hereafter be indebted to the company called &c., and all actions, suits and other proceedings whatsoever at law or in equity, for any injury or wrong done to any real or personal property of the said company, or upon or in respect of any present or future liability or liabilities to the said company, or upon any bonds, *covenants*, bills of exchange, promissory notes, contracts or agreements which already have been or hereafter shall be given or entered into, to or with the said company, or to or with any person or persons whatsoever in trust for the said company, or to or with any person or persons for the use or benefit thereof, or wherein the said company is or shall be interested, and all instruments, petitions and other proceedings for or incidental to the issuing or prosecuting any fiat in, or commission of, bankruptcy in *England* or *Ireland*, or any sequestration in *Scotland*, against any person or persons already indebted, or who may be hereafter indebted to the said company, or to any person or persons in trust for the said company, or to any person or persons for the use or benefit thereof, and liable to be made bankrupt by the laws now or at any time hereafter to be in force relative to bankrupts and traders in *England* and *Ireland*, or to sequestrations in *Scotland*, and all proceedings at law or in equity under any commission of, or fiat in, bankruptcy, or under any sequestration by, for or on behalf of the said company, or wherein the said company is or shall be interested or concerned, and generally, all other proceedings whatsoever, at law or in equity, to be commenced, instituted or carried on by or on behalf of the said company, or wherein the said company is or shall be concerned or interested, against any person or persons, or body or bodies politic or corporate or others

preamble some effect is to be given to them; but if not, then such clause is to be *construed with reference to the preamble. In Bac. Abr. statute (I.) 2. it is said that "it is in the general true that the preamble of a statute is a key to open the mind *of the makers as to the mischiefs which are intended to be remedied by the statute." So, in Co. Litt. 79 a. it is laid down that "the rehearsal or preamble of the statute is a good means to find out the meaning of the statute, and, as it were, a key to open the understanding thereof." In *Crespigny* v. *Wittenoom*, 4 T. R. 790, it is said by Mr. J. Butler, "I agree that the preamble cannot control the enacting part of a statute which is expressed in clear and unambiguous terms. But if any doubt arises on the words of the enacting part, the preamble may be resorted to to explain it." And Mr. J. Grose observes, "Though the preamble cannot control the enacting clause, we may compare it with the rest of the act in order to collect the intention of the legislature." In *Mason v. *Armitage*, 13 Ves. 25, Lord ERSKINE says, referring to *Simon* v. *Metivier*, 1 W. Bla. 599, 3 Burr. 1921, "It is said in the report that the preamble shows the intention; but the law is, that if the enacting part will bear only one interpretation, the preamble shall not confine it. If that is doubtful, then the preamble may be applied to throw light upon it." So, in *Halton* v. *Cove*, 1 B. & Ad. 538, it is said by Lord TENTERDEN, "It is very true, as was argued for the plaintiff, that the enacting words of an act of parliament are not always to be limited by the words of the preamble; but must, in many instances, go beyond it. Yet, on a sound construction of every act of parliament, I take it, the words in the enacting part must be confined to that

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whether such person or persons, or any of such persons or such body or bodies politic or corporate, or any member or members thereof respectively, is, or are, or shall be, or shall have been, a proprietor or proprietors of the said company or not, shall and lawfully may be commenced, made, executed, instituted, presented and prosecuted or carried on *in the name of the secretary* of the said company for the time being, or in the name of any one of the elected directors for the time being of the said company, as the nominal plaintiff, pursuer, complainer or petitioner, or as acting in any other character for or on behalf of the said company; and all actions, suits, and other proceedings at law or in equity, to be commenced, instituted or prosecuted against the said company by any person or persons, or body or bodies politic or corporate, *whether such person or persons*, or any of such persons, or such body or bodies politic or corporate, or any member or members thereof respectively, *is, or are, or shall be*, or *shall have been, a proprietor or proprietors* of the said company or not, shall and lawfully may be commenced, instituted and prosecuted against the secretary for the time being, or against any one of the elected directors for the time being of the said company, as the nominal defendant, respondent or defender in such last-mentioned actions, suits or proceedings for or on behalf of the said company, and the death, resignation or removal, or any other act or proceeding of such secretary or director, or any change in the members of the company, by the transfer of shares or otherwise, shall not abate, prejudice or render defective any action, suit, petition or other proceeding at law or in equity, commenced or instituted under this act, but the same may be continued, prosecuted, carried on, or defended in the name of the secretary for the time being, or any elected director for the time being of the said company, notwithstanding the death, resignation, or removal, or any other act or proceeding of such secretary or director, and notwithstanding such change in the members of the said company; and it shall and may be lawful for the said company at law, in equity, and in bankruptcy in manner aforesaid, to sue and proceed against, and to be sued and proceeded against, by any person or persons, or body or bodies politic or corporate, notwithstanding such person or persons, or body or bodies politic or corporate, or any member or members thereof respectively, is, or are, or shall be, or shall have been, a proprietor or proprietors of the said company, and that solely and jointly with any other person or persons, or body or bodies politic or corporate, in respect of any claim or demand which the said company may have against such person or persons, or body or bodies politic or corporate, either solely or jointly as aforesaid, or which such person or persons, or body or bodies politic or corporate, either solely or jointly as aforesaid, may have against the said company, the same as if such person or persons, or body or bodies politic or corpoporate, was, or were not, or had never been, a proprietor or proprietors of the said company."

which is the plain object, and general intention, of the legislature in passing the act, and that the preamble affords a good clue to discover what that object was."

Here, all the words in the enacting clause, on which the other side rely, will have some meaning given to them by construing them with reference to the preamble. Each branch of the preamble points to a case where the whole of the members of the company either must or should, properly speaking, be joined in bringing any action. The deed bears date in 1836, but the act was not passed until 1840. The legislature seem either to have assumed that all calls or shares had then been paid up, or to have left such calls to be recovered under the deed; for the act does not appear to have been intended to interfere with the deed; otherwise it would have contained a clause authorizing the company to make calls; and the absence of such a provision affords a strong presumption, that the enforcing of the calls was left entirely to the operation of the deed. In *Williams* v. *Beaumont*, 10
*492] Bingh. 260, 3 Moo. & Sc. 705, an act incorporating an *insurance company, after reciting that difficulties had arisen, and might thereafter arise, "in bringing and maintaining actions and suits *for recovering debts and enforcing obligations now due, or hereafter to become due to the said society*," enacted, "that all actions and suits commenced or instituted, &c. by or on behalf of the said society, &c., against any person, &c., *for recovering any debts, or enforcing any claims or demands now due, or which may hereafter become due or arise to the said society*, &c., shall, &c., be commenced or instituted and prosecuted in the name of the chairman or secretary, &c. as the nominal plaintiff, &c." It was held that the chairman might sue for a libel on the company. There, the judgment of the court seems to have proceeded very much on the ground taken in this case on the part of the defendant. ALDERSON, J., says, "The construction of the act is, that where an action could have been maintained by naming all the individuals of the company, it shall be lawful to substitute for their names the name of the chairman. Whatever actions could have been maintained by the entire body, may be maintained by the chairman on their behalf, and, inasmuch as the entire body might have maintained an action for this libel, the chairman is authorized to sue for them in his own name." Here, however, all the members of the company could not have sued; for being a covenant under seal, none could sue but the four parties with whom it was made.

Secondly, it appears from the declaration that certain shares are exempted from the payment of calls; and it is not alleged that the defendant's shares are not exempted from such liabilities, or that they are shares on which the company are entitled to make calls. [*Stephen*, Serjt. This objection is not taken as a ground of demurrer.] The objection is open to the defendant upon general demurrer. The other side will rely on the allegation that
*493] the proportion or instalment of the *defendant called for in respect of his shares, amounted to 150*l.*; but that is a mere calculation, which, it is submitted, is not sufficient to obviate the objection.

Thirdly, the declaration does not allege that the day on which the call was made was more than three calendar months after the date of the deed of settlement, or that three calendar months had expired from the payment of any former instalment. There is nothing in the declaration from which any intendment can be drawn with respect to either of these points, inasmuch as the date of the deed and the day of the call are both laid under a videlicet. In *Parkinson* v. *Whitehead*,(a) the declaration stated that there-

(a) Antè, Vol. II. 329.

tofore, to wit, on the 31st of May, 1825, by an agreement in writing, the defendant's testator agreed, within two years from *Midsummer then next*, to build certain houses; and alleged for breach that the houses at the commencement of the action (1839) were unbuilt, contrary to the agreement. This court held the declaration bad on general demurrer, for not showing that two years from *Midsummer* next after the making of the agreement had elapsed previous to the commencement of the suit. It is clear, therefore, that no cause of action is shown to be existing at the commencement of the suit.

Stephen, Serjt., *contrà*. With respect to the main objection, that this action should not have been brought in the name of the secretary of the company, the preamble and the enacting part of the clause taken together, show that this very case falls fairly within the provisions of the act. It appears from the recitals in which the deed of settlement is set forth, that only part of the capital has been paid up. The enacting portion of the clause provides that the secretary may sue "upon *any bonds, *covenants*, &c., contracts or agreements which already have been or hereafter [*494 shall be given or entered into, to or with the said company, or to or with any person or persons whatsoever in trust for the said company, or to or with any person or persons for the use or benefit thereof, or wherein the company is or shall be interested." It is impossible to conceive words more studiously adapted to the present case than those employed. It is argued that the recital that "difficulties have arisen and may hereafter arise in recovering debts and moneys due to the said company," shows that the act was only meant to apply to cases in which it was necessary for all the members of the company to sue or to be sued; but it is an undoubted principle that a preamble cannot be admitted to control or restrain the enacting words of a clause where these are free from doubt or obscurity. "Where words in a statute are express, plain, and clear, the words ought to be understood according to their genuine and natural signification and import, unless by such exposition a contradiction or inconsistency would arise in the statute by reason of some subsequent clause from whence it might be inferred that the intent of the parliament was otherwise. And this holds with respect to penal, as well as other, acts:" Bac. Abr. Statute (I), 2. The object of the act was, not only to provide against the inconvenience of naming all the proprietors as plaintiffs in actions brought by the company against third parties, but also to enable the company to sue its own members on contracts, whether made with the company or with the trustees of the deed of settlement. [MAULE, J. Has there not been a recent case on this subject in the Exchequer?] The case alluded to is *Hughes* v. *Thorpe*, 5 M. & W. 656. The 6 G. 4, c. 42, s. 10, (the act for the better regulation of copartnership *banks in Ireland) enacted that all actions and suits &c. against any [*495 person who may be indebted to any such copartnership, and all proceedings at law or in equity under any commission of bankrupt, and all other proceedings at law or in equity to be commenced or instituted for or on behalf of any such copartnership against any person or persons, bodies politic or corporate, or others, whether *members of such copartnership* or otherwise, for receiving any debts &c. due to such copartnership, shall from the passing of this act, be commenced or instituted and prosecuted in the name of any one of the public officers, &c. of the said copartnership A question was there raised, but which it became unnecessary to decide, whether the act conferred upon the company a right to bring an action in the name of its public officer against one of its members for a debt due to the copartnership. PARKE, B., said, "That is a point which I think ad

mits of considerable doubt, and upon which I have not made up my mind. I believe the intention of the legislature was to give such a power; but I have considerable doubt whether the words admit of it." The words on which the doubt arose in that case are very similar to those contained in the middle of the present clause; but other words are added here, namely, "and it shall and may be lawful for the said company at law, in equity, and in bankruptcy in manner aforesaid to sue," &c.(*a*) which appear to have been introduced to guard against the difficulty which was suggested in *Hughes* v. *Thorpe*. The fourth section of the act presents an incidental confirmation of the liability of a proprietor to be sued in the name of the secretary, for calls.(*b*)

*496] *With respect to the objection that the declaration contains no allegation that the defendant's shares are not exempted shares, it cannot be supported. The declaration avers that the defendant is the proprietor of sixty shares; and, after setting out, among other things, the deed whereby the defendant contracted with the trustees, and the call made of 2*l.* 10*s.* per share, it states that the proportion or instalment of the defendant so called for in respect of his said sixty shares, amounted to 150*l.*; that the defendant had due notice of the call, &c.; and that he then became liable to pay to the company, on, &c., the said sum of 150*l.*, being the said proportion, &c. As this objection arises on general demurrer, the question is, whether the allegation that the defendant became liable to pay the company
*497] 150*l.* is not *sufficient to show that he was a proprietor of *unexempted* shares; for it could not be true, if he was not. It is submitted that the averment is equivalent to an allegation that he was a proprietor of unexempted shares, and a traverse might have been taken upon it. It is clear that the averment is not in the nature of a *virtute cujus*—an inference from preceding allegations. If the defendant meant to object to the form of the allegation, he should have demurred specially to it. *Davis* v. *Lovell*, 4 M. & W. 678, shows that upon general demurrer this allegation is sufficient. [Maule, J. Supposing the defendant's shares had really been exempted shares, ought he not to be able to raise that defence by a negative plea? Could he, on a traverse of the allegation in question, say, that his were exempted shares?] The affirmative would lie on the plaintiff; and, in order to make out that any sum was due, he must show that the defendant was

(*a*) See antè, p. 490.

(*b*) "Provided also and be it enacted, that no person or persons, or body or bodies politic or corporate, having or claiming, or who shall or may have or claim, any demand or demands, or cause of action, or suit upon or against the said company, whether such person or persons or any of such persons shall be a proprietor or proprietors of the said company or not, shall bring more than one action or suit, or actions or suits in respect of such demand or cause of action or suit, or alleged cause of action or suit; and in case the merits in respect of any such demand or cause of action or suit, actions or suits, or alleged cause of action or suit, actions or suits shall have been finally determined in any action or suit, then and in every such case the proceedings in such previous action or suit may be pleaded in bar of any such other or subsequent action or suit, or actions or suits which may be commenced or instituted in respect of the same demand against the secretary or against any other director or proprietor of the said company; and in case the merits in respect of any demand or cause of action or suit which the said company, or any person or persons in trust for them, or for their benefit, now has or have or hereafter may have upon any person or persons, or body or bodies politic or corporate, whether such person or persons, or any of such persons shall be or shall have been a proprietor or proprietors of the said company or not, shall have been determined in any other action or suit previously commenced or prosecuted by the secretary or any elected director of the said company, then, and in such case the proceedings in such previous action or suit may, in like manner, be pleaded in bar of any such subsequent or other action or suit, or actions or suits which may be commenced or prosecuted for the same demand by the same or any other secretary or elected director of the said company."

the proprietor of unexempted shares. If the defendant meant to say that the declaration contained no allegation upon which, as to this point, he could take an apt issue, he should have set that out as ground of special demurrer.'

Another objection is, that it is not alleged that three months had elapsed between the date of the deed and the making of the call, or that there was an interval of a like period between the day appointed for the payment of the present and that appointed for the payment of any former call. It is averred, however, that the directors "duly made a call of money for the purposes of the company, according to the provisions of the said indenture of settlement," which, it is submitted, is a sufficient allegation of a compliance with the whole of the stipulations in the deed. It is a mistake to suppose, that where a variety of requisites are necessary previously to making a call, it is incumbent to state separately that *they have all been complied with. It is a well-known rule in pleading that, [*498 where a full statement would lead to inconvenience and prolixity, a condensed form of allegation is sufficient.

The remaining point is, whether any cause of action is shown to have existed before the commencement of the suit. Such an allegation is clearly unnecessary: it has always been understood that where there is an averment of past matter, such matter must be taken to have occurred before the commencement of the suit. There is a clear distinction between a prospective allegation and one referring to a thing that is past; for if there were not, it would be necessary, in almost every case, to aver that events had happened before the action was brought. There is an allegation here that the directors, ten days after the time appointed for the payment of the call, had called upon the defendant to pay the money. It is clear, therefore, that the day appointed for payment of the call had elapsed; for a bygone time is mentioned in the declaration, and that time is referred to as being subsequent to the day when the call became due.

Channell, Serjt., in reply. The first objection to the form of the allegation is, not that no call was made, but that there is nothing to show the defendant's liability to the call. The defendant could not have traversed the allegation which has been relied on. If he had done so, the plaintiff would have demurred, on the ground that it was uncertain whether the defendant meant to deny that he was a proprietor, or that the call had been duly made, or to say that his shares were exempt.

With respect to the objection that the declaration does not show that either period of three months had elapsed, no such effect can be given to the words "duly made a call of money, &c., according to the provisions *of the said indenture of settlement," as has been suggested. The language of the declaration in *Parkinson* v. *Whitehead*, was quite [*499 as strong as that which occurs here; and yet it was held insufficient. As regards the main objection, the conclusion of the clause in the act has been relied on, as obviating the doubt entertained in *Hughes* v. *Thorpe;* but, throughout the section, the general words are always used in connexion with the words "at law or in equity." It does not follow that because the trustees may possibly be entitled to sue the defendants on the deed, the secretary of the company may sue him under the act; for that would be to give a construction to the act, which, it is submitted, cannot be fairly drawn from its provisions, when taken in connexion with the preamble.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court.

This was an action of debt brought by the plaintiff, therein described as secretary, for the time being, duly appointed and enrolled in that behalf, of a certain company called "The Monmouthshire Iron and Coal Company," being a company mentioned in an act of parliament of the third and fourth years of the reign of her present Majesty, which was passed to enable the said company to sue and be sued in the name of any one of their directors or their secretary, and to raise money for carrying on their works; and the action was brought upon a certain indenture of settlement, dated the 25th of October, 1836, to which the defendant was a party, to recover the amount of a certain call made by the directors for the purposes of the said company, according to the provisions of the indenture, upon the shares in the capital belonging to the defendant. The defendant demurred to the declaration; and the principal ground of objection which
*500] was raised on the part of the defendant *was, that the statute only enabled the secretary to sue where the question was one in which the whole of the company were concerned on the one part, and third persons or strangers on the other; and that it never was intended to enable the company to sue in the name of the secretary one of its own members, for an instalment of the capital secured by a deed, in which each of the proprietors had covenanted with certain trustees to make due payment of the instalments. But we think, upon reference to the enacting words of the first section, they are sufficiently large to comprehend this case. Amongst those words will be found the following: "any covenants which already have been entered into with the said company, or with any persons in trust for the said company, or with any persons for the use of the said company;" which appear to us necessarily to include within them the covenant made by the defendant with the trustees in the deed of settlement for the benefit of the company. And the same section further enacts that the action shall be maintainable against the defendant, "whether he is a proprietor of the said company or not." And as, on the one hand, this construction may be beneficial to the company, by preventing the necessity of recourse to equity in case their trustees require to put the deed in suit; so, on the other hand, no injury can result to the defendant by giving this interpretation to the statute; as, by section 4, he can only be liable to one action on the same subject-matter of demand.

Other objections of a formal nature were urged against the sufficiency of the declaration; first, that it appears by the declaration, that there being a certain number of shares which were exempted from having calls made thereon, it does not distinctly appear that the shares of the defendant were not exempted shares. But we think that the direct allegation in the declaration, "that the proportion or instalment of the defendant, so called
*501] *for in respect of his sixty shares in the capital of the company," amounted to such a sum of money, is, by necessary implication and intendment, an allegation that those shares were not exempted from liability; for, had that been the case, no proportion or instalment whatever would have been due upon them. And as to the more formal objections— that there is no allegation that the call was not made until after the expiration of three calendar months from the date of the indenture, or that it was not payable until after the expiration of three calendar months, from the time appointed for the payment of any former instalment,—we think there is no ground for either; for as to the last, the declaration, besides containing a distinct allegation, that the call was made according to the provisions of the said indenture, avers also, "that the same call was not made so

payable till more than three calendar months after the day appointed for payment of any previous instalment;" and as to the former, namely, the want of an averment that it was not made until after three months from the date of the indenture, the declaration contains a substantive allegation, not under a *videlicet*, that the instalment became due and payable on the 16th of January then next, which by a subsequent averment, not under a *videlicet*, is alleged to be the 16th of January, 1841; and as the statute,—which refers to, and recites the deed,—received the royal assent on the 4th of August, 1840, the day of payment of the call must have been more than three months after the date of the deed.

We think, therefore, that none of the grounds of objection are sustainable, and that there must be judgment for the plaintiff.

Judgment for the plaintiff.

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*ALEXANDER BRYMER BELCHER and Others, Assignees of ROBERT STOCKDALE, a Bankrupt, v GEORGE CAPPER and Others. [*502

By a memorandum of charter it was agreed that A. should let, and B. should hire A.'s vessel for six calendar months, during which time B. was to possess the entire and exclusive use and disposal of the whole reach and burthen of the vessel, with the exception of the space occupied with the cabin, together with room for the usual accommodation of the crew, and for the stowage of stores and provisions; that the master should from time to time, and as often as B.'s interest should require, take on board, and properly stow, all such lawful goods, to the extent of a full and complete cargo, as should be tendered to him for that purpose, and proceed therewith upon such lawful voyage or voyages as B. or his agents should direct him to do; and that he should deliver the said goods agreeably to the bills of lading; that *the freight* and primage for such goods *should be payable to* B. or his order; that in the event of the completion of the six months whilst the vessel was upon a voyage or after she had commenced taking goods on board for a voyage, the term of that agreement should be prolonged until the discharge of her cargo after her arrival at, or return to, a port in Great Britain; that the owners or masters should keep the vessel tight, and manned, and provisioned and fitted with necessary stores. In consideration whereof B. agreed to pay to A. at a certain rate per ton per month, to be paid by—one month's pay in advance in cash,—one month's pay after the vessel should be entered outwards,—one month's pay that day two months,—and one month's pay at the expiration of each succeeding month, till the end of the term she might be employed,—and the balance in cash *on her final discharge*, together with port charges, &c.; that B. should have the privilege of putting in a master of his own appointment, he finding the cabin with all stores, and paying his wages, A. allowing whatever rate of wages A. paid his own master; and as the master was to be appointed by B. to superintend his interests, A. was not to be responsible for such master's act and conduct, should he deviate from the charter, but B. was to be responsible to A. for the conduct and integrity of such master whilst he should have the navigation of the vessel. *Held*, that the possession of the vessel was given up by A. to B. during the continuance of the contract; that the master so appointed by B. was in possession of the cargo as his agent, and not as the servant of A.: that personal credit was given to B. for the payment of the hire of the vessel, and that no lien upon, or right of stoppage of, the goods, was reserved to the owners as a security for the payment of such hire.

Money having become due under the charter from B. to A., and A. having brought an action against B., it was agreed that A. should withdraw his action, and that B. should deliver to C. certain bills of lading for the homeward cargo and should empower C. to receive the proceeds thereof for the purpose of paying A. any freight due to him under the charter, the balance to be paid to B.'s account with C. A. withdrew the action, and B. empowered C. accordingly. Upon the arrival of the vessel, A., in his own right, and as agent for C., took possession of the cargo, &c. At the time of making the agreement no part of the cargo was on board, nor were any of the bills of lading thereof in existence, nor were any such bills of lading at any time in the possession of A. or of B or of C. Before the shipping of the cargo or the existence of the bills of lading, and before C. had any control over the cargo, and while B. was the apparent and reputed owner thereof, and whilst A.'s action was still pending, B. became bankrupt, and D. and E. were appointed assignees. The cargo was from the time of the shipping till the seizure thereof, in the possession and control of D. and E., as assignees, and of

one F., a master appointed by B. as their agent. Before the bankruptcy, however, certain goods had been provided and shipped by B.'s agents as part of the homeward cargo, and on his account; which goods were carried from Y. to Z., where, for the purpose of more conveniently loading the whole of the homeward cargo, they were landed before the bankruptcy of B., and remained there ready for shipment. Other goods, provided by B.'s agents at G., were also, before his bankruptcy, ready for shipment on his account, as a further portion of the homeward cargo. Both sets of goods were shipped accordingly; after which A. took possession thereof for the purpose of paying himself such freight, &c.

Held, that the portion of the cargo which had been brought from Y. to Z., was sufficiently in the possession of B. at the date of the agreement, as part of the homeward cargo mentioned in that agreement, to bring it within the terms thereof, as equitably assigned to C. for the purpose therein mentioned.

Semble also, that if the rest of the goods were within the possession of B.'s agents and before his bankruptcy, set apart and definitely appropriated as part of the homeward cargo, a similar result would follow.

But *held*, that as B. was left in the sole possession and management of the cargo, with full power to dispose of, or gain credit upon, any portion of it, having parted with no document essential to his power of disposal, such cargo passed to D. and E., under the 6 G. 4, c. 16, s. 72, as goods in the order and disposition of B. at the time of his bankruptcy

ASSUMPSIT. The declaration stated that before the said Robert Stockdale became bankrupt, to wit, on the 23d of October, 1839, by a certain charter-party *of affreightment memorandum of charter) then made between the defendants, therein described as George Capper and nephews, merchants in the city of London, and owners of the ship or vessel called the Maas, of the burthen of 137 tons, old measurement, or thereabouts, then on a voyage from London to Rotterdam and back to London, and the said Robert Stockdale, therein described as of London, merchant, the defendants *agreed to let*, and the said Robert Stockdale *agreed to hire* the said vessel for and during the term of six calendar months, *such term to commence fourteen days after the vessel should be ready to enter out at the custom-house upon the terms and conditions following, to wit, that during the said term of that agreement, or as thereinafter provided, *the said affreighter should possess the entire and exclusive use and disposal of the whole reach and burthen of the vessel, with the exception of the space occupied with the cabin, together with room for the usual accommodation of the crew, and for the stowage of the ship's stores and provisions;* that the master should, from time to time, and as often as the interest of the said affreighter should require, take on board and properly stow all such lawful goods and merchandise to the extent of a full and complete cargo, if required, as should be tendered to him for that purpose, and proceed therewith upon such lawful voyage or voyages as he, the said affreighter, or his agents, should direct him so to do; and that he should deliver the said goods and merchandise agreeably to the bills of lading, the act of God, the Queen's enemies, and all and every danger and accidents of the seas, rivers, and navigation, of whatever nature and kind, during the said voyage, always excepted; that the freight and primage on all such goods, merchandise, bullion, or specie should be for, and payable to, the said affreighter or to his order; that all cargoes were to be brought alongside, and taken from alongside at shipper's risk and expense, and that in the event of the completion of the above-mentioned term of six calendar months, whilst the said vessel was upon a voyage or after she had commenced taking goods on board for a voyage, the terms of that agreement should be prolonged until the discharge of her cargo after arrival at, or return to, a port in Great Britain; at which place the final completion of that agreement was to take place, unless otherwise mutually agreed between the owners and affreighters; that during the aforesaid term *of that agreement the said owners or master should keep the said ves-

*503] *504] *505]

sel tight, staunch, and strong, sufficiently manned, provisioned, and properly provided, and fitted with all stores necessary for the due performance of the voyage or voyages she might be sent upon; in consideration of which the said affreighter thereby agreed to pay, or cause to be paid, to the owners of the said vessel at and after the rate of 22*s.* per ton old measurement, per register, per calendar month for so long as she should be by him employed as aforesaid under that agreement; such consideration to be paid as follows, viz., by one month's pay in advance in cash, one month's pay after the vessel should be entered on board, one month's pay that day two months, and one month's pay at the expiration of each succeeding month till the end of the term she might be employed, thus leaving one month's pay in abeyance, and the balance, in cash, on her final discharge, together with all port-charges and pilotage, except in Great Britain; the master to be supplied with such cash as he might require for ship's disbursements, at any of his loading or discharging ports by the charterer's agent, free of commission, taking the master's draft upon his owners for the same; which amount was to be paid by the owners, or deducted from the balance of freight due to the vessel; and it was by the charter-party further understood and agreed, that in case of damage to the ship by stranding or other accident, fourteen running days were to be allowed by the said affreighter for the necessary repairs beyond that period; the monthly payments to be suspended until the said vessel should be sufficiently repaired to prosecute her voyage; and, in the event of the loss of the ship, the affreighter was to pay the aforesaid rate of freight up to the time only when the vessel was lost, seen, or known to be in safety; but if the loss happened at sea, and the date could not be ascertained, then the charterer was to pay *half [*506 a month's hire. No goods were to be shipped that would not go down the hatchway. Dunnage, mats, boards and nails, if required, to be found by the charterer. The vessel to be employed abroad, between the river Gambia and Sierra Leone, and between the Gambia and the Cape Verd Islands on the African coast, all inclusive; but not to be sent to any place where she could not lie afloat at any time of tide; and if ordered to London to discharge her homeward cargo, it would be in one of the regular docks, at the option of the charterer, the vessel to be entered and cleared outward, and reported on her return to London, by the said Robert Stockdale, free of charge; not to ship exceeding fifty tons weight of teak wood or timber, and no piece exceeding twenty-five cwt. The vessel to be ready for loading in the London docks ten days after she should be cleared of her inward cargo from Rotterdam, provided she met with no accident requiring extensive repairs. The charterer to have the privilege of putting in a master of his own appointment, he finding the cabin with all stores and paying his wages, the owners allowing the charterer whatever rate of wages they paid their own masters. It was also, by the same charter-party, agreed and understood that as the master was to be appointed by the charterer to superintend his interest, the owners were not to be responsible for his acts and conduct, should he deviate from that charter-party; but the charterer held himself responsible to the owners for the said master's honest and correct conduct and strict integrity whilst he should have the navigation of their vessel. In the event of sickness or death from the effects of the climate, the time occupied in procuring substitutes was not to be deducted from the freight. The commission upon that charter was 2½ per cent., payable to Messrs. Leach and Clark. Penalty for non-performance of that agreement, 1000*l.* Averment: that *the [*507 said charter-party being so made as aforesaid, afterwards, to wit on

the 18th of December, 1839, in and by a certain memorandum or declaration in writing endorsed on the said charter-party and signed by the defendants and the said Robert Stockdale respectively, it was declared that the periods of payment of the said freight should be as follows, viz.: one month's pay on the 10th of January, 1840, one month's pay on the 10th of March following, and one month's pay on the 10th day of every succeeding month during the remaining period of that agreement. Mutual promises to perform the charter and memorandum, with a further promise by the defendants to suffer and permit the master for the time being of the said ship or vessel to perform and fulfil all things by him to be performed and fulfilled as such master in pursuance of the said charter-party, and to suffer and permit the delivery, according to the terms of the said charter-party, of the cargo, goods and merchandise which should be shipped on board the said ship or vessel in pursuance of the said charter-party, and to suffer and permit the said charterer to use the said ship or vessel according to the terms of the said charter-party and memorandum, during the continuance of the said charter-party and agreement therein contained, and during that time to *possess the entire and exclusive use and disposal of the whole reach and burthen of the said vessel, with the exception of the space occupied with the cabin, together with room for the usual accommodation of the crew, and for the stowage of the ship's stores and provisions.* Averment: that afterwards, and after the making of the said charter-party and memorandum thereon subscribed as aforesaid, and before the said Robert Stockdale became bankrupt, to wit, on the 1st of January, 1840, the said ship or vessel did arrive in the said port of London from Rotterdam aforesaid, *508] and afterwards, to wit, on, &c. *last aforesaid, the said ship or vessel was ready to enter out, and did enter out, at the custom-house according to the terms of the said charter-party, and the said Robert Stockdale did then, to wit, on the day and year last aforesaid, put in the said ship or vessel a master of his own appointment, to wit, one James M'Cormick, according to the terms of the said charter-party; and the said ship or vessel did sail and proceed on her voyage under the command of the said James M'Cormick, according to the terms of the said charter-party of affreightment, to wit, to Gambia and Sierra Leone and the Cape Verd Islands aforesaid, and to divers places on the African coast, between the river Gambia and Sierra Leone, and between Gambia and Cape Verd Islands; and the said vessel was not sent to any place where she could not lie afloat at any time of the tide; and the said master did afterwards, at the said several places, to wit, on the 1st of March, 1840, and on divers other days and times, between that time and the sailing of the said vessel for London, take on board and properly stow divers lawful goods and merchandise, in pursuance of, and according to, the terms of the said charter-party, to wit, to the extent of a full and complete cargo, and of great value, to wit, of the value of 10,000*l.*, and did then, to wit, on the 1st of August in the year last aforesaid, and after the bankruptcy of the said Robert Stockdale, proceed therewith on the homeward voyage of the said ship or vessel, to wit, to London aforesaid, according to the orders and directions of the plaintiffs as assignees as aforesaid; and the said ship or vessel being so loaded as aforesaid, did afterwards, and after the bankruptcy of the said Robert Stockdale, to wit, on the 1st of October, 1840, arrive at London, at one of the regular docks there, to wit, at the West India docks there; and the said term of six calendar months in the said charter-party mentioned, was completed after the said vessel *had commenced taking *509] goods on board for her said voyage, to wit, on the 15th of July,

1840, whereby the said agreement and the terms thereof were prolonged until the discharge of her cargo after her arrival at, or return to, a port in Great Britain. That the said Robert Stockdale, before he became bankrupt, and the plaintiffs as assignees as aforesaid, since the bankruptcy of the said Robert Stockdale, had respectively performed and fulfilled all things contained in the said charter-party and memorandum or declaration in writing, on their parts respectively to be performed and fulfilled, according to the true intent and meaning of the said charter-party and memorandum. Yet the defendants had not performed or fulfilled all things contained in the said charter-party and memorandum, on their parts and behalves, to be performed and fulfilled, and did not nor would suffer or permit the master for the time being of the said ship or vessel, to perform and fulfil all things by him to be performed and fulfilled as master of the said ship or vessel in pursuance of the said charter-party, and did not nor would suffer or permit the delivery of the said cargo, goods, and merchandise so, as aforesaid, shipped on board the said ship or vessel in pursuance of the said charter-party; but on the contrary thereof, although the said cargo, goods, and merchandise were, by the bills of lading thereof, made deliverable to the plaintiff, *Alexander Brymer Belcher*, who, on the arrival of the said vessel, was, and from that time had been, ready to receive the same; and although the plaintiffs as such assignees as aforesaid, were then ready and willing to unload the same, to wit, in the West India Docks, being one of the said regular docks, and to take the same from alongside at the expense of them, the plaintiffs, and to deliver and cause the same to be delivered to the said *A. B. Belcher*, according to the said bills of lading; of all which the defendants then, to wit, from *the time of the arrival of [*510
the said ship or vessel at London aforesaid, hitherto had notice, and were then during the time aforesaid often requested by the plaintiffs to suffer the same to be so delivered; and although the delivery of the said cargo, goods, and merchandise was not in any way hindered or prevented by the act of God, the Queen's enemies, or any danger or accident of the seas, rivers, or navigation of any nature or kind whatsoever; and although the said agreement in the said charter-party contained, being so prolonged as aforesaid, was then subsisting and continuing, and not terminated; they the defendants from the time of the arrival of the said ship or vessel, with the said cargo, goods and merchandise, hitherto had altogether *refused to deliver, or to permit the said master of the said vessel or any other person to deliver the said cargo to the said* A. B. Belcher, *agreeably to the bills of lading, or to the plaintiffs;* and had altogether hindered and prevented the delivery of the said cargo, goods and merchandise, or any part thereof to the plaintiffs, or any of them, and had detained, and still did detain the same, and every part thereof on board of the said ship or vessel, contrary to the true intent and meaning of the said charter-party and of the said memorandum. And that the defendants did not, nor would suffer the plaintiffs as assignees as aforesaid, after the bankruptcy of the said Robert Stockdale, to use or enjoy the said ship or vessel according to the terms of the said charter-party or of the agreement therein contained, or, during that time, to possess the entire and exclusive use and disposal of the whole reach and burthen of the said vessel, with the exception of the space occupied with the cabin, together with room for the usual accommodation of the crew, and for the stowage of the ship's stores and provisions; but that after the said bankruptcy, and after the arrival of the said ship or vessel as aforesaid, at London *aforesaid, and before the discharge of the said [*511
cargo, and the said ship not having discharged her cargo after ar-

rival at, or return to a port in Great Britain, and during the continuance of the said charter-party and agreement therein contained, being so prolonged as aforesaid, to wit, on the said 1st October, 1840, *the defendants altogether deprived the plaintiffs of the use and enjoyment of the said ship or vessel, and every part thereof; and the defendants themselves seized and took possession of the whole of the said ship or vessel, and excluded the plaintiffs therefrom;* and to suffer the plaintiffs to possess the use or disposal of any part of the same, or to remove or unload the said cargo so being on board of the same, and occupying other parts thereof than the space occupied with the cabin, or the room for the use and accommodation of the crew, or for the stowage of the ship's stores or provisions, had altogether refused, and still did refuse, and from thence hitherto had kept and detained, and still did keep and detain possession of the whole of the said ship or vessel, so having on board the cargo, goods, and merchandise aforesaid, contrary to the true intent and meaning of the said charter-party and memorandum; whereby the plaintiffs had been unable to obtain possession of the said cargo, or to unload or dispose of the same or any part thereof; and by reason of the premises the said cargo, goods and merchandise had been, and were greatly deteriorated, &c., and had become of no value; and the plaintiffs as assignees aforesaid, had been deprived of the use and possession of the said goods and merchandise, and of the profits, benefits, and advantages which they otherwise would have derived therefrom, and had wholly lost and been deprived of many advantageous and profitable opportunities of selling and disposing of the same..

*512] The defendants pleaded, sixthly, that after the making *of the said charter-party and memorandum, and during the subsistence of the provisions thereof, and after the bankruptcy of the said Robert Stockdale, and after the arrival of the said ship or vessel at London, and before her final discharge, to wit, upon the 28th of September, 1840, there was due and owing to the defendants, the said owners of the said ship or vessel, a certain large sum of money, to wit, 1348*l.* 19*s.* 6*d.* for the use of the said ship or vessel, according to the terms of the said charter-party, and for the freight and carriage and conveyance of the said cargo, goods and merchandise in the declaration mentioned, according to the terms and provisions of the said charter-party and memorandum, and a certain other sum, to wit, 1570*l.* 0*s.* 1*d.* was payable to the defendants on the final discharge of the said ship or vessel according to the terms and provisions of the said charter-party and memorandum for the use of the said ship, and for freight and carriage and conveyance of the said cargo, goods, and merchandise to wit, on, &c. last aforesaid; yet the plaintiffs did not and would not then, to wit, on, &c. last aforesaid, or at any other time, nor did the said Robert Stockdale, pay or offer to pay the said sums of money, or any part thereof, to the defendants; but the plaintiffs had always neglected and refused, and still did refuse, to pay the same, and the said sums of money were still due and unpaid respectively to the defendants; and, thereupon, and upon the refusal of the plaintiffs to pay the said sums of money, respectively, the defendants did refuse to deliver, or to suffer or permit the said master to deliver, the said cargo to the said *A. B. Belcher*, and had hindered and prevented the delivery of the said cargo, goods, and merchandise to the plaintiffs, and had detained, and still did detain, the same on board the said ship, and had refused, and still did refuse, to suffer the plaintiffs to re-
*513] move or unload the said cargo, and kept and detained, *and still did keep and detain possession of the whole ship or vessel so

having on board the cargo, goods, and merchandise aforesaid, as they lawfully might for the cause aforesaid, and as and for a lien for the moneys so respectively due and payable according to the terms and provisions of the said charter-party and memorandum aforesaid; which were the same matters in the declaration in that behalf alleged, and therein supposed to be breaches of the promise and undertaking of the defendants. Verification.

Special demurrer, assigning, among other causes, that it did not appear that the defendants at the time of committing the said breaches of promise, were in possession of the said ship or cargo, or in a situation to enforce their lien.(a)

Seventh plea. As to so much of the declaration as related to the said supposed breaches of promise by the plaintiffs in their declaration alleged, wherein they complained of the defendants not suffering or permitting the master to perform and fulfil all things by him to be performed and fulfilled as master in pursuance of the said charter-party, and not suffering or permitting the delivery of the said cargo, goods and merchandise so shipped on board in pursuance of the said charter-party, and refusing to deliver, or to suffer, or permit the master, or any other person, to deliver, the said cargo to the said *A. B. Belcher*, agreeably to the bills of lading, or to the plaintiffs, and hindering and preventing the delivery of the said cargo, goods, and merchandise to the plaintiffs, and detaining the same on board the said ship, contrary to the true intent and meaning of the said charter-party and memorandum, and not suffering the *plaintiffs as assignees after the bankruptcy of the said Robert Stockdale, to use or enjoy [*514 the said ship according to the terms of the said charter-party and memorandum, or to possess the entire and exclusive use and disposal of the whole reach and burthen of the said vessel with the exception therein mentioned, and the depriving the plaintiffs of the use and enjoyment of the ship, and seizing and taking possession of the whole of the said ship and excluding the plaintiffs therefrom, and refusing to suffer the plaintiffs to possess the use and disposal of any part of the same, or to remove or unload the said cargo, and keeping and detaining possession of the whole of the said ship or vessel so having on board the said cargo, goods, and merchandise,—that after the making of the said charter-party and memorandum, and during the subsistence of the provisions thereof, and after the bankruptcy of the said Robert Stockdale, and after the arrival of the said ship at London, to wit, on, &c. last aforesaid, and before the final discharge thereof, the said cargo, goods, and merchandise were by the bills of lading thereof made deliverable to the plaintiff, *A. B. Belcher*, or his assigns, he or they paying freight for the same as customary, and although the said freight amounted to a large sum, to wit, 1400*l.*; and although there was then due and owing to the defendants, owners of the said ship, for the use of the said ship, for freight and carriage and conveyance of the said cargo, goods, and merchandise a large sum of money, to wit, 1348*l.* 19*s.* 6*d.*, according to the terms of the said charter-party and memorandum; and although a certain other large sum, to wit, 221*l.* 0*s.* 7*d.*, was payable to the defendants, the said owners of the said ship, on her final discharge, for use of the said ship, and for freight and carriage and conveyance of the said cargo, goods, and merchandise, according to the terms of the said charter-*party and memorandum, to wit, on, &c. last aforesaid; and although the two last-mentioned sums so respectively due and pay- [*515

(a) Plaintiffs' points:—"The plaintiffs will contend that the defendants had no lien upon the ship or cargo, and they will also rely upon all or any of the causes of demurrer stated in the body of this demurrer."

able to the defendants amounted to a large sum, to wit, to an amount not less than the amount of the said freight, to wit, to the sum of 1570*l.* 0*s.* 1*d.*, payable as customary as in that behalf as aforesaid; yet the said plaintiff, *A. B. Belcher*, did not and would not then or at any other time, and the said other plaintiffs did not and would not pay or offer to pay the said sum above in that behalf mentioned, or any other sum for freight for the said goods as customary, or any part of such freight, but to pay the same or any part thereof neglected and refused, and had always hitherto neglected and refused, to wit, on, &c. last aforesaid; and thereupon the defendants refused to suffer the delivery of the said cargo, goods, and merchandise, or to permit the master or any other person to deliver the same to the said *A. B. Belcher* or to the plaintiffs, and detained the same on board their said ship, and refused to suffer the plaintiffs to remove or unload the said cargo, and kept and detained possession of their said ship so having on board the said cargo, goods, and merchandise as they lawfully might for the cause aforesaid; which were the said supposed breaches of promises in the introductory part of this plea, and in the said declaration in that behalf alleged. Verification.

Replication, that the said freight so payable according to the terms of the said bills of lading by the said *A. B. Belcher*, or his assigns, as in the said seventh plea mentioned, was payable to the said James M'Cormick so by the said Robert Stockdale appointed master of the said ship as aforesaid; and that at the time of the arrival of the said ship, and at the time of seizing, taking, keeping, and detaining possession thereof by the defendants as in that plea and in the declaration mentioned, and of their said refusal to
*516] suffer the delivery of *the said cargo, goods, and merchandise, continued to be such master, and the said last-mentioned freight was so payable to the said James M'Cormick *as the master and agent of the said plaintiffs as assignees as aforesaid;* the said last-mentioned freight being, by the terms of the said charter-party, payable to the affreighter of the said vessel, and the said last-mentioned freight not being payable to the defendants or to the said James M'Cormick, as *their* agent in that behalf; and that on the arrival of the said ship, to wit, on the said 1st of October, 1840, the plaintiffs as such assignees as aforesaid discharged the said *A. B. Belcher* from paying to the said James M'Cormick, and the said James M'Cormick from receiving from the said *A. B. Belcher*, the said last-mentioned freight, and then required the said James M'Cormick to deliver the said cargo, goods, and merchandise without payment of such freight in respect thereof; and the said James M'Cormick was then ready and willing to deliver, and, but for the hindrance, prevention, and refusal of the defendants in that behalf, and their so seizing and taking and keeping possession of the said ship and cargo, goods, and merchandise as in the said declaration aforesaid, would have then delivered the said cargo to the said *A. B. Belcher* according to the said bills of lading, and according to the requisition of the plaintiffs, without the payment of the freight aforesaid. Of all which premises the defendants before and at the time of the committing of the said breaches of promise in the declaration mentioned, or any of them, to wit, on, &c. last aforesaid, had notice. Verification.

Rejoinder: that the said James M'Cormick, the said master, was put in by the said R. Stockdale the charterer of the said vessel as aforesaid, of his own appointment, under and in pursuance of the privilege by the said charter-party of affreightment in that behalf, reserved and allowed, in
*517] manner and form as by the said charter-party *of affreightment in

the declaration in that behalf was alleged, *as the defendants' master of the said ship, and as their agent and servant in respect of the said ship;* and the said James M'Cormick became and was the agent of the said plaintiffs as such assignees, in such manner, and to such extent as by the said charter-party of affreightment in the declaration in that behalf was alleged, and not otherwise; and that the said James M'Cormick had no other possession, control, or disposal of the said cargo, goods, and merchandise than in the character of such master of the defendants' vessel so appointed as aforesaid; that although the freight for such goods and merchandise was, by the said charter-party, eventually payable to the said affreighter in manner and form as was in the said charter-party in the declaration in that behalf alleged, yet the said James M'Cormick so being such master of the defendants' ship, did, as their master of the said ship, and as their agent, by and with the knowledge and consent of the plaintiffs *or* (a) of their agent, lawfully authorized, sign the said bills of lading in the said plea mentioned, to wit, on the day and year in that behalf in the said plea mentioned, and did thereby, on the behalf of the defendants undertake and promise that the said goods, wares, and merchandise in that plea in that behalf mentioned, should be delivered to the plaintiff *A. B. Belcher* or his assigns, he or they paying freight for the same, as customary, to the defendants; that at the time of the said signing of the said bills of lading, and thence hitherto a large sum of money, to wit, 311*l.* 6*s.* 6*d.* had become and was due and owing from the said R. Stockdale to the defendants according to the terms and provisions of the said charter-party; of which the plaintiffs then had notice; that after the said signing of the said bills of lading, according to the provisions of the said charter-party, divers other large sums of money become *due and owing to the defendants in respect of the said freight [*518 therein mentioned, before, and on, the arrival of the said ship, to wit, on the day and year in the replication to the seventh plea in that behalf alleged, amounting to a large sum of money, to wit, 1000*l.*, and that at the time of the supposed breaches in the introductory part of the plea mentioned, to wit, on the day and year in that behalf therein mentioned, the plaintiffs had notice, and were informed by the defendants, that the said two sums of money therein mentioned, to wit, the sums of 1348*l.* 19*s.* 6*d.*, and 221*l.* 0*s.* 7*d.* were, according to the terms of the said charter-party and memorandum, due and payable respectively to the defendants, and were then unpaid, as therein in that behalf mentioned; and the plaintiffs were then by the defendants requested to pay the same, and the plaintiffs were and the said *Alexander Brymer Belcher* was then by the defendants requested to pay to them the said freight as customary, according to the terms of the bills of lading as aforesaid; and that they the defendants did not consent or agree that the said assignees should discharge the said *A. B. Belcher* from paying the freight or any part thereof. *Without this*, that the last-mentioned freight was not payable to the defendants, in manner and form as the plaintiffs had in their said replication to the said seventh plea in that behalf alleged; concluding to the country.

Special demurrer; and joinder.

Eighthly. The defendants pleaded as to so much of the declaration as related to the supposed breaches of promise alleged by the plaintiffs in their said declaration, wherein they complained of the defendants' refusal to deliver, or to suffer or permit the master to deliver the said cargo to the said *A. B. Belcher*, or to the plaintiffs, and of the defendants' detaining the same on

(a) *Sic;* but not assigned as cause of demurrer.

board the said ship, and refusing to suffer the plaintiffs to remove or unload the
*519] said cargo so being on board the same,—*that after the making of the said charter-party and memorandum, and during the subsistence of the provisions thereof, and after the said ship or vessel had sailed and proceeded on her voyage, as in the declaration mentioned, and before the bankruptcy of R. Stockdale, to wit, on the 13th of May, 1840, a large sum of money, to wit, 311*l.* 6*s.* 6*d.* became and was due and owing from the said R. Stockdale to the defendants, according to the terms and provisions of the said charter-party and memorandum; and thereupon, to wit, on &c. last aforesaid, the defendants commenced an action against R. Stockdale to recover the last-mentioned sum; and thereupon, afterwards, and before the bankruptcy of R. Stockdale, to wit, on &c. it was mutually agreed between R. Stockdale and the defendants, that the defendants should withdraw their said action and all proceedings at law against R. Stockdale, and that R. Stockdale should deliver to one W. G. Colchester the bill of lading for the said intended homeward cargo, and should impower the said W. G. C. to receive the amount of the proceeds thereof, for the purpose of paying the defendants in the first place any freight that might be due to them on the said charter-party for the vessel, and the balance thereof to the account of R. Stockdale with W. G. C.; and afterwards, and before the bankruptcy of R. Stockdale, to wit, on &c. last aforesaid, in pursuance of the last-mentioned agreement, the defendants withdrew their said action and all proceedings at law against R. Stockdale, and R. Stockdale empowered, authorized, and licensed W. G. C. to receive the amount of the said proceeds, for the purpose aforesaid; that afterwards, and after the arrival of the said ship or vessel in London, on the 28th of September, 1840, a large sum of money, to wit, 1348*l.* 19*s.* 6*d.* for freight, became and was due to the defendants on the said charter-party for the said vessel, and the said sum still remained due and unpaid
*520] to the defendants; and thereupon, *to wit, on &c. the defendants, the said owners of the said ship or vessel, as well in their right as for and on behalf and as the agents of W. G. C., and with his consent, went on board of the said ship and took possession of the said cargo, goods, and merchandise in the declaration mentioned, being the said homeward cargo of the said ship or vessel for the purpose last aforesaid; and in such right, and as such agents as aforesaid, in pursuance of such agreement, power, authority and license, refused to deliver, or suffer or permit the said master to deliver, the said cargo to the said *A. B. Belcher* or to the said plaintiffs, and detained the same on board the said ship, and refused to suffer the plaintiffs to remove or unload the said cargo, so being on board of the same; as they lawfully might for the cause aforesaid; which were the said supposed breaches of promise in the introductory part of that plea, and in the declaration, in that behalf alleged. Verification.

Replication, *that at the time of making the agreement in the eighth plea mentioned, the said cargo, goods, and merchandise were not, nor was any part thereof, on board the said ship or vessel, and that the said bills of lading* so agreed to be delivered to W. G. C. *were not, nor were nor was any such bills or bill of lading, at the time of making the said agreement, made out or in any way in existence*, nor had the same at any time come into the power, possession, or control of W. G. C., or the defendants, or R. Stock dale; and the said power, authority, and license to receive the amount of the proceeds of the said cargo, so given by the said R. Stockdale to W. G. Colchester, were so given at the time of making the said agreement, and before the shipping of the said cargo, goods, and merchandise, or the ex-

istence of any such bills of lading; that after the making of the said agreement, and before the said cargo, goods, and merchandise were so shipped on board the said ship or vessel, *and before any such bills of lading were in existence, and before the said license, power, and authority had conferred, or could confer, upon the said W. G. Colchester any title to, or control over, the said cargo, goods, and merchandise, and before the arrival of the said vessel, and before the said cargo, goods, and merchandise or vessel were in any manner in the possession of the defendants or the said W. G. Colchester, and whilst the said R. Stockdale was the apparent and reputed owner of the goods and merchandise, and before the defendant had withdrawn the said action in the said eighth plea mentioned, and whilst the same was still pending, to wit, on the 13th of June, 1840, the fiat in bankruptcy against R. Stockdale, and under which he was and is such bankrupt as aforesaid, and under which the plaintiffs were appointed such assignees as aforesaid, was awarded, and the said R. Stockdale was found to be, and was, such bankrupt as aforesaid, and the plaintiffs were then, in due form of law, appointed such assignees as aforesaid; whereupon and whereby the said consent, power, and authority of the said R. Stockdale so given as aforesaid to the said W. G. Colchester, and the said agreement so made as, in the said last plea, aforesaid, between the defendants and R. Stockdale, were altogether revoked, annulled, defeated, and determined; of all which premises the defendants then and before the committing of the breaches of promise in the declaration mentioned or any of them, and before any exercise of the license, power, or authority so given to the said W. G. Colchester as aforesaid, to wit, on, &c. last aforesaid, had notice; that the said cargo, goods, and merchandise and vessel were, from the time of the same cargo, goods, and merchandise being shipped on board the said ship or vessel until the same were so seized and taken possession of by the defendants, as in the declaration mentioned, in the possession, order, custody, *and control of the plaintiffs, as such assignees as aforesaid, and of James M'Cormick as the agent of the plaintiffs as such assignees as aforesaid; and that the plaintiffs had not in any way confirmed, sanctioned, or assented to the said agreement in the said last plea mentioned, or the said license, power, or authority so given by the said R. Stockdale to the said W. G. Colchester, as in the said last plea mentioned, but had altogether rejected and repudiated the same. Verification.

[*521 — margin] [*522 — margin]

Rejoinder. That before the bankruptcy of R. Stockdale, and before any revocation by him of the agreement, power, authority, and license in the said last plea mentioned, to wit, on the 30th of May, 1840, divers large quantities of goods, wares, and merchandise were, and had been theretofore, provided by certain agents of R. Stockdale, and on his account, to wit, at Sierra Leone in Africa, and placed by them in and on board the said vessel as and for a part of the said homeward cargo of the said vessel, on account of the said R. Stockdale; which last-mentioned goods, wares, and merchandise were afterwards, and before the bankruptcy of the said R. Stockdale, to wit, on the 1st of June, 1840, brought in the said vessel from Sierra Leone to the river Gambia in Africa, and then and there unloaded and discharged from the said vessel, for the purpose of enabling the said vessel to proceed to take in divers quantities of timber, and for the purpose of more conveniently loading the whole of the homeward cargo in and on board the said ship; and the said last mentioned goods, wares, and merchandise were landed on shore, to wit, on, &c. last afore-

said, and before the bankruptcy of R. Stockdale, and there remained, to wit, until the shipment thereof as hereinafter mentioned, destined, prepared, and ready for shipment in and on board the said vessel, as and for
*523] a part of the said homeward *cargo of the said vessel, on account of the said R. Stockdale; that afterwards, and before the bankruptcy of R. Stockdale, to wit, on the 4th of June, 1840, divers other large quantities of goods, wares, and merchandise were, and had been theretofore, provided and prepared by certain agents of R. Stockdale, to wit, at the river Gambia in Africa, and were then by them prepared and destined and ready for shipment for or on account of R. Stockdale, and as and for a further portion of the said homeward cargo of the said ship or vessel; that afterwards, to wit, on, &c., last aforesaid, the said goods, wares, and merchandise in this rejoinder to the replication to the last plea first and lastly above mentioned, were shipped on board the said ship or vessel, as and for the said homeward cargo thereof; and thereupon afterwards, to wit, on the day and year, and for the purposes and causes, and in the right and by the power, authority, license, and consent, in the said last plea in that behalf mentioned, the defendants went on board and took possession of the said goods, wares, and merchandise therein lastly referred to, to wit, of the said homeward cargo of the said ship or vessel, and refused to deliver or to suffer or permit the said master to deliver the said cargo to the said *A. B. Belcher*, or to the plaintiffs, and detained the same on board the said ship, and refused to suffer the plaintiffs to remove or unload the said cargo so being on board of the same; as they lawfully might for the cause aforesaid; and that these were the supposed breaches of promise in the introductory part of the said last plea mentioned. Verification, and prayer of judgment, if, &c.

Special demurrer; and joinder.(a)

*524] **Channell*, Serjt., in support of the demurrers to the pleas. The first question is, whether the sixth plea in which the defendants set up a lien on the cargo for freight, can be sustained: and that will depend on the construction to be put upon the charter-party. It is submitted that, by the charter-party, there was an absolute letting or hiring of the ship to the charterer, and consequently that the claim of lien cannot be supported. By the memorandum the defendants "agreed to let" and the charterer "agreed to hire" the vessel for six calendar months, upon the terms and conditions "that during the said term of that agreement as thereinafter provided, the said affreighter should possess the entire and exclusive use and disposal of the whole reach and burthen of the said vessel, with the exception of the space occupied with the cabin, together with room for the usual accommodation of the crew, and for the stowage of the ship's stores and provisions." It is clear from these words that the intention of the parties, was, to constitute the charterer the owner of the ship for the speci-

(a) Plaintiffs' points.—The plaintiffs will contend that the cargo, being in the reputed ownership of the bankrupt at the time of his bankruptcy, and subsequently, until the seizure by the defendants, in the possession and custody of the plaintiffs as assignees, and never having been in the custody of Colchester or the defendants, and the defendants not having abandoned their action, according to the terms of the agreement, such agreement not having been at all carried into effect at the time of the bankruptcy, and no bills of lading being then in existence, (all which things are admitted by the rejoinder to the replication to the last plea,) the agreement, even if otherwise binding, became of no effect, and any authority conferred by it would be revoked; and this, notwithstanding certain goods might have been prepared and destined for the cargo before the bankruptcy; and the plaintiffs will also insist and rely upon all or any of the causes of demurrer stated in the body of this demurrer.

fied period. In *Hutton* v. *Bragg*, 7 Taunt. 14, 2 Marsh. 339, which is still considered as one of the leading cases on this subject, it was held that the owner of a vessel has no lien for the hire stipulated by the charter-party for the voyage on the goods shipped by the charterer; because *the latter is the owner of the ship for the voyage, and the first owner has no possession of the ship or goods, without which there can be no lien. [*525
The case of *Newberry* v. *Colvin*, 7 Bingh. 190, 4 M. & P. 876, is also a strong authority against the defendants. There the owners, among other things, covenanted that the ship should be taken into the service of one B. for a certain time, and B. covenanted to receive the vessel into his service during that time, and to pay for the use and hire of the said ship certain freight; and it was held, 8 B. & C. 166, 2 Man. & R. 47,(*a*) overruling the judgment of the court of King's Bench, that these stipulations were equivalent to an actual demise of the ship, and that the effect of the charter-party was to make the freighter the legal owner of the ship *pro tempore*. Here, the charter-party, in addition to other expressions which of themselves are equivalent to a demise of the ship, contains actual words of demise. *The Master, &c. of the Trinity House* v. *Clark*, 4 M. & S. 288, is to the same effect. There, the defendant chartered his ship to the commissioners of the transport service on behalf of the Crown, to be employed as a transport, and the ship, in the course of such employment, made several voyages from Deptford to foreign ports and back; and it was held that, by the terms of the charter-party, coupled with the nature of the service, a temporary ownership passed to the Crown; so that the defendant, during the time of such service, was not to be considered as owner, within the charters granted to the Trinity House, which impose lighthouse duties, and for buoyage and beaconage on the masters and owners of ships. Lord ELLENBOROUGH, in the course of his judgment, observed: "The charter-party 'grants' the ship," "and 'lets it to hire and freight,' *which are proper words of lease, and would of themselves pass the possession." [*526
In *Saville* v. *Campion*, 2 B. & Ald. 503, which will probably be cited on the other side, the charter-party contained no express words of demise; and there was, as observed in the judgment, nothing to show that the delivery of the goods was to precede the payment of the stipulated hire in cash and bills. In *Tate* v. *Meek*, 8 Taunt. 280, 2 B. Moore, 278, and *Yates* v. *Railston*, 8 Taunt. 293, 2 B. Moore, 294, it is clear there was no demise of the ship, and that the delivery of the cargo and the payment of the freight were to be concomitant acts. Undoubtedly, in *Christie* v. *Lewis*, 2 Brod. & B. 410, 5 B. Moore, 211, although the charter-party contained words of demise, a majority of the judges held that, taking the whole of the charter-party into consideration, the possession of the ship did not pass to the freighter, but remained in the owner; but DALLAS, C. J., dissented, and thought the case governed by *Hutton* v. *Bragg*. The utmost extent to which *Christie* v. *Lewis* can be pushed is, that actual words of demise may be controlled by other stipulations in the charter-party, which are inconsistent with an intention to give the charterer possession of the vessel. But here there is nothing to limit or control the words of demise, for every portion of the charter-party is consistent with the charterer having the absolute possession of the ship. In *Campion* v. *Colvin*, 3 New Cases, 17, 3 Scott, 338, the question arose upon the same charter-party as that in *Saville* v. *Campion*. It is submitted that under this charter-party

(*a*) The judgment of the court of error was confirmed by the House of Lords, 6 Bligh, 189, 2 Dow, 415.

the plaintiffs had a right to the possession of the ship until her cargo was finally discharged, and the plea discloses no answer to the declaration as to the charge of excluding the plaintiffs from the vessel, and refusing to permit them to remove or unload the cargo.

*527] *With respect to the seventh plea, the validity of that plea depends on the same question as that of the sixth; for the defendants cannot justify the detention of the cargo if they had no lien. The freight for the homeward cargo was payable to the charterer; the captain, who was appointed by the charterer as his agent, having signed bills of lading making the goods deliverable to *Belcher*. As regards the rejoinder to the replication to the seventh plea, it is clearly bad; for all that it traverses is, an inference of law.

The eighth plea sets up an agreement by which Stockdale, before his bankruptcy, agreed with the defendants to deliver to Colchester the bills of lading for the homeward cargo, and to empower Colchester to receive the proceeds, to be applied as in the plea mentioned, and justifies the taking possession of the cargo under such agreement. To this plea the plaintiffs have replied, that at the time of the agreement no part of the cargo was on board the vessel, nor any of the bills of lading in existence, and that before the shipping of the cargo or the existence of the bills of lading, and before Colchester had any control over the cargo, and while Stockdale was the apparent and reputed owner thereof, Stockdale became bankrupt, and the plaintiffs were appointed assignees, whereby the authority given to Colchester and the agreement with the defendants became revoked, &c. The rejoinder states that before the bankruptcy, and before any revocation of the agreement or authority, certain goods were shipped at Sierra Leone by Stockdale's agents, as part of the homeward cargo, which goods were carried to the river Gambia, where, for the more convenient loading of the whole cargo, they were landed; and that other goods provided by Stockdale's agents at the river Gambia were, before his bankruptcy, ready for shipment, as a further portion of the homeward cargo; and that afterwards
*528] both sets of goods *were shipped on board the vessel as the homeward cargo thereof. It is clear that the rejoinder affords no answer to the replication; for it appears on the face of the pleadings that Colchester never was in the possession of the cargo under the agreement, or of the bills of lading, previously to the bankruptcy, and consequently that there is no assignment of the goods, at law or in equity, so as to prevent them, on Stockdale's bankruptcy, vesting in the plaintiffs as his assignees.

Bompas, Serjt., (with whom was Greenwood,) *contrà*. The tendency of the later decisions has been to increase the power of the ship-owner to hold the cargo until the freight has been paid. *Hutton* v. *Bragg* has been repeatedly overruled, and can no longer be considered as law. *The Master, &c. of the Trinity House* v. *Clark*, was decided on the specific ground that the government had a complete control over the vessel, rather than on the terms of the charter-party. No case has been cited at all analogous to the present, where the point determined was the broad question of lien. There are many cases where, although the charter-party contained words of demise, the ship-owner has been held to have a lien. In *Paul* v. *Birch*, 2 Atkyns, 621, it is said by Lord HARDWICKE, "As to the general law, the cargo is no doubt liable to pay the freight, or the expense of carrying the goods." In *Mitchell* v. *Scaife*, 4 Campb. 298, the vessel was let for a voyage from Liverpool to Jamaica and back, and the balance of the freight was to be paid on the delivery of the homeward cargo at L-er-

pool, by bills, in like manner as here the balance of the freight is to be paid in cash on the vessel's final discharge. In that case the captain had signed bills of lading for the cargo, (which was the property of, and consigned to, a third *party,) specifying a rate of freight amounting to a less sum than that mentioned in the charter-party. It was held [*529 that the owner had a lien on the cargo for the freight specified in the bills of lading, but not beyond. In *Birley* v. *Gladstone*, 3 M. & S. 205,(a) where the vessel was let to freight, the owner's claim to freight on the goods actually brought home, was not disputed. In *Tate* v. *Meek*, the owner of the vessel covenanted to deliver the cargo at the place of destination, agreeably to bills of lading that should be signed for the same, and the freighters covenanted to pay for the freight and hire of the vessel for the voyage at certain rates per ton, &c.; the said freight to be paid part in cash on the day the vessel should be reported inwards, and the remainder, by bills at two months after date from the day on which the delivery should be complete. The master having signed bills of lading for the delivery of the freighters' goods to order or assigns, they paying freight as per charter-party; it was held that the owner was justified in detaining the goods until payment of the freight stipulated by the charter-party. GIBBS, C. J., in delivering judgment, says, "The question is, whether the delivery of the goods and the payment by a bill be not concomitant acts, which neither party is obliged to perform without the other being ready to perform the correlative act. We think they are such." In *Tate* v. *Meek* undoubtedly there were no words of demise; but such words did occur in *Yates* v. *Railston*, 8 Taunt. 293, 2 B. Moore, 294, and *Yates* v. *Meynell*, 8 Taunt. 302, 2 B. Moore, 297, notwithstanding which the ship owners were held not to be bound to part with the goods until they received *the freight. *Saville* v. *Campion* is in many respects analogous to the [*530 present case, and is a strong authority for the defendants. *Faith* v. *The East India Company*, 4 B. & Ald. 630, is also an important case to show the lien of the ship-owner on the cargo for freight, although such freight is expressed to be payable for the use or hire of the ship. In *Christie* v. *Lewis*, PARKE, J. says, "The question in all these cases generally has been a question of construction, or rather a question of fact arising out of the construction, whether there has been an entire letting or parting with the possession of the ship for given purposes, so that during the time the owner has no efficient control, but the charterer has the full disposition of the ship, or, in other words, to use the language of GIBBS, C. J. in *Tate* v *Meek*, whether the delivery of the cargo and the payment of freight are to be considered as concomitant acts. When the fact is ascertained, the legal result is clear." [MAULE, J. Here, the bills of lading make the freight on the homeward cargo payable to the charterer.] It is usual where the freight to be paid under the bills of lading is more or less than that stipulated in the charter-party, to make it payable to the charterer. The payment of the freight and the delivery of the cargo clearly are concurrent acts, and the ship-owner is not bound to deliver the goods without receiving the freight. In *Small* v. *Moates*, 9 Bingh. 574, 2 Moo. & Sc. 674, there was an express contract for a lien, and TINDAL, C. J., in delivering the judgment of the court, says, "An express contract is the strongest and surest ground upon which the right of lien can in any case be placed; and in his charter-party the charterer has, in effect, covenanted with the ship

(a) See also *Gladstone* v. *Bailey*, 2 Meriv. 401.

owner, that whatever may be the legal operation of the charter-party as be-
*531] tween themselves, the charterer's possession *of the ship shall be the possession of the owner so far as the right of the latter to a lien on the cargo is in any way concerned." That case shows, that although by the terms of the charter-party, the possession of the ship be given to the charterer, the owner's right of lien shall still be preserved if such appear to be the intention. Whenever freight is to be paid on the delivery of goods, a lien is created; for, as observed by PARKE, J., in *Christie* v. *Lewis*, when it is ascertained that the delivery of the cargo and the payment of freight are to be considered as concomitant acts, the legal result is clear. [MAULE, J. Supposing in this case the voyage had terminated within the six months?] *Campion* v. *Colvin*, 3 New Cases, 17, 3 Scott, 338, in which, as already stated, the question arose on the same charter-party as that which was before the court in *Saville* v. *Campion*, is also confirmatory of the lien of the defendants. By this charter-party, the defendants do not part with the possession of the ship; for the cabin, deck, and other portions of the vessel still remain under their control; and if the owners are in possession of any part of the ship they are in possession of the whole; as where the owner of a house sublets a part, the whole is in law considered to be in his possession. The defendants also undertake to keep the vessel in repair, and in case of accident the monthly payments are to be suspended. Although the charterer was to have the privilege of putting in a master of his own; that is a usual stipulation, particularly in East India voyages. The charterer also agrees to be responsible to the owners for the master's conduct "whilst he should have the navigation of *their* vessel." Looking at the whole of the charter-party, it is clear, that the defendants never intended to part with the possession of the ship.

Supposing, however, that, in strictness, the defendants had not a lien on
*532] the homeward cargo, yet *where there are concurrent acts to be performed by the parties, the party seeking to enforce performance by the other side, should in his declaration aver performance of the concurrent acts to be done on his part. In *Spiller* v. *Westlake*, 2 B. & Ad. 155, it is said by Lord TENTERDEN, "Where by one and the same instrument a sum of money is agreed to be paid by one party, and a conveyance of an estate to be at the same time executed by the other, the payment of the money and the execution of the conveyance may very properly be considered concurrent acts; and in that case no action can be maintained by the vendor to recover the money until he executes or offers to execute, a conveyance." So, in *Morton* v. *Lamb*, 7 T. R. 125, Lord KENYON says, "Where two concurrent acts are to be done, the party who sues the other for non-performance, must aver that he had performed, or was ready to perform his part of the contract." *Jones* v. *Barkley*, 2 Dougl. 684; *Phillips* v. *Fielding*, 2 H. Bla. 123; and *Rawson* v. *Johnson*, 1 East, 203; are to the like effect. [MAULE, J. The declaration here contains a general averment of performance. *Channell*, Serjt, referred to *Varley* v. *Manton*, 9 Bingh. 363, 2 Moo. & Sc. 484; and *Kemble* v. *Mills*,(a) to show that such an averment is sufficient on general demurrer.] Even if the defendants had not, strictly speaking, a lien, the sixth plea is good. [TINDAL, C. J. You may set out in your plea a good substantial answer—a right to keep the goods—without in terms alleging that they are kept for a lien.] If the defendants show upon the declaration and the plea, that the delivery of the goods and the payment of freight are to be concurrent acts, that is

(a) Ante, Vol. I. 757. 2 Scott, N. R. 121.

sufficient. The real object of the declaration is, to *recover damages for not delivering the cargo, and it treats the refusal to deliver the cargo as an exclusion of the plaintiffs from the vessel. There is, however, no foundation for the charge, if the owners never parted with the possession of the vessel. [*533

The lien claimed in the seventh plea, is upon the homeward cargo under the bills of lading. With respect to the rejoinder to the replication to that plea, the only point in which the defendants could take issue, was, whether the freight was payable to them. If that issue had been taken simply, all the necessary facts would not have been on the record. The defendants therefore set out a number of facts to show that the freight was payable to them, and then take issue on the allegation that it was not so payable; consequently, the rejoinder amounts to an argumentative denial with a special traverse of such allegation. It is said that the traverse is a mere legal inference, but if so the replication is bad as not being in confession and avoidance.

The eighth plea involves a question of considerable importance. The effect of the contract thereby disclosed is, to modify the charter-party, and, at all events, to make the homeward cargo liable for the freight. The contract set up is one which is by no means unusual, namely, to bind the cargo to pay the freight. As Stockdale could not pay the freight then due, he agreed to make the cargo liable. The answer attempted, is that Stockdale became bankrupt before the goods were put on board. But it is clear that the agreement amounted, in effect, to an equitable assignment of the goods.(a) The plaintiffs contend that the goods were not bound by the agreement, as they were not specifically set out. The rejoinder, however, shows that although not on board, they were specifically appropriated for the cargo. In *Brown* v. *Heathcote*, 1 Atkyns, 160, one R. W. and his partner gave *a bond to H. for 1200*l.* and the same day assigned by deed to H., or order, the goods in two ships *then at sea;* and also thirteen bills of lading and policies of insurance containing the said goods as a collateral security. The latter were endorsed to H., the former not. Upon a bill brought by the assignee of R. W., who had become bankrupt, for these goods, insisting that R. W. acted as the visible owner, the ship and cargo not being put into the possession of H.; the court was of opinion that every thing which could show a right to the ship and cargo being delivered over to H., R. W. could no longer be said to have the *order and disposition* of them within the meaning of the 21 Jac. 1, c. 19, s. 11., and consequently that H. had a right to retain the ship and cargo till the principal sum and interest were paid. So in *Lempriere* v. *Pasley*, 2 T. R. 485, an assignment of goods at sea as a collateral security for a debt, and a subsequent endorsement of a bill of lading were held good, as against the assignees of the assignor, who had committed an act of bankruptcy between the assignment of the goods and the endorsement of the bill of lading. The principle of these cases was recognised in *Burn* v. *Carvalho*, 1 A. & E. 883., 4 N. & M. 889; *Hutchinson* v. *Heyworth*, 9 A. & E. 375, 1 P. & D. 266, is also a strong authority upon this point. [*534

Channell, Serjt., in reply. It is contended that the court should treat the delivery of the cargo and the payment of the freight as concurrent acts; but the balance of the freight is to be paid on the discharge of the vessel, and not on the discharge of the cargo. If, as put by Mr Justice MAULE, the voyage had terminated within the six months, it is clear that the char-

(a) See *Bruce* v. *Wait*, 3 M. & W. 15.

terer could not have discharged the vessel, but must have paid a monthly
*535] *compensation for the remainder of the time; and, although the vessel had earned no freight, he must still have paid. This case, therefore, differs from *Crozier* v. *Smith*.(*a*) The circumstance relied on—that the owners were to repair the vessel, amounts to nothing; such a clause is to be found in every charter-party. The owner of a house does not the less demise a house, because he covenants to repair it.

Supposing the defendants had no lien on the cargo, it is clear that it never came into their possession until they improperly seized the vessel after her return to England, and that they never had possession of the bills of lading. Moreover, it nowhere appears that the goods were appropriated so that the bills of lading could operate upon them. In *Brown* v. *Heathcote* and *Lempriere* v. *Pasley*, the goods were actually assigned; but here every thing rested in contract, the defendants never having possession of any document as a symbol of title; and there is nothing to show that the bankrupt ever lost his control over the goods. *Cur. adv. vult.*

TINDAL, C. J., now delivered the judgment of the court.

This case came on upon demurrers by the plaintiffs to the sixth plea, and to the rejoinders to the replications to the seventh and eighth pleas.

The action was brought by the plaintiffs, as assignees of the estate and effects of Robert Stockdale, a bankrupt, for the breach of a charter-party of affreightment, made, before the bankruptcy of Robert Stockdale, between the defendants as owners, and Robert Stockdale as charterer, of the ship Maas. By the charter-party, as set out in the declaration, the defendants agreed to let, and Robert Stockdale agreed to hire, the ship Maas for
*536] and during *the term of six calendar months, such term to commence fourteen days after the vessel should be ready to enter at the custom-house, upon the terms and conditions, that during the term of that agreement, or as thereinafter provided, the affreighter should possess the entire and exclusive use and disposal of the whole reach and burthen of the said vessel, with the exception of the space occupied with the cabin, together with room for the usual accommodation of the crew, and for the stowage of the ship's stores and provisions; that the master should, from time to time, and as often as the interest of the affreighter should require, take on board, and properly stow, all such lawful goods, to the extent of a full and complete cargo, if required, as should be tendered to him for that purpose, and proceed therewith upon such lawful voyage or voyages as he the said affreighter or his agents should direct him to do; and that he should deliver the said goods and merchandise agreeably to the bills of lading; that the freight and primage for such goods should be payable to the affreighter or his order; that in the event of the completion of the six months, whilst the vessel was upon a voyage or after she had commenced taking goods on board for a voyage, the term of that agreement should be prolonged until the discharge of her cargo after her arrival at, or return to, a port in Great Britain, at which place the final completion of that agreement was to take place, unless otherwise mutually agreed between the owners and the affreighter; the owners or master to keep the vessel tight and manned, provisioned and fitted with necessary stores; in consideration of which the affreighter agreed to pay to the owners at the rate of 22*s*. per ton per calendar month, for so long as she should be employed by him as aforesaid under that agreement; such consideration to be
*537] paid by one month's pay in advance in cash, one month after the *vessel should be entered outwards, one month's pay that day two

(*a*) Antè, Vol. I. 407.

months, and one month's pay at the expiration of each succeeding month till the end of the term she might be employed,—thus leaving one month's pay in abeyance,—and the balance in cash, on her final discharge, together with all port-charges and pilotage, except in Great Britain; the master to be supplied with such cash as he might require for ship's disbursements at any of his loading or discharging ports, by the charterer's agent, free of commission, taking the master's draft upon his owners for the same; which amount was to be paid by the owners or deducted from the balance of freight due to the vessel. The declaration then states certain clauses for the suspension of the monthly payments, during interruptions of the voyage, for repairs, and for the ceasing of all payments in case the vessel should be lost, and other terms not material to the present inquiry; and then proceeds to set out a provision that the charterer was to have the privilege of putting in a master of his own appointment, he finding the cabin with all stores, and paying his wages, the owners allowing whatever rate of wages they paid their own masters; and that, as the master was to be appointed by the charterer to superintend his interests, the owners were not to be responsible for such master's acts and conduct should he deviate from the charter-party; but the charterer held himself responsible to the owners for the said master's honest and correct conduct, and strict integrity whilst he should have the navigation of their vessel. The declaration then proceeds to allege mutual promises in the usual general form, and a promise by the defendants to suffer and permit the master to perform all things by him to be performed as master in pursuance of the charter-party, and to suffer and permit the delivery of the cargo according to the terms of the charter-party, and to suffer and permit the *charterer to use the ship according to the terms of the charter-party during its continuance, [*538 and during that time to possess the entire and exclusive use and disposal of the whole reach and burthen of the said vessel, with the exception of the space occupied with the cabin, together with room for the usual accommodation of the crew, and for the stowage of the ship's stores and provisions. The declaration then proceeds to aver that Stockdale had, before his bankruptcy, put in the ship a master of his own appointment; and that the ship proceeded on her voyage under his command; and that the master had, at certain places named, taken on board goods and merchandise according to the terms of the charter-party, and after the bankruptcy of the charterer proceeded therewith on the homeward voyage of the vessel, according to the orders and directions of the plaintiffs, assignees of the charterer; and that the vessel so loaded arrived at London at the West India docks, the six months' term mentioned in the charter-party having expired after the commencement of the loading of the vessel, and the terms of the agreement having been thereby prolonged until after the discharge of her cargo at a port in Great Britain. The declaration then proceeds to allege performance by the bankrupt, and by the plaintiffs as assignees, and alleges as a breach of the defendants' promise, that they did not suffer or permit the delivery of the goods and merchandise shipped on board the vessel in pursuance of the charter-party; but, on the contrary thereof, although the goods were by the bills of lading thereof, made deliverable to the plaintiff, *Alexander Brymer Belcher*, who, on the arrival of the vessel, was, and thence hitherto hath been, ready to receive the same; and, although the plaintiffs, as such assignees, were then ready and willing to unload the same at the West India docks, and to take the same from alongside at their expense, and to deliver the *same to the said *A. B. Belcher*, according to the bills of lading; yet the defendants refused [*539

to deliver, or to suffer or permit the master or any other person to deliver the cargo to the said *A. B. Belcher*, agreeably to the bills of lading, or to the plaintiffs, and have prevented their delivery, and detained them on board the vessel contrary to the meaning of the charter-party. The declaration then assigns as a second breach that the defendants would not suffer and permit the plaintiffs, as assignees, to use or enjoy the vessel according to the terms of the charter-party during its continuance, or during that time to possess the entire and exclusive use and disposal of the whole reach and burthen of the said vessel, with the exception stated in the charter-party, but that, after the bankruptcy of Stockdale, and after the ship's arrival in London, and before the discharge of the cargo, and during the continuance of the charter-party, they deprived the plaintiffs of the use and enjoyment of the ship and every part thereof, and the defendants themselves seized and took possession of the whole of the said ship, and excluded the plaintiffs therefrom, alleging, as special damage, the deterioration of the goods, and the loss of profits by the sale.

The defendants, by their sixth plea, allege that after the making the charter-party, and during the subsistance of its provisions, and after the bankruptcy of Stockdale, and after the arrival of the ship at London, and before her final discharge, a large sum of money was due to the defendants as owners of the ship, for the use of the ship, according to the terms of the charter-party, and for the freight and carriage and conveyance of the cargo and goods in the declaration mentioned, according to the terms and provisions of the charter-party; and a certain other sum of money was payable to the defendants on the final discharge of the ship, for the use of the said
*540] ship, and for freight, and carriage of the *cargo; yet that the plaintiffs and R. Stockdale would not pay the amount, or any part thereof, and the same remains unpaid; and the plea then proceeds to justify the refusal to deliver the cargo, and the detention of the same on board the ship, and their refusal to permit the plaintiffs to remove the same, and the keeping possession of the whole ship so having such cargo on board *as and for a lien* for the moneys so respectively due and payable according to the terms and provisions of the charter-party.

To this plea the plaintiffs have demurred, and have assigned several causes of special demurrer, to which, as will afterwards appear, it is unnecessary to advert.

Upon this demurrer two questions were argued before us—first, whether, by the terms of the charter-party, the defendants had any lien upon the cargo in respect of the freight or debt due under the charter-party for the hire of the ship—secondly, whether the existence of any such lien would justify the defendants excluding the plaintiffs from the ship before her final discharge.

It must be admitted that there is some contradiction in the authorities bearing upon the first point, viz.: the right of lien in the owners of the ship, and that, in the later cases, the terms of actual demise have not been considered as affording so decisive a criterion of the intention of the contracting parties as was supposed to belong to them in the case of *Hutton* v. *Bragg*, 7 Taunt. 14, 2 Marsh. 339. But when the several cases are closely examined, it will be found that the apparent conflict of authorities in this instance, as in all other questions arising upon the construction of written instruments, arises more from the variety of terms employed by the parties themselves in framing their contracts than from difference of opinion in the judges who interpret them; for in each of the cases in

*which the owner's lien has been supported notwithstanding the [*541 terms of express demise, other stipulations will be found, sufficient to rebut the inference that the owners meant to part with the possession of the ship. Thus, in *Mitchell* v. *Scaife*, 4 Campb. 298; *Birley* v. *Gladstone*, 3 M. & Sel. 205; *Yates* v. *Railston*, 8 Taunt. 293, 2 B. Moore, 294, and *Christie* v. *Lewis*, 2 Brod. & B. 410, 5 B. Moore, 211, there were terms that showed that the payment of the hire was to be either precedent to, or concomitant with, the delivery of the goods; whereas, in *Small* v. *Moates*, 9 Bingh. 574, 2 M. & Scott, 674, the lien of the owner was expressly reserved by the charter-party. In each case the whole contract must be taken together, and due effect given to the several clauses that counteract or qualify each other; and thus it often happens that the same expression will bear different meanings, and require a different interpretation, according to the context of the instrument in which they are found. In construing this charter-party, therefore, we have not relied implicitly upon the interpretation put by judges in other cases on any particular expression also found in this contract; but we have collected the intention of the contracting parties from the whole scope of the instrument, having reference nevertheless to the several authorities cited at the bar, as guides to our decision; and we are satisfied that, in this particular case, according to the terms of this particular charter-party, the possession of the vessel was given up by the owners to the charterer during the continuance of the contract; that the master was in possession of the cargo as agent for the charterer, and not as the servant of the owners; that personal credit was given to the charterer for the payment of the hire of the vessel; and that no lien, or right of stoppage of the goods, was intended to *be reserved to the [*542 owners as a security for the payment of the contract price. And we come to this conclusion because we find words of demise large enough to transfer the possession, if such words were necessary. We find also the owners giving to the charterer the power of appointing his own master, and requiring him to be responsible for the conduct of the master so appointed, as he would be for the conduct of his own servant; and we find that, in fact, the master was so appointed by the charterer. We find, further, that the freight for the goods was to be paid according to the bills of lading to the master thus appointed by the charterer, for the charterer's use, without any stipulation for its application towards the payment of the agreed price for the hire of the vessel. And we further find that, according to the terms of the contract, the parties contemplated that every part of the cargo would be delivered before the balance reserved would become payable; and on the other hand, we find nothing in the contract that indicates any intention to make the delivery of the cargo to depend upon the precedent or concomitant payment of any portion of the stipulated price.

We are therefore of opinion that neither the declaration alone, nor the declaration and sixth plea taken together, disclose any facts that would give the defendants the lien which they claim; and the plaintiffs therefore will have judgment on the demurrer to the sixth plea. On this ground it becomes unnecessary for us to say any thing upon the minor point—of the exclusion of the plaintiffs from the whole of the vessel,—or upon any of the special grounds of demurrer.

The seventh plea is pleaded in effect to so much of the declaration as relates to the alleged breach in not suffering and permitting the delivery of the cargo, and in detaining the same on board the ship, and taking and detaining possession of the whole of the ship with the *cargo on [*543 board, and excluding the plaintiffs therefrom, and in justification

in substance alleges, that although the cargo and goods were, by the bills of lading, deliverable to *A. B. Belcher* or his assigns, he or they paying customary freight for the same, and although the freight amounted to a large sum, and although there was then due to the defendants, as owners of the ship, for the use of the said ship for freight and carriage, a large sum according to the terms of the charter-party, and although a further sum of money was payable to the defendants, as owners of the said ship, on her final discharge for the use of the said ship, and for freight and carriage and conveyance of the said cargo and goods, yet the said *A. B. Belcher* refused to pay the said sums of money, or any other sum, for freight for the said goods; whereupon the defendants refused to suffer the delivery of the said goods to *A. B. Belcher* or to the plaintiffs, and detained the same on board the said ship, and refused to suffer the plaintiffs to remove or unload the said cargo, and kept and detained the possession of their said ship, so having on board the said cargo; as they lawfully might, for the cause aforesaid.

To this plea the plaintiffs replied, that the freight so payable, according to the terms of the bills of lading by the said *A. B. Belcher* or his assigns, was payable to James M'Cormick as the master and agent of the plaintiffs as assignees of Stockdale, the freight being by the terms of the charter-party payable to the affreighter of the said vessel, and the said freight not being payable to the defendants or to James M'Cormick as their agent in that behalf; that on the arrival of the ship the plaintiffs as assignees discharged the said *A. B. Belcher* from paying to M'Cormick, and M'Cormick from receiving the freight, and required M'Cormick to deliver the cargo
*544] without payment of such freight; and that the said James *M'Cormick was then ready and willing to deliver, and but for the hindrance of the defendants, and their so seizing and taking and keeping possession of the ship and cargo, would have delivered the cargo to the said *A. B. Belcher*, without the payment of the freight.

To this replication the defendants rejoin, that James M'Cormick was put in by Robert Stockdale the charterer of the vessel of his own appointment, under and in pursuance of the privilege reserved by the charter-party, as the defendants' master of the said ship, and as their agent and servant in respect of the said ship; and that the said James M'Cormick became and was the agent of the plaintiffs as such assignees, in such manner, and to such extent as by the charter-party is alleged and not otherwise, and that the said James M'Cormick had no other possession, or control, or disposal of the said cargo than in the character of master of the defendants' vessel, so appointed as aforesaid; and the defendants further say, that although the freight was eventually payable to the affreighter, yet James M'Cormick as the defendants' master of the ship, and as their agent with the knowledge and consent of the plaintiffs signed the bills of lading mentioned in the seventh plea, and thereby, on behalf of the defendants, undertook and promised that the goods and merchandise in that plea mentioned should be delivered to the said *A. B. Belcher* or his assigns, he or they paying freight for the same as customary, to the defendants, and that at the time of the signing of the bills of lading, and thence hitherto a large sum was due and owing from Robert Stockdale to the defendants according to the terms of the charter-party; and that after the signing of the bills of lading according to the provisions of the charter-party, other large sums of money became due to the defendants in respect of the freight, before and on the arrival of the ship; and that the plaintiffs had notice that the
*545] two sums *mentioned in the seventh plea, were, according to the terms of the charter-party, due and payable to the defendants, and

were then unpaid, and were requested to pay the same; and that the plaintiffs and also *A. B. Belcher* were requested by the defendants to pay to them the freight as customary, according to the terms of the bills of lading, and that the defendants did not consent that the assignees should discharge *A. B. Belcher* from paying the freight; *without this, that the said last-mentioned freight was not payable to the defendants.*

To this rejoinder the plaintiffs demurred, assigning several special grounds of demurrer. But as it is obvious from the pleadings, that the main question raised upon this demurrer has already been disposed of by our judgment on the demurrer to the sixth plea, and as we have already held that the master must be considered as having signed the bills of lading as agent for the charterer, and to be entitled as such agent, and not as the servant to the owners, to demand the freight upon those bills from consignees, and that the defendants had no lien upon the goods for the stipulated price for the hire of the ship, it will be unnecessary to say any thing more upon this part of the case, than that the judgment upon this demurrer must also be entered for the plaintiffs.

The eighth and last plea is pleaded to so much of the declaration as relates to the alleged breach in refusing to deliver, or to suffer and permit the master to deliver, the cargo to *A. B. Belcher* or to the plaintiffs, and in retaining the cargo on board the ship and refusing to suffer the plaintiffs to remove or unload the said cargo. The defendants by this plea allege that before the bankruptcy of R. Stockdale, a large sum of money became due from him to the defendants according to the terms of the charter-party, to recover which the defendants commenced an action against R. Stockdale, and that before his bankruptcy, it was agreed between *R. Stockdale [*546 and the defendants, that the defendants should withdraw their action, and all proceedings at law against R. Stockdale, and that he should deliver to W. G. Colchester the bills of lading for the then homeward cargo, and should empower W. G. Colchester to receive the amount of the proceeds thereof, for the purpose of paying in the first place to the defendants any freight that might be due to them on the charter-party, and the balance to the account of R. Stockdale with W. G. Colchester; that in pursuance of the agreement the defendants withdrew their action and all proceedings at law against R. Stockdale, and that he empowered to W. G. Colchester accordingly; that after the arrival of the vessel a large sum of money was due to the defendants on the charter-party for the freight: whereupon the defendants, owners of the ship as well in their own right, and also as agents of W. G. Colchester, and with his consent, went on board of the ship and took possession of the homeward cargo for the purpose last aforesaid, and in such right and as such agents, and in pursuance of such agreement and authority, refused to deliver, or to suffer or permit the master to deliver, the cargo to *A. B. Belcher* or to the plaintiffs, and detained the same on board the ship, and refused to suffer the plaintiffs to remove or unload the same; as they lawfully might, &c.

To this plea the plaintiffs replied, that at the time of the making of the agreement therein mentioned, no part of the cargo was on board the vessel, nor any of the bills of lading in existence, nor had they at any time come into the possession of W. G. Colchester or of the defendants, or of R. Stockdale; and that the authority to receive the amount of the proceeds of the cargo was given by R. Stockdale to W. G. Colchester before the shipping of the cargo, or the existence of the bills of lading; and that also

before the shipping of the cargo, or the existence of the bills of lading, and
*547] before W. G. Colchester *had any control over the cargo, and while R. Stockdale was the apparent and reputed owner thereof, and whilst the defendants' action against him was still pending, R. Stockdale become bankrupt, and the plaintiffs were appointed his assignees, whereby the authority given to W. G. Colchester by R. Stockdale, and the agreement made with the defendants became revoked of which the defendants had notice before any exercise of the authority given to W. G. Colchester. The plaintiffs in their replication further allege that the cargo was from the time of the shipping thereof till the seizure thereof by the defendants in the possession and control of the plaintiffs as assignees, and of James M'Cormick as their agent, and that the plaintiffs had not in any way confirmed or assented to the agreement in the last plea mentioned, or to the power or authority given by R. Stockdale to W. G. Colchester, but had altogether rejected the same.

To this replication the defendants have rejoined, that before R. Stockdale's bankruptcy, and before any revocation by him of the agreement, or of the authority given by him, certain goods had been provided and shipped at Sierra Leone by R. Stockdale's agents, as part of the ship's homeward cargo, and on his account; and that these goods were afterwards carried in the ship to the river Gambia, where for the purpose of more conveniently loading the whole of the homeward cargo, they were landed before R. Stockdale's bankruptcy, and there remained ready for shipment. The defendants further allege, that other goods provided by R. Stockdale's agents at the river Gambia were also before his bankruptcy ready for shipment on his account as a further portion of the homeward cargo; and that afterwards both sets of goods were shipped on board the vessel as the homeward cargo thereof; and thereupon the defendants, for the purposes, and
*548] by the authority in the last plea *mentioned, went on board and took possession of the homeward cargo of the ship, and refused to deliver or to permit and suffer the master to deliver the cargo to *A. B. Belcher*, or to the plaintiffs, and detained the same on board the ship, and refused to suffer the plaintiffs to remove or unload the same, as they lawfully might, &c.

To this rejoinder the plaintiffs have demurred specially; but, in the view we take of the case, it becomes unnecessary to consider the special causes of demurrer assigned.

In considering the questions raised upon these pleadings, it must be remembered that the plaintiffs, as assignees, take the property of Stockdale, subject to all the encumbrances, equitable as well as legal, to which it would have been subject in the hands of Stockdale himself if he had continued solvent, except in those cases specially provided for by the bankrupt act. Two questions, therefore, will arise upon this demurrer: first, whether any lien, legal or equitable, vested in Colchester before the bankruptcy of Stockdale; and, secondly, whether such lien, if it existed, has been affected by the bankruptcy of Stockdale. It was not contended at the bar that there had been any legal assignment of the goods to Colchester, but it was argued that the agreement stated in the eighth plea amounted to an equitable assignment to him, and that he had an equitable lien on the goods, to the extent of the freight due to the defendant on the charter-party; and the cases of *Brown* v. *Heathcote*, 1 Atk. 160; *Lempriere* v. *Pasley*, 2 T. R. 485; *Burn* v. *Carvalho*, 1 Ad. & E. 883, 4 N. & M. 889; and *Hutchinson* v. *Heyworth*, 9 Ad. & E. 375, 1 P. & D. 266, were cited as authorities

for this point. According to these authorities, there can be no doubt that, if the goods had been on board the vessel, and the bills of *lading [*549 had been handed over to Colchester before the bankruptcy, though not endorsed to him till afterwards, he would have acquired a good equitable lien, not only as against Stockdale, but as against the assignees. And, according to the opinion of Lord HARDWICKE in *Brown* v. *Heathcote*, he would have acquired such lien as against Stockdale by virtue of the agreement alone, without the delivery of any bill of lading. The cases of *Lempriere* v. *Pasley*, and *Falkener* v. *Case*, as cited by Mr. Justice ASHHURST in the former case, were decided against the assignees, on the ground that the bankrupt had done all that was in his power to complete the equitable assignment, and to deprive himself of the power of disposing of the property assigned. The case of *Burn* v. *Carvalho* was decided in favour of the assignees, because the equitable assignment was not complete before the bankruptcy. In the case of *Hutchinson* v. *Heyworth*, the bankrupt had sent out directions to his agent abroad before his bankruptcy, to pay a portion of the proceeds of certain shipments to certain creditors there; and the money having been paid after the bankruptcy, and after notice from the assignees, the question was, whether the bankrupt's directions had been revoked by his bankruptcy; and the court held, that as the agent had, before the bankruptcy of his principal, pledged himself to the creditor upon his guaranteeing him against the claims of other creditors, to pay over the money according to the principal's orders, there was either an appropriation of the funds to that extent, or an equitable assignment, before the bankruptcy, and that in neither case was there any revocation by the bankruptcy of the owner.

On the part of the plaintiffs it was contended, that neither of these cases was in point; that there was in this case no actual assignment of the goods, but only a contract to assign at some future time; that *Colchester [*550 never had possession either of the goods, or of any symbol representing the goods; and that the contract had been revoked by the bankruptcy of Stockdale before any cargo had been finally shipped on board the vessel; and, therefore before the contract had attached to any definite goods, and while it was uncertain of what goods the cargo would be eventually composed.

As to the first portion of the cargo, which had been brought on board the vessel from Sierra Leone to the river Gambia, and there unloaded for the temporary purpose of more conveniently loading the whole of the homeward cargo, we think that those goods are sufficiently alleged to have been in the possession of the charterers, at the date of the agreement, as part of the intended homeward cargo mentioned in the agreement, to bring them within the terms of that agreement, as equitably assigned to Colchester for the purposes mentioned in that agreement; and if the other part of the cargo had been with equal clearness described to have been in the possession of the charterers' agents, and to have been *set apart*, as well as *destined*, as part of the homeward cargo before and at the time of the agreement, we should have been inclined to hold that the agreement operated as an assignment in equity of those specific goods, and that those goods were sufficiently identified with the goods that form the subject of the present action. But there is so much obscurity in the language of the rejoinder as to that portion of the cargo that was provided at the river Gambia, that we find it impossible to say, with any degree of certainty, that the goods which were afterwards put on board of the vessel and brought to England, were at any

time before the bankruptcy set apart and definitely appropriated as part of the homeward cargo, so as to form the subject of any complete assignment before the bankruptcy of Stockdale.

*551] But this becomes of less importance, because we are *of opinion, that if enough had been shown to make out a valid equitable assignment as against Stockdale himself if he had remained solvent, still the property in all the goods passed to the plaintiffs, as goods in the order and disposition of the bankrupt at the time of his bankruptcy, under the seventy-second section of the statute 6 G. 4, c. 16; and that, therefore, as against the assignees, Colchester could not set up any lien under the agreement stated in the plea. Before this agreement the bankrupt was the real owner of the goods, and according to the most favourable view of the statement in the rejoinder, was, through his agents, in actual possession of them. By the replication it is alleged, and not denied by the rejoinder, that neither Colchester nor the defendants ever had possession of the goods forming the intended cargo, but that Stockdale continued the apparent and reputed owner. By the assignment to Colchester, he became in equity the owner of the goods; and, according to the case of *Ryall* v. *Rolle*, 1 Atk. 165, and many subsequent cases, an equitable assignee is to be considered as the true owner of the goods assigned, within the meaning of the provisions in the bankrupt laws respecting reputed ownership. If, therefore, the goods forming the intended cargo were in the possession, order, and disposition of Stockdale at the time of his bankruptcy, with the consent of Colchester the true owner, the property in those goods would pass to the assignees. And as by the pleadings it is admitted, that the bankrupt was left in the sole possession and management of the cargo, with full power to dispose of, or gain credit upon, any part of it, having parted with no document that was essential to his power of disposal, we see no ground upon which we can hold these goods to be exempted from the operation of the seventy-second section of the bankrupt act. 6 G. 4, c. 16.

*552] *The judgment must therefore be entered for the plaintiffs upon this demurrer, as well as upon the former demurrers before considered. Judgment for the plaintiffs.

THAMES-HAVEN DOCK AND RAILWAY COMPANY *v.* ROSE.

By a private act, the business of a company thereby incorporated was to be carried on by *twelve* directors; five of whom were to be a quorum. There were provisions in the act as to the election of new directors in case of death, &c. The directors were authorized to make calls, and in case of non-payment the company had power to sue.

An action having been brought for calls, the defendant, in March, suffered judgment by default. In Trinity term following he applied to set aside the judgment, upon the ground that at the time the calls were made, there were only seven directors; and that he had only lately learnt that fact.

The court refused the application, holding that the enactment as to the number of directors was only directory.

Also, *semble*, that the application was made too late.

Bompas, Serj., on behalf of the defendant, moved for a rule calling upon the plaintiffs to show cause why the judgment, which had been signed in this cause, and all subsequent proceedings, should not be set aside for irregularity.

The company was incorporated by a private act, 6 & 7 W. 4, c. cviii.,

by the name and style of The *Thames-Haven Dock and Railway Company*.(a) The *defendant was a proprietor in the company, and [*553
the action was brought against him in respect of calls. He

(a) The following sections of this act were referred to in the argument:—

Section 108 enacts, that the business and concerns of the company shall be carried on under the management of *twelve directors*, to be chosen from time to time from amongst the proprietors for the time being of the company, qualified by holding ten shares or upwards each; and that such directors shall have the general management, direction, superintendence, and control of the business and concerns of the company, and the custody of the common seal of the company, with power to use the same on their behalf, and also the custody of the books of account, and other books, deeds, and papers, and shall have power to direct the investment, calling in and laying out, sale and disposal of the stock, effects, funds, moneys, and securities of the company, and all other the dealings of the company, and to call and appoint the times and places of holding general and other meetings of the proprietors, and to superintend, direct, and control the correspondence and mode of keeping the accounts, and the ascertainment of dividends, and the profits on shares, and to do all other things necessary, or to be deemed by them proper or expedient, for carrying on the business and concerns of the company, and to enforce, perform, and execute all the powers, authorities, privileges, acts, and things in relation to the company, and to bind the company, as if the same were done by the whole corporation, except such as are hereby required to be done at some general or special meeting of the company; and the directors for the time being shall have power to frame rules and regulations, and prescribe the orders and directions for carrying on the business and concerns of the company, and alter and vary the same from time to time as they in their discretion shall think fit; and all such rules and regulations shall have the force of bye laws, provided the same be not repugnant to any of the provisions of the act, nor to any bye law which may have been duly passed at any general or special meeting of the proprietors of the company; and no individual proprietor, not being a director, (except as hereinafter provided,) shall have a right to any interference, management, direction, or control in or over the business and concerns of the company, or the capital, stock, or effects thereof.

Sect. 109 enacts, that nine individuals therein named, shall be the first directors of the company, and that they shall, unless they or any of them shall sooner die, resign, or become disqualified, as thereinafter mentioned, continue in office until the first general meeting of the company to be held after the passing of the act; that at such meeting, all the directors shall go out of office, and *twelve directors* shall be elected in their place and stead, who shall continue in office until the first half-yearly meeting of the company in the year 1838, that at such half-yearly meeting in 1838, three of the directors who shall have been so elected as aforesaid (to be determined by ballot amongst themselves) shall go out of office; that at each first half-yearly general meeting in the three following years, three of the directors who shall have been so elected as aforesaid (to be determined by ballot amongst themselves) shall go out of office, and at each half-yearly general meeting in every subsequent year the three directors who shall have been longest in office since their last election, shall go out of office; and at every general half-yearly meeting at which three directors are to go out of office as aforesaid, three new directors shall be elected.

Sect. 110 provides and enacts, that any director who shall, by ballot or rotation, go out of office, may be immediately or at any future time re-elected by the company as a director, and that after such re-election he shall, with reference to the going out in rotation, be considered as a new director.

Sect. 111 provides and enacts, that no person holding any office, &c., or being concerned or interested in any contract, under the company, shall be capable of being chosen, or of continuing, a director, nor shall any director be capable of accepting any office, place, or employment, or of taking or being concerned, or interested in any contract under the company; and that in either of the said cases, the party so offending shall forfeit the sum of 50*l*. during the time he shall be a director; and that if any director shall, at any time subsequent to his election, accept or continue to hold any other office or place of trust or profit under the company, or shall either directly or indirectly be concerned in any contract with the company, or shall participate in any manner in any work to be done for the company, or shall at any time cease to be a proprietor of ten shares at least in the undertaking, the office of such director shall thereupon become vacant, and he shall thenceforth be disqualified from voting or acting at any succeeding meeting of directors: provided nevertheless, that until the disqualification of any director shall have been communicated to, and recorded by, a court of directors, every act and proceeding to which such disqualified director shall have been a party, shall be as binding and effectual as if no such disqualification had taken place: provided also, that it shall be lawful for any general meeting to exempt any particular person from the operation of this present clause, in case they shall deem it advantageous so to do.

Sect. 112 enacts, that when any director elected by virtue of the act, shall die or resign or become disqualified or incompetent to act as a director, or shall cease to be a director

*555] *had suffered judgment by default on the 10th of March last; but the affidavit on which the motion was made, *stated that it had only lately come to his knowledge, that there were only *seven* directors of the company at the time the calls in question were made.

*556] *The learned serjeant contended that, as by the 108th section,(a) all the business and concerns of the company were to be carried on by twelve directors, and that as there were only seven at the time the calls were made, in respect of which the action was brought, there were no proper parties to maintain the action. [MAULE, J. The 112th

by any other means than by going out of office, it shall be lawful for the remaining directors to elect some other proprietor duly qualified to be a director; and that every such proprietor so elected to fill up any such vacancy, shall continue in office so long only as the person in whose place or stead he may be elected would have been entitled to continue in office had he lived and remained in office.

Sect. 116 enacts, that the directors for the time being shall meet together at the office of the company once at least in every two calendar months, and at such other times as they shall think proper, and at such other times as they shall be convened as thereinafter mentioned; and each of such meetings shall be styled a court of directors; but that no meeting shall be deemed a court competent to enter and determine upon business unless at least *five directors* shall be present at the commencement of the business, and when a decision takes place upon the whole or any part of the business; and if, on the day appointed for such meeting, a sufficient number of directors to constitute a court shall not attend, then and in every such case the meeting shall be adjourned to the next or some subsequent day by the directors then present, but if none be present, then by the secretary of the said company, or such other person as shall attend in his place; and that any director shall be at liberty to call an extraordinary meeting of directors, upon such notice and in such manner, and to consist of at least such number (not being less than five,) as shall from time to time be provided by the bye-laws of the company, or the orders of the court of directors, &c.

Sect. 118 enacts, that *the directors* shall have full power from time to time to make such calls of money from the several subscribers to, and proprietors for the time being of, the undertaking, not exceeding in the whole, including the sums already paid in respect of such share, the sum of 150*l*. for each share, as they shall from time to time find necessary for the purposes of the undertaking; so that no call shall exceed the sum of 5*l*. upon each share in the undertaking, and so that the total amount of such calls in any one year shall not exceed 20*l*. upon each share, and that there shall be an interval of three calendar months between every two successive calls; and that such several sums of money so to be called for shall be paid into such bank or banks, or to such person or persons and at such time and place and in such a manner, as the directors shall from time to time order and appoint, and that of such time and place twenty-one days notice at the least shall be previously given by advertisement, under the hand of the secretary for the time being, inserted in two or more London newspapers, and in one or more newspaper or newspapers usually circulating in the county of Essex.

Sect. 119 enacts, that the court of directors for the time being shall have full power and authority to use the common seal on behalf of the company; and that all contracts in writing relating to the affairs of the company, which shall be signed by any three of the directors in pursuance of a resolution of a court of directors, shall be binding on the company and all other parties thereto, their respective successors, heirs, &c., and actions and suits may be maintained thereon, and damages and costs recovered by or against the company or any other parties thereto, failing in the execution thereof.

Sect. 123 enacts, that the several parties who have subscribed, or who shall hereafter subscribe, for or towards the undertaking, and every proprietor of any share in the undertaking, shall pay the respective sums of money by them respectively subscribed for, or such parts or proportions thereof as shall from time to time be called for by the directors, by virtue of and pursuant to the powers and authorities of the act, to such persons and at such times and places as the directors shall from time to time, in manner thereinbefore mentioned, direct and appoint; and that if any proprietor of any such shares shall refuse or neglect to pay his ratable proportion of the money, so to be called for at such time and in such manner as aforesaid, then and in such case, and so often as the same shall happen, such proprietor shall pay interest for the same after the rate of five pounds per centum per annum, from the day appointed for payment thereof up to the time when the same shall be actually paid; and that if any proprietor of any such share shall neglect or refuse to pay such his ratable proportion, together with interest (if any) accruing for the same, for the space of one calendar month next after the day appointed for the payment thereof, then *it shall be lawful for the company to sue for and recover the same*, with full costs of suit, in any of His Majesty's courts of record, by action of debt or on the case, or by bill, &c.

(a) Supra, 552.

section (a) says, that when any of the twelve directors shall die, &c., it shall be *lawful* for the remaining directors to elect some other proprietor, &c., to be a director." It does not say it shall be *necessary* to do *so. [*557 CRESSWELL, J. Is there any thing in the act that requires the action to be brought by twelve directors?] Not in express terms; but it is submitted, that as twelve directors are required to transact the business of the company, when there are not so many, there is in fact no company. The expression, that "it shall be lawful" for them to proceed to an election in cases of a vacancy, must be construed in an imperative sense.(b) The 116th section(c) provides that five directors may act as a quorum, but the five must be part of the twelve. [MAULE, J. The other directors may have died or become disqualified.] Then the remaining directors are bound to proceed to a new election. [TINDAL, C. J. There must be some interval between the death of a new director and a re-election. MAULE, J. Or there may not remain twelve shareholders with ten shares each, which is the qualification requisite to become a director.] In that case the corporation would be at an end. [MAULE, J. There might be ground for applying for a mandamus in the present state of the company, to order them to proceed to a new election; but it would be going a great way to set aside the proceedings in an action.] Suppose there were only one director left, it could not be said that the company were then properly constituted so as to sue other parties. And the same principle will apply to the present state of facts. [COLTMAN, J. There does not appear to be any irregularity on the face of the proceedings?] There does not; but they would appear equally regular if the action were brought by a stranger in the name of the company. In such a case the court would set aside the proceedings, on the ground that the action had been brought without authority. MAULE, J. There might be some ground for that argument if the application were made on the *part of the company; but here, they appear to approve of the action. They might, if they had thought proper, have [*558 called a meeting and instructed counsel to state that the action was brought without their authority.] It is submitted that it is equally open to the defendant to rely upon that point, as there are no parties in existence legally competent to authorize the action. The present application has been made at the earliest possible period, as it appears from the affidavit that it was only during the present week that the defendant discovered there were only seven directors when the calls were made upon which the action is brought. [MAULE, J. It may be, that only seven attended at the meeting. TINDAL, C. J. Or the number may have been filled up before the action was brought; and the twelve directors may have adopted the acts of the seven. CRESSWELL, J. The 123d(d) says, that "it shall be lawful for the *company* to sue."] But the company have no power to act unless there are the proper number of directors. [COLTMAN, J. If the defendant had paid these calls, could he have been required to pay them again?] It is submitted, that if fresh calls had been made by a meeting of twelve directors, he *would* have been liable to pay those calls. In order to constitute a proper meeting, it is necessary to summon twelve directors; five of whom may act. But, in the present case, there can have been a summons of seven only; and five of that number have no power either to make calls, or to authorize the action being brought.

TINDAL, C. J. This is confessedly a case of the first impression, no precedent having been shown for a similar application.

(a) Suprà, 554. (b) Vide 1 Wms. Saund. 58. n. (1) (c) Suprà, 554. (d) Suprà, 556

*559] The first observation that occurs is, that this is a *very late period for making the application. The judgment was signed in March, and the defendant at that time had all the means of knowledge which he now possesses, so far as they are derived from the act of parliament, and an inspection of the books of the company; but he does not make this application till nearly the middle of Trinity term, when the consequence of acceding to it would be, that the proceedings would stand over till after the long vacation.

But, independently of this, I think there is no ground for the present application. The action is brought by the company for a debt, admitted by the defendant to be due, as he has allowed judgment to go by default. The act says that the company may sue; and they *have* sued in this instance. It is however contended, that upon this power to sue must be ingrafted, what is said in another part of the act—that the business and concerns of the company shall be carried on under the management of twelve directors; but that I think is matter of direction only. If any party is dissatisfied with the proceedings of the company, because there is not the full number of directors, he may apply for a mandamus to have the number completed. If the fact of the number not being completed is an answer to an action for calls, it is pleadable as such, and ought to have been pleaded in this instance; but a defendant cannot apply to the equitable jurisdiction or the discretion of the court, to set aside a judgment upon grounds which might have been pleaded as an answer to the action.

It appears to me, that the proper parties to the record being before us, and the debt being admitted, the court ought not—especially at this period of time—to interfere in the matter.

Coltman, J. This is an application to the summary jurisdiction of the court, which ought not to be acceded *to, unless for the purpose of furthering justice. It has not been shown that, if the money were paid in this action, it could be recovered again from the defendant; and it appears to me that it could not. I agree, therefore, that there ought to be no rule.

*560]

Maule, J. I am of the same opinion. I do not think that, according to the act of parliament, it is necessary that there should be always twelve directors of the compay. The question depends upon sects. 109, 110, 111 and 112(*a*) [The learned judge read those sections.]

By sect. 112, in the case of death or disqualification of any of the directors, a power is given to the remaining directors to elect others, but it is not compulsory on them to do so. If they are of opinion that the number of directors is not sufficient to enable them to carry on the affairs of the company, they may elect others. At present there are only seven directors; but it may be, that seven are a sufficient number for the purposes of the company. It appears to me that the provision referred to is a mere arrangement as to the internal affairs of the company, and that it does not apply to their external affairs, or prevent them from enforcing calls that have been duly made.

Cresswell, J., concurred. Rule refused.

(*a*) Supra, 553, 554.

*CROTTY v. HODGES. [*561

B., by the authority of A., wrote the name of A. as acceptor upon a blank paper, bearing a bill stamp, and added his own name as drawer. C. afterwards filled up the bill, and added the words, "payable at the Bank of E.," under the name of A. This was done without the knowledge of either A. or B.

To a declaration by an endorsee against A., as acceptor, (not stating the bill to be payable at any particular place,) the defendant pleaded *non acceptavit*. The bill being produced, *Held*, that it did not support the issue.

Assumpsit by the endorsee of a bill of exchange for 100*l*. drawn by one Watling upon the defendant, and by him accepted (generally.)

Plea: *non acceptavit;* and issue thereon.

At the trial before Tindal, C. J., at the Middlesex sittings after last Hilary term, it appeared that the name of the defendant, as acceptor, was written by Watling in the presence of the defendant, and by his direction, across the blank stamped paper, to which Watling then set his own name as drawer, (no place at which the bill was to be payable being then specified thereon.) This paper was then taken away by one Bowie, (the plaintiff's endorser,) who, in the course of the same afternoon, directed another person to fill up the body of the bill for 100*l*., and to add, to the signature of the defendant, the words "payable at the Bank of England." This addition was made without the authority or knowledge, either of the defendant, or of Watling.

It was contended, for the defence, that the additon was a material alteration, which avoided the contract, and that this defence was admissible under the plea of non-acceptance. By his lordship's direction a verdict was returned for the plaintiff; leave being reserved to the defendant to move to enter a nonsuit upon this point.

Sir *T. Wilde*, Serjt., obtained a rule nisi accordingly, in Easter term last, upon the authority of *Calvert* v. *Baker*, 4 M. & W. 417. He also cited *Rowe* v. *Young*, 2 Bro. & B. 165, 2 Bligh, 391;(a) *Tidmarsh* *v. *Grover*, 1 M. & S. 735; *Fenton* v. *Goundry*, 13 East, 459; *Cowie* v. *Halsall*, 4 B & Ald. 197, 3 Stark. N. P. C. 36; *Mackintosh* v. *Haydon*, Ryan & Moo. 362, and stat. 1 & 2 G. 4, c. 78. [*562

Talfourd, Serjt., now showed cause. The alteration is immaterial. The authority to accept was general; and the addition does not alter the legal effect of the acceptance, so as to render it a qualified one. But assuming it to be otherwise; the defence is in confession and avoidance, and should have been so pleaded, according to the rule of Hilary term, 4 W. 4, I. 3 Thus in *Hemming* v. *Trenery*, 9 A. & E. 926, 1 P. & D. 661, where the instrument declared upon appeared at the trial to have been materially altered by interlineations, it was held that the defence arising from the fact of these alterations could not be taken advantage of under the plea of non assumpsit. This was subsequent to the decision in *Calvert* v. *Baker*, where it was held that in an action by the endorsee against the acceptor of a bill, (not stated to be payable at any particular place,) it was a good defence, under a plea that the defendant did not accept the bill declared on, that after he had accepted it generally, it was altered, without his knowledge, by the addition of a memorandum making it payable at a banker's. That case must be taken to be overruled by *Hemming* v. *Trenery*. In *Cock* v. *Coxwell*, 2 C. M. & R. 291, 4 Dowl. P. C. 187, 1 Gale, Exch. Rep.

(a) Vide Story's Commentaries on Bills of Exchange, s. 239.

177, the bill having been altered was declared upon *in its altered state;* and there the plea of *non acceptavit* was held a sufficient answer.

The want of a second stamp would have been a good objection under this plea, because the instrument having been altered, was not admissible in evidence to support the affirmative of the issue raised upon the plea.

*563] **Bompas*, Serjt., in support of the rule. The defendant has put upon the record a plea, which a solemn judgment of the court of Exchequer, has decided to be sufficient. *Calvert* v. *Baker* has not been overruled, and it cannot be distinguished from the present case. If the defendant had pleaded the facts specially, his plea would have been bad, as amounting to a denial of the acceptance. [TINDAL, C. J. Might not the defendant have pleaded that the bill was altered after acceptance without his knowledge? *Hemming* v. *Trenery* seems to be a strong case.] There, a valid contract in writing had once existed; and it was held that a defence on the ground of the subsequent avoidance of that contract, by reason of the alteration, could not be raised under the general issue; but here, the authority given by the defendant was exceeded, and in fact he never did accept the bill produced. It would be a great hardship upon the defendant, if, after having pleaded in the precise form pointed out by the court of Exchequer, he should not be permitted to go into his defence under that plea. [MAULE, J. We are bound to consider whether the plea is an answer to the action. In a question of mere form, the court will not decide contrary to what has already been determined. The variance from the authority given by the defendant is material, with reference as well to the defendant as to its legal effects upon the rights of third parties. In *Tidmarsh* v. *Grover*, 1 M. & S. 735, the drawer and payee of a bill, accepted payable at B. and Co.'s, substituted E. and Co. for B. and Co. without the knowledge of the acceptor, and then endorsed the bill to the plaintiff. The acceptor was held to be discharged. [*Talfourd*, Serjt. That was before 1 & 2 G. 4, c. 78.] That statute does not affect the present question. In *Mackintosh* v. *Haydon*, Ryan & Moo. 362, it was held by ABBOTT, C. J., that *when the drawer of a bill, drawn since that statute, and accepted generally, adds to the acceptance a special place of payment without the knowledge of the acceptor, the latter is discharged. There, the acceptor was considered not to be liable upon the bill in any shape.

*564]

It was justly observed in that case, that "the right of the last endorsee to sue his immediate endorser would, as the bill appears, be complete upon default made at the banker's, and notice thereof; whereas, in truth, the acceptor, not having in reality undertaken to pay there, would have committed no default by such non-payment."(a) [MAULE, J. Your argument would be well founded, if there were a profert, with *non est factum* pleaded. Suppose the alteration to be made after some endorsements were made, but before others. CRESSWELL, J. The difficulty with respect to the stamp, appears to be this, that the stamp is insufficient unless the bill be read as it was originally drawn by Watling.]

TINDAL, C. J. It appears to me that the question here turns, not so much upon the avoidance of the bill by its subsequent alteration after acceptance, as upon the point—whether it has ever been accepted at all.

It is in evidence that the defendant authorized only the affixing of his

(a) It might also have been observed, that the last endorsee, by omitting to do that which, as the bill stood, appeared to be wholly unnecessary, namely, to present it to the acceptor for payment, would have discharged the prior endorsers.

signature to a *general* acceptance; and that, afterwards, an acceptance was affixed in a different form, which he had not sanctioned. It cannot, therefore, be said that he accepted the bill which was produced at the trial. This appears to me to get rid of the difficulty of reconciling the two cases that have been principally relied upon.

The rule must be made absolute.

*COLTMAN, J. There seems to be some conflict between the cases of *Calvert* v. *Baker* and *Hemming* v. *Trenery;* which has created a doubt with respect to the present case. But upon further consideration it appears that, without deciding between them, we may hold that here the defendant did not accept at all, the authority being to draw a bill in a particular form. [*565

MAULE, J. No fact was left, or was desired to be left, to the jury. The judge decided; but he reversed the point. The proper result of the evidence was, that the defendant authorized Bowie to draw and accept *generally.* That being so, the question is, whether this bill was ever *drawn* in any other way than as payable at the Bank of England. It seems to me that it was not. The drawing and the accepting of the bill must be considered as taking place at the same time; and, in such a case, until all is written which the party is about writing, the whole is *in fieri.* I therefore agree that a nonsuit should be entered.

CRESSWELL, J. I am of the same opinion. It appears to me that this bill never existed as an accepted bill, otherwise than as a bill payable at the Bank of England; and I think that the defendant never did accept *such* a bill.

Rule absolute.

*WETHERED v. CALCUTT. [*566

In an action against B., an overseer, for a penalty alleged to have been incurred under the 17 G. 2, c. 3, for not delivering a copy of the poor-rate to A., an inhabitant, it appeared that A. was a churchwarden of the parish. *Held,* that A. was not entitled to such copy.

DEBT, on the 17 G. 2, c. 3. The first count of the declaration alleged that the plaintiff was an inhabitant of the parish of Little Marlow, and the defendant one of the overseers of the poor of the said parish; that on the 17th of May, 1841, the churchwardens and overseers of the said parish made a certain rate for the relief of the poor, which said rate was duly allowed; that afterwards, to wit, on the Sunday next after the allowance of the said rate, to wit, on the 23d of May, in the year aforesaid, the said churchwardens and overseers of Little Marlow aforesaid, did reduce a certain notice of the said rate having been allowed as aforesaid, into writing, and did, previously to the commencement of divine service in the parish church of Little Marlow aforesaid, on the day and year last aforesaid, (the said last-mentioned day being the Sunday next, after the allowance of the said rate as aforesaid,) affix copies in writing of the said notice on the doors of all the churches and chapels within the parish of Little Marlow aforesaid; and that public notice of the said rate having been so allowed as aforesaid, was then duly given, according to the form of the statute in that case made and provided. The count then alleged a demand to inspect the rate, and a refusal by the defendant, &c.

Second count, that the plaintiff being such inhabitant, and the defendant

being such overseer of the poor of the said parish, and the said rate being so made, assessed, allowed, published, and notified as in that behalf aforesaid, he the plaintiff afterwards, at a reasonable and seasonable time in that behalf, to wit, on the 11th of October, in the year aforesaid, demanded
*567] of the defendant *so then being such overseer of the poor of the parish as aforesaid, a copy of the said rate so made, allowed, assessed, published, and notified as aforesaid, and was then, to wit, upon and at the time of the making of the said demand, ready to pay and offered to pay to the defendant for the same at and after the rate of 6*d*., for every twenty-four names thereof, and in the said rate, according to the form of the statute in that case made and provided; yet the defendant did not, nor would then, nor had he at any time since delivered or given to the plaintiff a copy of the said rate, or any part thereof, &c.

The defendant pleaded—not guilty "by statute."

At the trial before *Atcherley*, Serjt., at the last spring assizes at Aylesbury, it appeared that the plaintiff, who was one of the churchwardens of the parish of Little Marlow, had, on the 11th of October, 1841, called upon the defendant, one of the overseers of the same parish, and had demanded to inspect the rate in question, and also a copy thereof, at the same time tendering 10*s*. for such copy. The defendant informed him that the rate-book was in the possession of one Phillips, an assistant overseer, but said that he would send for it, and would let the plaintiff have a copy on the Thursday following. On the same day Phillips, by the direction of the defendant, carried the rate-book to a person of the name of Ward, in order to have a copy made of the rate. On the 25th of November, the plaintiff's attorney wrote to the defendant, threatening to proceed against him under the statute of the 17 G. 2, c. 3. On the 27th of November, the attorney for the defendant replied, stating, among other things, that "the copy of the rate required by Mr. *Wethered* was made upwards of a month ago; which he has been informed of. It has been, and now is, ready for delivery by me, on payment of 20*s*., my charge, and, now, the further charge of 5*s*."

*568] It was admitted that the rate had been duly made *and allowed, but the only evidence of publication was, that a paper which purported to be a notice of the making and allowance of the rate, was produced by Phillips, the assistant-overseer, and after being read in the church, was taken away by the defendant. The rate had been collected, and had been paid, among others, by the defendant.

For the defendant, it was contended; first, that there was no evidence of the publication of the rate; secondly, that the plaintiff, being himself a church-warden, was not within the 17 G. 2, c. 3; thirdly, that the defendant was not liable to the penalties imposed by the act, there having been no wilful refusal or neglect on his part to produce the rate, &c.; and, fourthly, that the demand to inspect the rate, &c., should have been made on Phillips, the assistant-overseer, and not upon the defendant; *Bennett* v. *Edwards*;(a) where it was held that an assistant-overseer, appointed under the 59 G. 3, c. 12, having, by virtue of his office, the poor-rate in his custody, is liable to a penalty under the 17 G. 2, c. 3, for refusing to produce it to an inhabitant when lawfully demanded.

The learned judge having directed a verdict for the plaintiff, for the amount of the penalties, with leave for the defendant to move to enter a

(a) 8 B. & C. 702, affirmed in the Exchequer Chamber, *Edwards* v. *Bennett*, 1 Bingh 230, 3 Y. & J. 455, 3 M. & P. 749.

nonsuit, if the court should be of opinion that any of the objections taken were valid.

Storks, Serjt., in Easter term last, obtained a rule nisi accordingly.

Channell, Serjt., (with whom was *Gunning*,) now showed cause (a). It is submitted that there is nothing *in the statute of 17 G. 2, c. 3, [*569] to limit the right thereby given, of enforcing the production, or the delivery of a copy, of the rate, in the manner that has been suggested. By section 2, churchwardens and overseers are to permit "all and every the inhabitants" of the parish, to inspect the rate at seasonable times, and, on demand, to furnish copies to "*any* inhabitant." By the third section, in case any churchwarden or overseer shall not permit "*any* inhabitant or parishioner" to inspect the said rates, &c., he shall forfeit the penalties therein mentioned; which are to be paid to the party aggrieved. The plaintiff is not the less an inhabitant parishioner, because he is a churchwarden. Supposing one of the overseers to take possession of the rate, and to refuse to produce it to the other parish officers, there seems no reason why they should not have the protection of the statute. It would be hard, if because a party is either a churchwarden or an overseer, he should be deprived of the benefit of the act, and be compelled to bring an action(b) to recover possession of the rate. It may be much more important to a churchwarden than to another inhabitant of the parish, to see the rate. A churchwarden or an overseer who does not sign a rate, may clearly appeal against it; and being within the words of the statute, the court will not exclude him from its provisions, if a case can be conceived in which he may be a party aggrieved by a non-compliance therewith.

Storks, Serjt., *contrà*. As no authority is to be found on this point, the court will look at the act, to see if the plaintiff comes within it. The preamble shows that the inconveniences meant to be remedied were caused by the parties who made the rate withholding it from the rest of the parish. The churchwardens and *overseers are clearly put in contradistinction to the other inhabitants; for the second section evidently contemplates the case of the former being called to produce or furnish a copy of the rate to third parties. [*570] It cannot be supposed that the remedy given by the act was meant to apply to churchwardens or overseers, who must be presumed to have the possession of those rates, the production of which the statute was passed to enforce.

TINDAL, C. J. This is an action under the 17 G. 2, c. 3, for penalties alleged to have been incurred by the defendant as one of the overseers of the parish of Little Marlow, in the county of Buckingham, for refusing to allow the plaintiff, a rated inhabitant of the parish, to inspect a rate made for the relief of the poor, and also for refusing him a copy of such rate. So far as the first count is concerned, it was not made out by the evidence, there having been no refusal to allow the plaintiff to *inspect* the rate. There was, however, some evidence to support the second count; and the question is, whether, on the facts proved, the case is brought within the statute. It seems to me that the act was passed to give the inhabitants a remedy against the officers of the parish, and that the word "inhabitants" is used in contradistinction to "churchwardens and overseers." If the churchwardens and overseers of this parish had done their duty, the whole of them, including the plaintiff, would have been present when the rate

(a) As the judgment of the court proceeded solely upon the second point, the argument on the other objections is omitted.

(b) Quære, et vide post, 573 n.

was made; and the legislature could never suppose that officers, whose duty it is to be so present, assisting in making the rate, could require the aid of the act, in order to inspect it or to obtain a copy. It appears to me, therefore, that the plaintiff has not brought himself within the act. It has been argued, that what took place when the defendant desired the assistant-overseer to furnish the plaintiff with a copy of the rate, was an *admission*
*571] *on his part that he was liable to do so; but I do not think that his voluntary promise placed the defendant in a worse position than that in which he stood before.

COLTMAN, J. I also am of opinion that this case is not within the statute. It seems to me that it would have been a good answer to give to the plaintiff's demand of a copy of the rate, "You are a churchwarden—make a copy for yourself." The act does not apply to a case like the present; for no inconvenience could ever be contemplated as likely to arise from the churchwardens and overseers themselves not possessing a power over their own rate.(a) The object of the statute clearly was, to give a remedy to the inhabitants against "the unlimited power" of the parish officers to make rates, and by which they were liable to be oppressed. Therefore, when the acts speak of "inhabitants" and "parishioners," those words must be understood as being used in contradistinction to churchwardens and overseers;" for a penal statute is not to be extended beyond its fair and necessary construction.

MAULE, J. I also think that the rule must be made absolute. The statute, after reciting that "great inconveniences do often arise in cities, &c., by reason of the unlimited power of the churchwardens and overseers of the poor, who frequently, on frivolous pretences, and for private ends, make unjust and illegal rates, in a secret and clandestine manner, contrary to the intent and meaning of the stat. 43 Eliz. c. 2," directs (s. 1) that public notice shall be given in the church of every rate for the relief of the poor, the next Sunday after it shall be allowed. By the second section it is provided, that the churchwardens and overseers of the poor, or other
*572] persons authorized as aforesaid, in every parish, township, *or place, shall permit all and every the inhabitants of the said parish, township, or place to inspect every such rate at all seasonable times, paying 1*s.* for the same, and shall upon demand forthwith give copies of the same or any part thereof, to any inhabitant of the said parish, township or place, paying at the rate of 6*d.* for every twenty-four names. The third section enacts, "that if any churchwarden or overseer of the poor or other person authorized as aforesaid, shall not permit any inhabitant or parishioner to inspect the said rates, or shall refuse or neglect to give copies thereof as aforesaid, such churchwarden or overseer, or other person authorized as aforesaid, for every such offence shall forfeit and pay to the party aggrieved the sum of 20*l.*, to be sued for and recovered by action of debt," &c. It is contended on the part of the plaintiff that churchwardens are comprehended in the expression, "any inhabitant or parishioner;" but it appears to me, that the generality of those terms must be limited by the intention and object of the act. Previously to the statute an obvious wrong might be suffered by the inhabitants of a parish, in having secret rates imposed upon them; and the act meant to give a copy to those persons, who, without its aid, could not obtain such copy. It is not without precedent to construe a statute by what is presumed to have been its intention, notwithstanding you thereby limit its effect. By the seventeenth section of the statute of

(a) Vide tamen, post, 573 n.

frauds, 29 Car. 2, c. 3, it is provided, that, in order to charge a party upon a contract for the sale of goods, there shall be some note or memorandum in writing of the bargain, made and signed by the parties to be charged by it or their agents thereunto lawfully authorized. Construing that clause literally, it would include the case of one of the parties signing as the agent of the other; but it was held, in *Farebrother* v. *Simmons*, 5 B. & Ald. 333, that the agent *contemplated by that section who is to bind the defendant by his signature, must be a third person, and not the other contracting party. [*573

CRESSWELL, J. The three sections of the statute were framed in order to provide a remedy for the inconveniences recited in the preamble. The first section directs that the churchwardens and overseers shall publish every rate when made, in the manner thereby prescribed;" the second "that they shall permit all inhabitants to inspect the rates at seasonable times, and, on demand, give copies thereof at a certain price; and the third section provides, "that if any churchwarden or overseer shall not permit any inhabitant or parishioner to inspect the rates, or shall refuse or neglect to give copies thereof, he shall forfeit and pay to the party aggrieved" a certain sum, to be recovered as therein mentioned. It is quite clear that the relief provided in these clauses is for the same class of persons. The churchwardens and overseers are all presumed to be cognizant of the rate, and are entitled to the possession of it; consequently they have a higher right than the one given by the act—to a mere inspection, or a copy of the rate. It cannot therefore be supposed that the statute was meant to apply to them. Rule absolute.(*a*)

(*a*) An action lies by one joint-tenant, or one tenant in common of a chattel against another for *destroying* the joint or common chattel, but not for *withholding* or concealing it. The churchwardens and overseers cannot have actual joint possession of the rate except when *all* are together; and it would appear that one who was *in malo lecti or in itinere* when the rate was made, or who, though he may have once seen it, finds his memory too infirm to retain the particulars of every assessment, can get it from the unaccommodating holder, or even obtain a sight of it, only by force or by stratagem. "*If* the one take the whole to himself out of the possession of the other, the other has no remedy in order to occupy in common, but to *take* it from him who has done to him the wrong, *when he can see his time*, (*quaunt il veit son temps.*") Littleton, sect. 323, Of Tenants in Common. And see 2 Wms. Saund. 47 h.

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*DIRKS *v.* RICHARDS. [*574

A picture was placed by A. in the hands of B. for sale. B. deposited it with C. On its being demanded by A., C. claimed 5*s*. for warehouse-room; but on a second demand being made, with an offer to pay any claim which C. might have for warehouse-room, C. refused to give up the picture without being paid 8*l*. due to him from B.

Held, that the demand of the 8*l*. amounted to a waiver of the claim for warehouse-room, and that it rendered a specific tender in respect thereof unnecessary.

DETINUE, for a picture. Pleas: *non detinet*, and not possessed; upon both of which issue was joined.

At the trial before ALDERSON, B., at the last assizes for the county of Surrey, it appeared that the picture had been placed in the hands of a person named Bye for sale. Bye deposited it with the defendant, an auctioneer, at the same time telling him that his charge for warehouse-rent must be moderate. The plaintiff subsequently demanded the picture, whereupon the defendant made a claim of 5*s*. for warehouse-room. The plaintiff having made a second demand in writing, accompanied with an

offer to pay the defendant any lien he might have on the picture for warehouse-room, the latter stated that he would not deliver it up until he was paid a debt of 8*l.* due to him from Bye. No tender was made of any specific sum for warehouse-room. *Scarfe* v. *Morgan*, 4 M. & W. 270, was cited on behalf of the defendant.

The learned judge directed the jury, if they were satisfied that the picture was the plaintiff's, and that it was detained by the defendant, to find for the plaintiff, telling them that by the demand of 8*l.*, the defendant waived or dispensed with any tender for warehouse-room. The jury having found for the plaintiff,

Sir *T. Wilde*, Serjt., in Easter term last, obtained a rule nisi for a new
*575] trial, on the ground of misdirection, *contending that a tender of a specific sum for warehouse-rent should have been made.

Shee, Serjt., now showed cause. The plaintiff having offered to pay what might be due for warehouse-room, the defendant's demand of 8*l.* for the debt due to him from Bye, was clearly a waiver of his claim for warehouse-rent. It rendered the detainer unjustifiable, and dispensed with the necessity of making any tender of such rent. *Knight* v. *Harrison*, cited in Saunders on Plead. & Ev. 641, is precisely in point. That was an action of trover for 100 pieces of calico. It appeared that the defendant, a commission-agent at Manchester, had bought, as agent of Moravia and Co. of London, from the plaintiffs at Manchester, 1500 pieces of calico, to be paid for by a bill to be drawn by the plaintiffs on Moravia and Co. The goods were delivered to the defendant on the 2d of October. On the 4th of October, Moravia and Co. stopped payment. The plaintiffs applied to the defendant for the goods then in his hands, and the defendant at first promised to return them, they not having been drawn for, but he afterwards said he would not deliver them, as it was doubtful whether he could safely do so. The plaintiffs obtained an order from Moravia and Co., and showed the order to the defendant; on which he said he would not give up the goods until Moravia and Co. had paid his *general balance*, the amount of which he did not state. The plaintiffs demanded the goods and tendered an indemnity, but the defendant refused to accept it. It was contended for the defendant; first, that he had a general lien for his whole balance; secondly, that he had a lien for 49*l.*, the amount of expenses incurred by him in getting the goods glazed: but Abbott, C. J., said, "He has no lien for his general balance, as against the plaintiffs. As at the time of the
*576] demand he insisted on having *his general balance, and did not name his particular lien, but made too large a claim, he is precluded from setting it up now; for, if he had relied upon that then, it is most probable the plaintiffs would have paid it." There is an obvious distinction between *Scarfe* v. *Morgan* and the present case; for here, the claim made by the defendant was in respect of a debt due to him from a third person, who was not the owner of the picture.

Channell, Serjt., (with whom was *Montague Chambers*,) in support of the rule. The question is, whether the claim of 8*l.*, which it is conceded the defendant had no right to make, dispensed with the necessity of a tender of what was really due to him for warehouse-rent. [Erskine, J. In *Boardman* v. *Sill*, 1 Campb. 410, the plaintiff brought trover for some brandy which lay in the defendant's cellars, and which, when demanded, he had refused to deliver up, saying *it was his own property*. Certain warehouse-rent was due to the defendant on account of the brandy, of which no tender had been made. Lord Ellenborough held, that as the

brandy had been detained on a different ground, and as no demand of warehouse-rent had been made, the defendant must be taken to have waived his lien, if he had one.] The present case is not to be distinguished from *Scarfe* v. *Morgan*. There, the plaintiff sent a mare to the defendant, who was a farmer, to be covered by a stallion belonging to him. The mare was taken to the defendant's stables, and covered accordingly, upon a *Sunday*. The charge for covering not being paid, the defendant detained the mare. A demand of her was afterwards made, but he refused to deliver her, claiming a lien, not only for the charge on that occasion, but for a general balance due *to him on another account. It was held that the defendant was entitled to a specific lien on the mare for the charge for covering her; and that the claim made by him to retain her for the general balance was not a waiver of his lien for the charge on the particular occasion, and did not dispense with the necessity of a tender of that sum. ALDERSON, B., there said, "It seems to me a monstrous proposition to say, that a party who claims in respect of two sums to detain a mare, is supposed to have waived his right to detain her as to one.(a) The more natural conclusion is, that the defendant intended to act upon both; if so, and if the other party is informed of that, it then became his duty to consider whether he would tender one or the other." [*577

MAULE, J. Did not the claim of the 8*l*. by the defendant amount to this? "I do not recognise your right to the picture; I claim a lien on it for 8*l*. due to me from Bye, who deposited it with me." If the defendant set up an inconsistent claim, it was clearly a waiver of his claim for warehouse-rent.

The rest of the court concurred. Rule discharged.

(a) Without supposing the party to *waive* his right to detain in respect of the specific lien, the assumption of the right to withhold the possession of the mare from the owner, until performance of a condition which the person detaining had no right to impose, would appear to be a tortious conversion on the part of such person, notwithstanding any other title to detain remaining in him.

In *Scarfe* v. *Morgan*, though there may have been a waiver, (*i. e.* a dispensation with the necessity,) of *a tender*, there could have been no intention to waive or abandon *the right to detain* for the particular charge, there having been an express demand of both sums. In the principal case no mention appears to have been made of the 5*s*. when the 8*l*. was demanded. It would, however, be, perhaps, too much to infer from that omission, that the defendant really meant to give up his claim for warehouse-rent.

*HOLLIS v. BRYANT. [*578

A creditor who, upon petition to the insolvent debtors' court under 1 & 2 Vict. c. 110, s. 36, obtained a vesting order, is not bound to assent to the discharge of the debtor upon his tendering the amount of the debt and costs, where it appears that such debtor has other creditors.

Ludlow, Serjt., on a former day in this term had obtained a rule nisi to set aside an order made by MAULE, J., which had been obtained by the defendant on the 7th of May,—that he should be discharged out of custody, as to the execution in this action, upon payment of the amount for which he was so charged in execution; that the plaintiff's attorney should deliver up the bill of exchange, upon which the action was brought, at the time of such payment; and that the plaintiff's attorney should thereupon enter satisfaction upon the judgment.

It appeared from the affidavits that at the time the order was made, the

defendant was in custody in execution at the suit of the plaintiff for 77*l*. 4*s*. 6*d*. and costs; that upon the application of one Burt, the court for the relief of insolvent debtors had made an order, under the 1 & 2 Vict. c. 110, ss. 36, 37, vesting the estate and effects of the defendant in the provisional assignee; that the plaintiff had been appointed assignee; that upon the 24th of May, the defendant, upon a suggestion that Burt's demand had been satisfied, had obtained a rule in the insolvent debtor's court, calling upon the plaintiff, as assignee, to show cause why the vesting order should not be annulled, and his appointment, as such assignee, vacated, upon payment of his debt and costs pursuant to the judge's order; that such rule was still pending, and that the plaintiff intended to show cause against the same, upon the affidavits of several unsatisfied creditors of the defendants to a large amount.

The learned serjeant referred to *Drury* v. *Hounsfield*, 11 A. & E. 101, 4 P. & D. 386.

*579] **Bompas*, Serjt., now showed cause, and contended that it was not competent to the defendant to introduce new facts that were not before the judge when the order was made which it was now sought to set aside; and that it did not sufficiently appear, as in *Drury* v. *Hounsfield*, that there were any other unsatisfied creditors, at the time when the vesting order was made.

Ludlow, Serjt., was heard in support of the rule.

TINDAL, C. J. I think it sufficiently appears that there are other unsatisfied creditors of the defendant who may be entitled to participate in his estate; and I am therefore of opinion, upon the authority of the case cited, that the defendant is not entitled to be discharged out of custody. All the facts do not appear to have been brought before the learned judge at the time the order was made. I think that the rule for setting the order aside must be made absolute.

The other judges concurred. Rule absolute.

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*580] *CRANE *v*. PRICE and Others.

It is no objection to the validity of a patent that the invention cannot be used except by means of a former patented invention; especially where the second patentee expressly disclaims any part of such former invention.

In 1829 A. obtained a patent for the use of hot-air blast in furnaces. In 1837 B. took out a patent for "an improvement in the manufacture of iron," which consisted in "the application of anthracite, or stone-coal, combined with a hot-air blast in the smelting of iron." The hot-air blast was used by B. under a license from A. The use of it with anthracite was new; and the iron produced in consequence was greater in yield, cheaper in cost, and better in quality than that produced by the ordinary method. *Held*, that such combination was a "new manufacture" within the 21 J. 1, c. 3.

In the specification of A.'s invention, it was alleged that the blast was to be passed through a vessel, (the form of which vessel was stated to be immaterial,) by means of *a tube*, into the furnace. B., in the application of the hot-air blast, used *a succession of tubes*. *Held*, that this was not a material variation from the subject of A.'s patent.

CASE, for the infringement of a patent for an improvement in the manufacture of iron.

The declaration, after alleging that the plaintiff, before and at the time, &c., was the true and first inventor of an improvement in the manufacture of iron, set out certain letters patent, bearing date the 28th of September, 7 W. 4, (1836,) granting, in the usual manner, to the plaintiff, his executors, administrators, and assigns, the sole privilege to make, use, exercise,

and vend the said invention for fourteen years; with the customary proviso as to the enrolment of the specification. The declaration then stated that, on the 27th of March, 1837, the requisite specification was made, and on the 28th of March was duly enrolled in the court of chancery. The breaches assigned were: first, that the defendants smelted, manufactured, and made iron on the said improved plan or principle, and in imitation of the said invention of the plaintiff, and according to the said improvement in the said letters patent mentioned, and sold and vended iron so smelted, &c.; secondly, that the defendants used and put in practice the said invention, by smelting, manufacturing, and working iron in imitation [*581 *of the said invention; thirdly, that the defendants did counterfeit, imitate, and resemble the said invention, and did make colourable additions thereto and subtractions therefrom, whereby to pretend themselves the inventors thereof; fourthly, that the defendants smelted and manufactured and made iron with certain improvements in the process of such smelting, and which were intended to imitate and resemble, and did imitate and resemble, the said improvement so invented by the plaintiff, and thereby counterfeited the same.

Pleas; first, not guilty.

Secondly, that the plaintiff was not the true and first inventor of the said alleged improvement.

The third plea set out the specification, as follows:

"To all to whom these presents shall come, I, *George Crane*, of, &c., iron-master, send greeting:" (the specification then briefly recited the letters patent and the proviso as to the specification.) "Now, know ye, that in compliance with the said proviso, I, the said *G. C.*, do hereby declare the nature of my invention, and the manner in which the same is to be performed, are fully described and ascertained in and by the following statement thereof, that is to say; according to the ordinary practice of obtaining iron from iron-stone, mine or ore in this country, the iron-stone, mine or ore, either calcined or in the raw state, according to the respective qualities, is put into suitable furnaces with coke produced from bituminous coal, formerly called pit-coal, in contradistinction to charcoal produced from wood, which was the fuel employed in this country previously to the introduction of pit-coal in the smelting and manufacture of iron. Now, as there are districts in which there are to be found large quantities of iron-stone, mine or ore, in the immediate neighbourhood of what is known as stone-coal or anthracite coal, it has been long considered as a desirable object, to employ such *coal for the smelting and manufacture of iron; and, although attempts have been made to apply such description of coal in the smelt- [*582 ing and manufacture of iron, the same have failed and have been abandoned. In addition to such advantages to be obtained from the using of anthracite or stone-coal, in the districts where such coal is found together with iron-stone, mine or ore, from the practice I have had, I am induced to believe such coal, from its properties, will be found to produce a quality of iron more nearly resembling iron obtained by the aid of vegetable charcoal. *Now, the object of my invention is the application of such anthracite or stone-coal, combined with a hot-air blast*, in the smelting or manufacture of iron from iron-stone. mine or ore. And, in order to give the best information in my power for enabling a workman to carry out my invention, I will describe the process or means pursued by me; and in doing so, I will suppose the furnace of an ordinary construction to be in blast, and that the machinery and apparatus are adapted for the application of hot-air blast, as is well understood and

extensively applied in many places where the ordinary fuel (coke of bituminous coal, or the coal in a raw state) is employed in the manufacture of iron from iron-stone, mine or ore; and I have found a furnace having suitable apparatus for making the blast to about 600° of Fahrenheit a good arrangement for carrying out my invention, though so high a degree of temperature is not indispensably necessary, but I believe preferable. In charging such a furnace, I throw in about 3cwt. of anthracite or stone-coal or culm, to each 5 cwt. of calcined argillaceous iron-stone, with a proper quantity of flux, as if working with the coke of bituminous coal. Such charging of the furnace, and the general working, with the exception of the using of anthracite or stone-coal, is to be pursued as if working with coke of
*583] *bituminous coal: and I would remark that the quantities above given, are such as I have hitherto employed in making the best qualities of pig iron, viz. No. 1, or No. 2, at my works, from the anthracite, stone-coal, or culm found in the neighbourhood of the Yniscedwyn iron works; but these quantities may be varied, according to local circumstances, and the refractory nature of the iron-stone, mine or ore, or otherwise to be reduced, and the quality of iron desired to be obtained, as is the case in ordinary working, and at the judgment and discretion of the manager, as heretofore: and I would remark that the anthracite or stone-coal, or culm, may be coked in like manner as bituminous coal before charging the furnace; but from my experience, I have not (so far as my practice goes, in working with the coal obtained in my neighbourhood) found that such coking is necessary, or that a more advantageous result is obtained than in applying the anthracite or stone-coal directly from the mine. And it is desirable to observe, I have found it of advantage that the blast of hot air should be as free and unimpeded as possible, and that from that account I have hitherto used only anthracite or stone-coal, the smaller parts of which would not pass through a sieve of an inch mesh; but, where the pillar or volume of blast is considerable, say 2lbs. and upwards on the square inch, this precaution is not necessary.

"Having thus described the nature of my invention, and the manner of carrying the same into effect, I would have it understood that I do not claim the using of hot-air blast separately in the smelting and manufacture of iron, as of my invention, when uncombined with the application of anthracite or stone-coal and culm; nor do I claim the application of anthracite or stone-coal in the manufacture or smelting of iron when uncombined
*584] with the using of hot-air blast; but what I do claim as *my invention, is the application of anthracite or stone-coal and culm combined with the using of hot-air blast in the smelting and manufacture of iron, from iron-stone, mine or ore, as above described. In witness," &c.

The plea then averred that the said alleged improvement, in the patent and specification mentioned, was not a new manufacture invented by the plaintiff within the intent and meaning of the statute, 21 Jac. 1, c. 3, s. 6, as to the public use and exercise thereof; by reason whereof the said letters patent were void.

Fourth plea—that the nature of the said invention, and the manner in which the said invention was to be performed, were not particularly described, according to the intent and meaning of the letters patent, in or by the specification.

The fifth plea, (after referring to the specification, and setting out the proviso in the patent, that nothing therein contained should give privilege to the plaintiff, his executors, &c., to use or imitate any invention or work

theretofore invented or found out by any other person and publicly used or exercised, unto whom letters patent had been granted) then proceeded to aver the grant of certain letters patent to one James Beaumont Neilson, dated the 11th of September, 9 G. 4. (1828,) whereby was granted to Neilson, for fourteen years, the sole privilege to make, use, exercise, and vend a certain invention for the improved application of air to produce heat in fires, forges, and furnaces, where bellows or other blowing apparatus were required; that the said improved application of air in the last-mentioned patent, was the production and application of a hot-air blast for the purpose of heating fires in forges and furnaces where bellows, &c. were required; which said hot-air blast was *long before the plaintiff's patent, publicly used and exercised in the smelting and manufacture of iron, from iron-stone, &c., and was the hot-air blast in the plaintiff's specification mentioned; that Neilson's patent was still in force, and that, in consequence thereof, the plaintiff could not use the said hot-air blast, in the smelting or manufacture of iron, without Neilson's license, that the plaintiff obtained such license before the grant of his patent; and that the using by the plaintiff of the hot-air blast, in the manner in the said specification mentioned, in the smelting and manufacture of iron, from iron-stone, &c., as described in the said specification, combined with the said anthracite or stone-coal and culm, as therein mentioned, was a using and imitating of Neilson's invention; which rendered the plaintiff's patent void. Verification. [*585

Replication. The plaintiff joined issue on the first, second, and fourth pleas.

To the third plea, the plaintiff replied that the improvement in the patent mentioned and described in the specification, was a new manufacture invented by the plaintiff, within the intent of the statute, as to the public use and exercise thereof; whereon issue was joined.

To the fifth plea, the replication, after referring to the proviso in Neilson's patent, as to the specification, averred the due enrolment of the specification, and set it out as follows;—(after reciting the grant of the patent, &c., with the proviso as to the specification,)—

"Now, know ye, that in compliance with the said proviso, I, the said J. B. N., do hereby declare that the nature of my said invention for the improved application of air to produce heat in fires, forges and furnaces where bellows or other blowing apparatus are required, and the manner in which the same is to be performed, are particularly described and ascertained as follows; that is to say, a blast or current of air must be produced by *bellows or other blowing apparatus in the ordinary way, to which mode of producing the blast or current of air this patent is not intended to extend. The blast or current of air, so produced, is to be passed from the bellows or blowing apparatus into an air-vessel or receptacle made sufficiently strong to endure the blast, and through and from that vessel or receptacle, by means of a tube, pipe or aperture, into the fire, forge or furnace. The air-vessel or receptacle must be air-tight or nearly so, except the apertures for admission and emission of the air; and at the commencement and during the continuance of the blast it must be kept artificially heated to a considerable temperature. It is better that the temperature be kept to a red heat, or nearly so; but so high a temperature is not absolutely necessary to produce a beneficial effect. The air-vessel or receptacle may be conveniently made of iron; but, as the effect does not depend upon the nature of the material, other metals or convenient mate- [*586

rials may be used. The size of the air-vessel must depend upon the blast, and on the heat necessary to be produced. For an ordinary smith's fire or forge, an air-vessel or receptacle capable of containing 1200 cubic inches will be of proper dimensions; and for a cupola of the usual size for cast-iron founders, an air-vessel capable of containing 10,000 cubic inches, will be of a proper size; for fires, forges, or furnaces on a greater scale, such as blast-furnaces for smelting iron, and large cast-iron founders cupolas, air-vessels of proportionally increased dimensions and numbers are to be employed. The form or shape of the vessel or receptacle is immaterial to the effect, and may be adopted to the local circumstances or situation. The air-vessel may generally be conveniently heated by a fire distinct from the fire to be affected by the blast or current of air; and generally it will be better that the air-vessel, and the fire by which it is heated, should be *587] enclosed in *brickwork or masonry, through which the pipes or tubes connected with the air-vessel should pass. The manner of applying the heat to the air-vessel is, however, immaterial to the effect, if it be kept at a proper temperature. In witness whereof," &c.

The replication then averred that Neilson's invention for the improved application of air to produce heat in fires, &c., as the same was described in Neilson's specification, was not the same as the hot-air blast, and the machinery and apparatus adapted for the application thereof, mentioned and referred to in the plaintiff's specification as then being well understood and extensively applied in many places, where the ordinary fuel was employed in the manufacture of iron, from iron-stone, &c.; nor was the using by the plaintiff of his said invention, as described in his said specification, a using or imitating of Neilson's invention described in his specification. Verification.

Rejoinder, to the replication to the fifth plea; that Neilson's invention was the same as the hot-air blast, and the machinery and apparatus adapted for the application thereof, mentioned in the plaintiff's specification, and that the using by the plaintiff of his invention, as described in his specification, was a using and imitating of Neilson's invention described in his specification. Issue thereon.

The following notice of objections was delivered by the defendants, with the pleas, under the stat. 5 & 6 W. 4, c. 83, s. 5.

"First, that the alleged invention mentioned in the declaration,—which the plaintiff in his specification claims and alleges to consist in the application of anthracite or stone-coal and culm, combined with the using of hot-air blast, in the smelting and manufacture of iron from iron-stone mine or ore,—is not a new manufacture, within the meaning of the stat. 21 Jac. *588] 1, c. 3, s. 6, for which *a patent can be granted, but only a using at the same time of a well-known article, namely, anthracite or stone-coal and culm, and of the hot-air blast, (the latter admitted in the plaintiff's specification to be then well-known,) each separately in use for smelting and manufacturing iron before the date of the said letters patent. Secondly, that anthracite or stone-coal and culm, had been publicly used as the only fuel in the smelting and manufacture of iron by Mr. Thomas Harper, at his furnace at Abercrave, in the county of Brecon, and had been so used mixed with other fuel by the British Iron Company, at their works at Abercrave aforesaid, and at the Yniscedwyn iron-works, the Landore iron-works, the Milbrook iron-works, and the Neath Abbey iron-works, in the county of Glamorgan, before the date of the said letters patent; and the alleged invention of the plaintiff is only the use of anthra-

cite or stone-coal or culm with the hot-air blast. Thirdly, that the using of hot-air blast in the smelting or manufacture of iron, was not the invention of the plaintiff, but was well-known and in use before the granting of the letters patent to the plaintiff, as admitted in the specification thereof, and the alleged invention of the plaintiff is only the use of the said hot-air blast, with the well-known anthracite, or stone-coal and culm: and that the hot-air blast was used in the smelting and manufacture of iron prior to the said letters patent, at the works of the said plaintiff, the Yniscedwyn iron-works, &c.; [here followed a list of sixteen iron-works, where the hot-air blast had been in use:] and also at a great many iron-works in the kingdom, too numerous to be individually specified. Fourthly, that the alleged invention of the plaintiff necessarily involves the use of another invention, which was patented before the date of the plaintiff's letters patent, viz., the hot-air blast of J. B. Neilson; and that the application thereof to anthracite or stone-coal, which was a well known fuel, was an application that all persons were at *liberty to make who had permission to use the said invention of the said J. B. Neilson. Fifthly, [*589
that the exclusive use of the hot-air blast having been previously granted to J. B. Neilson by letters patent, the subsequent patent, granted to the plaintiff for the same invention, is void. Sixthly, that anthracite or stone-coal and culm having been well-known and in use as a fuel, prior to the said plaintiff's letters patent, the application of such fuel to the smelting or manufacture of iron by well-known methods is not a new manufacture, within the meaning of the statute. Seventhly, that the use of the hot-air blast, described in the said specification, produces substantially only the same effect when the anthracite or stone-coal and culm is used as fuel in the smelting and manufacture of iron, as when any other kind of coal or coke is used for the same purposes. Eighthly, that the specification is defective, inasmuch as it does not describe the kind of furnace to which the alleged invention is applicable, and it is not applicable to all kinds of furnaces. Ninthly, that the said specification does not clearly state, whether or not it is intended to apply to the use of anthracite or stone-coal and culm, as the only fuel, or whether it is intended to include the use of anthracite or stone-coal and culm, together with other fuel."

At the trial before TINDAL, C. J., at the sittings at Westminster, after Hilary term, 1840, the plaintiff (besides Neilson's specification, as set out in the replication to the fifth plea) gave the following specifications in evidence:

First, that of an invention of Thomas Botfield—for "certain improvements in the manufacture of iron"—enrolled on the 1st of April, 1828, under a patent, dated the 2d of January, 1828. The principle of this invention was stated by the patentee as follows:—"for causing or obtaining a blast of atmospheric air, sufficient to smelt, fuse, run or make pig, cast or crude iron, from iron-stone *or ore. This blast is to be produced [*590
by means of rarefied air, gas, flame or heated air, from an oven or fire-place, and is to be applied in or to a blast-furnace, cupola, or air-furnace: this I propose to effect by the draft of a powerful chimney or chimneys, which may be built separate, at any distance that may be most convenient, or may join to or be made part of the blast-furnace or cupola, as may be found most desirable and best to answer the purpose required, and which is to be connected by a flue or flues with the cupola, blast, or air furnace; but, in case this draft should not prove sufficient for the purpose of smelting the iron-stone or ore, I propose and intend to apply and

use the common blast from machinery to assist the blast from the draft of the machinery: and I claim a right to use, and mean to use the atmospheric air, either separately or mixed with gas, flame, or heated air. I also claim as part of my patent the right to use and mix with other materials, rock salt, common refuse or other salt, in any state or degree of refining, or any other substance of which soda (the mineral alkali) forms a part. This is to be mixed in the blast-furnace, cupola, or air-furnace, with the iron-stone or ore, and with the other usual materials, of coke, or charcoal, and limestone, to which cinder (produced in the processes of converting pig, cast or crude iron, into malleable iron) may be added. And I propose, as I shall find necessary, to cause the iron-stone, or ore to smelt or fuse sooner or with less blast, fuel, or heat." And in another part of the specification, the patentee stated—" And I further declare that I propose to use coal, coke, stone-coal, culm, wood, charcoal, or any other kind of fuel or fuels, or combination of fuel, in any proportion or proportions, in the fire-place, oven, or air furnace, for producing the gas, flame, or heated air; and also to use all the materials before recited, in any proportion or pro-
*591] portions that may be found sufficient and *best adapted to produce the main object required. I claim, as my patent, the use of the additional chimney or chimneys, and the application of rarefied air, gas, flame, or heated air, to, at, or near the twire or twires of the blast-furnace or cupola, to cause or assist the blast of atmospheric air. And I also claim, as part of my patent, the use of salt, or any other substance containing soda, to mix with the iron-stone or ore, and other materials in the blast, cupola or air-furnace, to cause those materials to melt or fuse sooner, more easily, or with less blast and fuel."

Secondly, that of an invention of Edward Martin,—enrolled the 23d of June, 1804, under a patent of the same date,—" for making pig and cast iron of every description from iron-stone, iron-mine, and iron-ore, and of smelting, preparing and refining of pig and cast iron of every sort, and for the making of such pig and cast iron into wrought or bar iron by using raw stone-coal or culm to be worked and made by blast." In this specification the nature of the invention and the manner in which the same was to be performed, and the method used to make stone-coal and culm to stand the blast, were thus described: " To light the fire in the furnace, finery, or hearth, with free-burning wood, and as soon as the wood is sufficiently ignited, then to put on small quantities of raw stone-coal or culm, free of dust, (broken into the size of a common hen's egg,) to continue to feed the furnace, finery or hearth with raw stone-coal or culm, till it is quite full of vivid fire, before any blast is introduced; then (in making pig or cast iron) charge the furnace, in the common way with due proportions of raw stone-coal or culm clear of dust, (instead of coke or charcoal,) with iron-stone, iron-mine, or iron-ore, and limestone; then to introduce the blast in a very gentle manner for the first twelve hours; then to increase the blast gradu-
*592] ally, day after day, for the first week of blowing, *till the furnace is sufficiently hot and burthened, and then to blow to any extent, the machinery or the furnace is capable of bearing; and by keeping the furnace regularly and properly fed with materials, and keeping up a sufficient blast, the process will be completed. And in the remelting, preparing and refining of pig and cast iron of every sort, and for making such pig and cast iron into wrought or bar iron, the foregoing method of lighting and feeding the hearth or finery till it is full of vivid stone-coal or culm, must be pursued before the finery or hearth is charged with metal, or the blast intro-

duced; then, by charging with metal, and feeding the finery or hearth with raw stone-coal or culm, (instead of coke or charcoal,) and by introducing the blast in the common way, the wished-for success will be produced."

Thirdly, that of an invention of Philip Taylor,—enrolled on the 17th of February, 1826, under a patent, dated the 5th of the same month,—for "certain improvements in making iron." The principle of this invention was, the introduction, into the furnace in which anthracite or stone-coal was to be used, of carburetted hydrogen gas.

And, fourthly, that of an invention of Charles Pierre Devaux,—enrolled on the 8th of April, 1836, under a patent dated the 28th of October, 1835,—for "certain improvements in smelting iron-stone or iron-ore."

This specification stated the invention in these terms: "The improvements relate to the placing or arranging of apparatus between the ordinary blowing-machine and the furnace which contains the iron-stone or iron-ore to be smelted, whereby the blast of atmospheric air caused by the ordinary blowing machinery is forced through and amongst the fuel in a fire enclosed in such superadded apparatus, and whereby the atmospheric air so forced supports combustion in such fire, becomes heated, and in some degree decomposed, and is *thence constantly forced forward by the pressure [*593 of the condensed air in the apparatus (carrying with it the gas and vapours evolved by the fuel in the fire) into, and becomes a heated and gaseous blast to, the ordinary furnace containing the iron-stone or iron-ore to be smelted, great improvement will take place in the process of smelting iron-stone or iron-ore, and fuel saved."

Numerous witnesses were called on the part of the plaintiff, who were employed in the manufacture of iron, many of them in the neighbourhood of the plaintiff's works. Their evidence went to show,—that repeated attempts had been made to use anthracite coal in the manufacture of iron; that it was an object greatly desired by the trade; that the British Iron Company had succeeded in using it, but the iron produced was inferior in quality and not worth the cost of manufacture, and that the company had, in consequence, abandoned their works. Other instances were adduced, where similar attempts had failed. In February, 1837, the plaintiff, after frequent and expensive experiments, began to use the hot-air blast and stone-coal; the apparatus for the hot-air blast having been erected under the direction of one of Neilson's men. The plaintiff however (finding that the air vessel used by Neilson did not give a sufficient degree of heat) soon afterwards substituted for it a coil or succession of tubes, so as to cause a larger surface of air to be exposed to the influence of the fire in the transit from the blowing apparatus to the furnace; whereby a hot-air blast sufficient to melt lead (about 600° Fahrenheit) was produced; that the iron thus produced was of a very superior quality; that the yield was greater, and the consumption of fuel less by one-sixth; that since the plaintiff's discovery two manufactories had been commenced upon his system; that in April or May, 1837, the defendants were using hot-air blast, and stone-coal *together with coke, in the proportion of one-third of the [*594 former to two-thirds of the latter. It was also proved that cold blast blows anthracite coal black; which had been the cause of the failure of Martin's invention; that Taylor's invention had altogether failed, and that Botfield's was not applicable to anthracite coal; and that the description in the plaintiff's specification was sufficient to enable persons of competent skill, successfully to apply the invention.

The counsel for the defendants, after stating that no witnesses were to be

called for the defence, was proceeding to argue that the plaintiff's invention was not a new manufacture; when it was suggested by the Lord Chief Justice that there was no point to leave to the jury, and that the real question was one of law, namely, as to the meaning of the word "manufacture" under the statute; whether the application of a known mode of working the hot-air blast to a known material, so as to produce a new effect, is a manufacture; and also whether, if it be so, the plaintiff was the first inventor of it. It was therefore agreed that a verdict should be entered for the plaintiff, with nominal damages, upon all the issues, subject to a motion, on the part of the defendants, to enter a nonsuit or verdict for them, with leave to turn the evidence into a special case.

Sir *Thomas Wilde*, Serjt., in Hilary term, 1840, having accordingly obtained a rule nisi to enter a nonsuit or a verdict for the defendants, it was arranged that the evidence should be turned into a special case; the court being at liberty to draw the same inferences from the evidence that a jury might draw; if the court should be of opinion that the plaintiff was entitled to retain the verdict on all the issues, then the verdict was to stand as entered; but if the court should be of opinion that the defendants were entitled to have the verdict entered *for them on all or either of the [*595] issues, then the verdict was to be altered accordingly: if the court should be of opinion that the defendants were entitled to have the verdict entered for them on the third and fourth issues, or either of them, the court were to be at liberty, if they should be so advised, to give judgment *non obstante veredicto*. In case the verdict for the plaintiff should stand, the Lord Chief Justice was to be at liberty, if he should think fit, to certify on the record that the validity of the patent came in question before him, pursuant to the statute 5 & 6 W. 4, c. 83, s. 3.

The case was argued in Hilary term, 1842.(a)

Bompas, Serjt., and *Rotch* for the defendants. As to the first issue: there was no infringement of the plaintiff's patent proved. The plaintiff's invention was the simple application of Neilson's patent to the use of anthracite coal in smelting iron. The plaintiff's specification does not state the proportions or method to be observed in the manufacture; but merely that stone-coal with the hot-air blast, is to be used in the ordinary way. The plaintiff cannot contend that his patent would be infringed by the application of hot-air to stone-coal in combination with other fuel in *any* proportions whatsoever. There are extensive districts where the coal is more or less anthracitous; in such places the proportions of anthracite and of bituminous coal which manufacturers may use, could not be ascertained. According to the evidence, the defendants used only a small proportion of anthracite compared to the quantity of coke. But the mere using of *some* anthracite with the hot blast could not amount to an infringement of the plaintiff's patent, supposing that patent to be valid.

As to the second and third issues: the plaintiff is neither the first inventor of the alleged improvement, *nor is the invention a "new manu [*596] facture" within the meaning of the statute.

The patent is for "an improvement in the manufacture of iron." No improvement is suggested throughout the plaintiff's specification, whereby an improved *quality* of iron is to be obtained. All that is there stated is, that the alleged invention of the plaintiff will produce iron more like that obtained by the aid of vegetable charcoal. The *process* used by the plaintiff contains nothing new. The hot-air blast was not new—that was the

(a) Before Tindal, C. J., and Coltman, Erskine, and Maule, JJ.

subject of Neilson's patent. The use of anthracite coal was not new: it had been previously used by a number of persons. The plaintiff's specification, therefore, reveals no novelty of detail. It is true that an improved method in the application of a former discovery, or a new combination of machinery, the details of which were already known, may be the subject of a patent; but the mere use of a thing already known, in a known manner, and for a known purpose, has frequently been decided not to be the subject of a patent: *Brunton* v. *Hawkes*, 4 B. & Ald. 541; *Saunders* v. *Aston*, 3 B. & Ald. 881; *Cornish* v. *Keene*, 3 New Cases, 570, 4 Scott, 337; *Kay* v. *Marshall*, 5 New Cases, 492, 7 Scott, 548. In *Minter* v. *Mower*, 6 Ad. & E. 735, 1 N. & P. 595, the patent was held to be bad, as including the subject of a former invention. In this case the plaintiff's patent includes the invention of Neilson.

As to the fourth issue: the specification is insufficient, inasmuch as it does not describe the sort of furnace requisite to be used. It appeared from the evidence that the invention failed when used with a large furnace.

As to the fifth issue—whether the hot-air blast described in the plaintiff's specification is to be obtained in the same manner as that for which Neilson had *obtained a patent—there was no evidence to show that [*597 there was any other hot-air blast in use in England, except under Neilson's patent, the validity of which had been fully established. *Neilson* v. *Thompson*, 2 Webst. Pat. Ca. 275. 278; *Neilson* v. *Fothergill*, Ib. 287; *Neilson* v. *Harford*, 8 M. & W. 806, 2 Webst. P. C. 295. 328. Indeed the hot-air blast with which the plaintiff worked his apparatus was erected by one of Neilson's servants, and was worked under a license from Neilson. A patent which includes the subject of a former patent is bad, because the second patentee obtains a right which was exclusively granted to the first; and it is contrary to the proviso in the patent, which declares that it shall not extend to, or give privilege to use or imitate, any invention or work which had been heretofore invented by any person to whom a patent had been granted.

Sir *Frederick Pollock*, A. G., *R. V. Richards*, *Montague Smith*, and *Webster* for the plaintiff. Under the agreement entered into at nisi prius, it is submitted that it is not now open to the defendant to dispute the infringement of the plaintiff's patent. But even if it were so, there was abundant evidence to entitle the plaintiff to a verdict on that issue. In order to entitle the plaintiff to maintain this action, it is sufficient to show that the defendants used anthracite coal in combination with hot-air blast, in considerable quantities; he was not called upon to prove that it was the only kind of coal used in their manufacture.

Upon the second issue—whether the plaintiff is the first inventor—it is not pretended that any other person had successfully used anthracite coal combined with the hot-air blast, in the manufacture of iron; others had made the attempt indeed, but had failed.

*The third issue is the most important in the case,—viz., whether the combination of which the plaintiff claims the invention, [*598 and for which he has obtained his patent, is a "new manufacture" within the statute of James I. From the decided cases upon this subject it is not very easy to discover any general rule or principle by which the courts have been guided. There can be no doubt, however, that a party *may* have a patent for any new *modus operandi* or combination, which shall produce an entirely new *result*. Now it is clear that, up to the period of the granting of the present patent, anthracite coal had been found thoroughly

untractable and useless, for the purposes of smelting iron, and that to make it so serviceable was a great object in the trade. By the combination in the plaintiff's invention, the object has been obtained; and the iron produced by this method is both cheaper and better. The most beneficial discoveries are often but new combinations of well-known substances or principles, producing new results. Such have been the subject of patents in various cases. *Hall* v. *Boot*, Gods. Pat. 242, 1 Webst. Pat. Ca. 100; *Forsyth's Patent*, 1 Webst. Patent Cases, 95; *Derome's Patent*, Ib. 152; *Hartley's Patent*, Ib. 54; *Lewis* v. *Davies*, 3 C. & P. 502; *Lewis* v. *Marling*, 4 C. & P. 52, 10 B. & C. 22, 5 M. & R. 66, are authorities to this effect. Even the *omission* of any process in the manufacture, hitherto deemed essential, may be the subject of a patent: *Russel* v. *Cowley*, 1 C. M. & R. 864. In *Strong* v. *De la Rue*, 5 Russ. 322, it was held that an invention for preparing paper, so as to render it more available for copper-plate printing, was valid. In *Hill* v. *Thompson*, 3 Mer. 626, S. C. 3 B. Moore, 424,
*599] 8 Taunt. 375, Holt, N. P. C. 636, *Lord ELDON laid down the rule "that there may be a valid patent for a new combination of materials previously in use for the same purpose, or for a new method of applying such materials." In *Brunton* v. *Hawkes*, 4 B. & Ald. 541, the invention, as stated in the specification, was not new. In *Saunders* v. *Aston*, 3 B. & Ald. 881, and *Rex* v. *Metcalf*, 2 Stark. Nisi Prius C. 249, the patents would have been held valid if the inventions had been properly described in the specification. *Cornish* v. *Keene*, 3 N. C. 586, 4 Scott, 337, is also an authority that a new combination of old materials, may be the subject of a valid patent.

As to the fourth issue—that the invention was not sufficiently described in the specification—it appeared from the plaintiff's evidence that the specification was sufficient for all practical purposes. No evidence was called by the defendants to show that the description was inaccurate or insufficient, and the affirmative of the issue lay upon them.

The fifth issue raises two questions; 1st, whether the hot-air blast described in the plaintiff's specification, is the subject matter of Neilson's patent; and 2dly, whether a patent can be maintained for an invention which involves the subject of a former patent.

As to the first point, the evidence was almost sufficient to prove that Neilson's hot-air blast was inapplicable to the plaintiff's invention.

As to the second of these points, there are many cases which establish the principle,—in which valid patents have been granted for improvements upon the subject of existing patents, or for the application of a former patent in a new manner, or to a new material; *Hornblower* v. *Boulton*, 8 T. R. 95;
*600] *Fox Ex parte*, 1 Ves. & B. 67; *Lewis* v. *Davis*, 3 C. & P. 502; **Harmer* v. *Playne*, 14 Ves. 130, 11 East, 101; *Huddart* v. *Grimshaw*, Dav. Pat. Ca. 265, 1 Webst. Pat. Ca. 85; *Boulton* v. *Bull*, 2 H. Bla. 495; *Rex* v. *Wheeler*, 2 B. & Ald. 345.

Bompas, Serjt., was heard in reply.

TINDAL, C. J., now delivered the judgment of the court.

This was an action on the case for infringement of a patent granted to the plaintiff on the 28th of September, 1836, for "an improvement in the manufacture of iron." The declaration was in the usual form; and the defendants pleaded thereto, first, that they were not guilty; secondly, that the plaintiff was not the true and first inventor of the said improvements; upon each of which pleas issue was joined; thirdly, after setting out at length the plaintiff's specification, the defendants pleaded that the alleged

improvement therein described was not a new manufacture invented by the plaintiff, within the intent and meaning of the statute, as to the public use and exercise thereof within England; which allegation was traversed by the plaintiff in his replication; fourthly, the defendants pleaded, that the nature of the plaintiff's invention, and the manner in which it was to be performed, were not particularly described or ascertained by the plaintiff in his specification; upon which plea issue was joined: and in their last plea, the defendants, after referring to the plaintiff's specification before set out in the third plea, stated the grant of letters patent dated the 11th of September, 1828, to one James Beaumont Neilson for "the improved application of air to produce heat in fires, forges and furnaces *where bellows or other blowing apparatus are required;" that Neilson's invention [*601 was the production and application of a hot-air blast, and was in public use, with Neilson's license, in the smelting and manufacturing of iron from iron-stone, and was the hot-air blast in the plaintiff's specification mentioned; that the plaintiff could not use the hot-air blast in his specification mentioned, without Neilson's license, and that he obtained such license before the grant of his letters patent; and that the using by the plaintiff of the hot-air blast, in the smelting of iron from iron-stone, combined with the anthracite or stone-coal, as mentioned in the specification, was a using and imitating of Neilson's invention; whereby the plaintiff's patent was void. The plaintiff replied to this last plea, that Neilson's invention was not the same as the hot-air blast, and the machinery and apparatus adapted for the application thereof, mentioned and referred to in the plaintiff's specification, nor was the using by the plaintiff of the invention as described in his specification a using or imitating of Neilson's invention as described in Neilson's specification; which allegations were traversed by the defendants in their rejoinder.

At the trial before me, the verdict was entered for the plaintiff on all the issues, subject to the opinion of the court upon the evidence given at the trial, as contained in a report agreed upon between the parties, the court being at liberty to draw the same inferences from it as a jury might draw.

Upon the argument, it was contended by the defendants that the verdict ought to be entered for them on each of the issues joined on the record: but as the main question between the parties turns on the third issue, which involves the question whether the invention of the plaintiff is a manufacture within the intent and meaning of the statute of James, that is, whether it is or is not the subject-matter of a patent, and, as the *determination of this issue in favour of the one party or the other will render [*602 the decision as to the other issues simple and free from difficulty, we will apply ourselves, in the first instance, to that question.

Now, in order to determine whether the improvement described in the patent is or is not a manufacture within the statute, we must, in the first place, ascertain precisely what is the invention claimed by the plaintiff; and then, by the application of some principles admitted and acknowledged to govern the law relating to patents, and by the authority of decided cases, determine the question in dispute between the parties.

The plaintiff describes the subject of his invention to be, the application of anthracite or stone-coal, combined with hot-air blast in the smelting or manufacture of iron from iron-stone, mine or ore, and states distinctly and unequivocally, at the end of his specification, that he does not claim the using of a hot-air blast separately as his invention, when uncombined with the application of anthracite or stone-coal; nor does he claim the applica

tion of anthracite or stone-coal when uncombined with the use of hot-air blast; but that what he claims for his invention is, the application of anthracite or stone-coal, and culm, combined with the using of hot-air blast in the smelting and manufacture of iron from iron-stone, mine or ore. And the question therefore becomes this, whether—admitting the use of the hot-air blast to have been known before, in the manufacture of iron with bituminous coal, and the use of anthracite or stone-coal to have been known before in the manufacture of iron with the cold blast, but that the combination of the two together (the hot-air blast and the anthracite) was not known before in the manufacture of iron,—such combination can be the subject of a patent. We are of opinion, that if the result produced by such
*603] a combination is either a new article, or a better article, or a *cheaper article, to the public, than that produced before by the old method, such combination is an invention or a manufacture intended by the statute, and may well become the subject of a patent.

Such an assumed state of facts falls clearly within the principle exemplified by ABBOTT, C. J., in *The King* v. *Wheeler*, 2 B. & Ald. 350, where he is determining what is and what is not the subject of a patent, viz.:—"It may perhaps extend to a new process, to be carried on by known implements or elements, acting upon known substances, and ultimately producing some other known substance, but producing it in a cheaper or more expeditious manner, or of a better or a more useful kind." And it falls also within the doctrine laid down by Lord ELDON, in *Hill* v. *Thompson*, 3 Meriv. 629, viz.:—"There may be a valid patent for a new combination of materials previously in use for the same purpose, or for a new method of applying such materials; but, in order to its being effectual, the specification must clearly express that it is in respect of such new combination or application."

There are numerous instances of patents which have been granted where the invention consisted in no more than the use of *things* already known, the acting with them in a *manner* already known, the producing effects already known, but producing those *effects* so as to be more economically or beneficially enjoyed by the public. It will be sufficient to refer to a few instances, in some of which the patents have failed on other grounds, but in none on the objection that the invention itself was not the subject of a patent. We would instance *Hall's* patent, 1 Webst. Pat. Ca. 97, for applying the flame of gas to singe off the superfluous fibres of lace, where the
*604] flame of oil had been used before for that same purpose: *Derosne's* *patent, *Derosne* v. *Faire*, 1 Webst. Pat. Ca. 152, in which the invention consisted in filtering the syrup of sugar through a filter, to act with animal charcoal and charcoal from bituminous substances, where charcoal had been before used for the filtering of almost every liquid except the syrup of sugar: *Hill's* patent, 3 Meriv. 629, above referred to, for improvements in the smelting and working of iron; there the invention consisted only in the use and application of the slags or cinders thrown off by the operation of smelting,—which had been previously considered useless for the production of good and serviceable metal,—by the admixture of mine rubbish. Again, *Daniell's* patent, *Rex* v. *Daniell*, Gods. Pat. 274, was taken out for improvements in dressing woollen cloth, where the invention consisted in immersing a roll of cloth, manufactured in the usual manner, in hot water.

The only questions, therefore, to be considered with respect to the evidence are, was the iron produced by the combination of the hot-air blast and the anthracite, a better or a cheaper article than was before produced

from the combination of the hot-air blast and the bituminous coal? and was the combination described in the specification new, as to the public use thereof in England? And upon the first point, upon looking at the evidence in the cause, we think there is no doubt that in the result of the combination of the hot-air blast with the anthracite or stone-coal, the yield of the furnace was more, the nature, properties, and quality of the iron were better, and the expense of making the iron was less, than under the former process, by means of the combination of the hot-air blast with the bituminous coal. It is to be observed, that no evidence was produced on the part of the defendants to meet that given by the plaintiff on these points, and that it was a necessary *consequence, from the proof in the cause, that from the substitution of the anthracite, in whole or in part, in the stead and place of bituminous coal, the manufacture of iron should be conducted at a less expense. [*605

It was objected, in the course of the argument, that the quantity or degree of invention was so small that it could not become the subject of a patent—that the person who had procured a license to use the hot-air blast under Neilson's patent, had a full right to subject to that blast coal of any nature whatever, whether bituminous or stone-coal. But we think, if it were necessary to consider the labour, pains and expense encountered by the plaintiff in bringing his discovery to perfection, that there is evidence in this cause that the expense was considerable and the experiments numerous; but, in point of law, the labour of thought or experiment, and the expenditure of money, are not the essential grounds of consideration upon which the question, whether the invention is or is not the subject-matter of a patent, ought to depend; for if the invention be new and useful to the public, it is not material whether it is the result of long experiments and profound research, or whether of some sudden and lucky thought, or of mere accidental discovery. The Case of Monopolies, *Darcy* v. *Allein*, 11 Co. Rep. 84; Noy, 178, states the law to be "that where a man, by his own charge or industry, or by his own wit or invention, brings a new trade into the realm, or any engine tending to the furtherance of a trade that never was used before, and that for the good of the realm, the king may grant him a monopoly-patent for a reasonable time." And if the combination now under consideration be, as we think it is, a manufacture, within the *statute of James the First, there was abundant evidence in the cause, that it had, before the granting of the patent, been a great object or desideratum to smelt iron-stone by the means of anthracite, and that it had not been done before; indeed no evidence was called on the part of the defendants to meet that which the plaintiff brought forward. These considerations, therefore, enable us to direct that the verdict shall be entered for the plaintiff, upon the third issue,—that this was a manufacture, and a manufacture *new* as to the public use and exercise thereof within England and Wales. [*606

On the same ground also the second issue is disposed of, in favour of the plaintiff. For no evidence was produced on the part of the defendants to show any inventor earlier than the plaintiff; nor did the fact that there was an earlier inventor appear from the cross-examination of the plaintiff's witnesses.

As to the first issue, namely, whether the defendants had infringed the patent, we think it clearly appears on the evidence that the defendants had used, either in part or in whole, the combination described in the specification of the plaintiff's patent.

The plaintiff's evidence goes fully to show such infringements, and is not met by any explanation on the part of the defendants. Indeed, the defendants' case did not appear to rest on this point, at the trial, so much as on the important question raised by them, whether the improvement described in the specification was a manufacture, within the statute of James.

Upon the fourth issue, which raised no more than the usual inquiry, whether the nature of the invention was sufficiently described in the specification, the usual evidence was given,—that persons of competent skill and experience could follow the directions, and produce the manufacture
*607] described, with success; and this evidence *was entirely unopposed. Upon this issue, also, the verdict ought to be entered for the plaintiff.

With respect, however, to the issue raised in the rejoinder to the plaintiff's replication to the fifth plea, we are of opinion, that, taking the whole of the evidence brought forward by the plaintiff, it is impossible to find any substantial or real distinction between the hot-air blast and the machinery and apparatus described in Neilson's specification, and that described and referred to in the plaintiff's, or to say that the using by the plaintiff of the invention described in his specification was any other than the using or imitating of the invention described in Neilson's specification. The plaintiff, indeed, worked by license under Neilson's patent at the time of his discovery. Upon this fifth issue, therefore, we think the verdict should be entered for the defendants.

Then arises the question, whether the plaintiff is or is not entitled to a judgment notwithstanding the verdict, upon this fifth issue; on which point the argument on the part of the defendants is, that the taking out a patent for an invention, which invention cannot be used or enjoyed by the public, except by means of a former invention of another person, which former invention is itself the subject-matter of a patent still in force, is void by law. Undoubtedly, if the second patent claims, as part of the invention described in it, that which was the subject-matter of a patent then in force, it would be void, on the double ground, that it claimed that which was not new, (which, indeed, would equally be the case if the former patent had expired,) and also, that it would be an infringement of, and inconsistent with, a former grant of the king still in force, which latter consideration alone would make a new patent void. But, in this case, there is an express disclaimer as to any part of the invention of the use of the hot-air
*608] blast, *which was covered by Neilson's patent; the specification describes the application of hot-air blast to be well understood and extensively applied in many places where ordinary fuel is employed. The validity, therefore, of the plaintiff's patent cannot be impeached on either of the grounds above adverted to. Unless, therefore, the grantee of the new letters patent is bound by law to specify whether such former invention, which is excepted, was so excepted on the ground of its being generally known, and used by the public, or because it was the subject of a patent which secured the use of it to a former patentee, the new patent will be good. But that distinction is as much in the knowledge of the public as in that of the grantee of the patent. If, indeed, the new patent had been taken out for an improvement or alteration of an invention secured by a former patent, then, for obvious reasons, a greater particularity would be necessary to distinguish the new from the old. But the present specification expressly says, "I take the whole of an invention already well known to the public, and I combine it with something else." But, it is further

argued, that in point of law no patent can be taken out, which includes the subject-matter of a patent still running and in force. No authority was cited to support this position; and the case in which Lord TENTERDEN held, that where an action was brought for an infringement of improvements in a former patent, granted to another person, and still in force, the plaintiff must produce the former patent and specification at the trial, *Lewis* v. *Davis*, 3 C. & P. 502, affords a strong inference that the second patent was good. The case also of *Harmar* v. *Playne*, 11 East, 101, is a clear authority to the same point; and upon reason and principle there appears no objection. The new patent, after the expiration of the old one, would be free *from every objection; and whilst the former exists, the new patent can be legally used by the public, by procuring a license from Neilson, or by purchasing the apparatus from him or some of his agents; and the probability of the refusal of a license to any one applying for it, is so extremely remote that it cannot enter into consideration as a ground of any legal objection. [*609

Upon the whole, therefore, we hold that the verdict is to be entered for the plaintiff upon all the issues except the fifth; that the verdict is to be entered for the defendants on the fifth issue; but that, notwithstanding such verdict, the judgment must be given for the plaintiff.

Judgment for the plaintiff.

STUBBS and Wife to OAKLEY.

Where the acknowledgment of a married woman had been taken in a remote part of India, under peculiar circumstances, in the absence of all the commissioners, before two gentlemen who were not named in the commission, the court allowed the commission to be amended by inserting their names therein.

Talfourd, Serjt., applied for an order, directing the officer of the court to receive and file the acknowledgment of a married woman taken in India, or that the commission might be amended by inserting therein the names of John Hall and Andrew Paton.

It appeared from the affidavits upon which the application was made, that two commissions, dated in September, 1841, were sent to India for the purpose of taking and certifying the acknowledgment by *Anne Belinda Stubbs*, wife of *John Stubbs*, lieutenant of the forty-ninth regiment of Bengal native infantry, of the execution by her of two indentures of release and conveyance and assignment, in order to pass the interest of Mrs. *Stubbs* in certain estates in the county of Salop. Lieutenant *Stubbs* being upon detached service *accompanied by his wife, and it being consequently uncertain where they might be found, the commissions were directed to all the officers of his regiment, by name, and also to Orlando Stubbs, colonel, late of the forty-fourth Bengal native regiment, commanding Scindia's contingent, or any two of them. The commissions were returned, together with the deeds, which had been executed and acknowledged before John Hall, a lieutenant in the East India company's twenty-second regiment of native infantry, and Andrew Paton, an assistant-surgeon in the Company's Bengal service. The certificates of acknowledgment were signed by Hall and Paton, who were described as "two of the commissioners specially appointed pursuant to the statute." The affidavits verifying the certificates were respectively sworn, at Erinpoorah, in the territory of Sirohi, in the East Indies, before David Downing, "major in the third [*610

regiment of Bengal native infantry, political superintendent, Sirohi, and commanding at Erinpoorah." The following document was also sent, signed by Major Downing, and dated at Erinpoorah:—

"This is to certify, that the aforesaid officers (to whom the commissions were directed) of the forty-ninth regiment of Bengal native infantry are, one and all, to the best of my knowledge and belief, beyond one thousand miles from this place, and could not therefore possibly perform the said commission. I further certify, that the two officers who have acted as commissioners in taking the acknowledgment of the said *Anne Belinda Stubbs*, viz. Andrew Paton, assistant-surgeon, Jhodpore legion, and John Hall, lieutenant twenty-second regiment, Bengal native infantry, now adjutant of the Jhodpore legion, are such as they represent themselves to be, and in every respect adequate to act as such commissioners: and I further
*611] declare, that if a new commission should be *sent from England to this country, naming any special commissioners, the exigencies and casualties of the service are such just now, that the probability is that the said special commissioners would be removed before the commission could arrive at Erinpoorah."

There was also a letter from Lieutenant *Stubbs*, dated at Erinpoorah, to the same effect, and also stating, that he was attached to the Jhodpore legion, an irregular regiment, and that he was liable at any moment to be ordered to a distance, either with that regiment or with his own; that, under the circumstances, it was thought advisable to execute the commissions in the manner they had been, which was as nearly in conformity with the instructions sent as was practicable, as, in the event of their being sent back to England to be amended, it was deemed highly improbable in the then state of India, that, on their being again sent out, the parties would be in a more convenient position for their execution; that there was no notary public, nor any magistrate before whom an oath could be taken, within several hundred miles from Erinpoorah; and that Major Downing was, as the writer believed, duly qualified to administer oaths.

TINDAL, C. J., said that, under the very peculiar circumstances brought before the court, they would direct the commissions to be amended by inserting the names of the two gentlemen before whom the acknowledgment had been taken as commissioners; there being no doubt that their names would have been inserted at first if the necessity for so doing had been known and mentioned.

Per curiam. Rule accordingly.

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*612] *BARTHOLOMEW *v.* CARTER.

By sect. 41 of the 10 G. 4, c. 44, (the metropolitan police act,) certain privileges are given to persons against whom actions are brought "for any thing done in pursuance of the act;" and it is enacted that "though a verdict shall be given for the plaintiff he shall not have costs against the defendant, unless the judge, before whom the trial shall be, shall certify his approbation of the action and of the verdict obtained thereupon.

In an action for false imprisonment, it appeared that the plaintiff had been a constable in the metropolitan police, in which the defendant was a superintendent. By the regulations of the commissioners, every constable who is unmarried, is bound, if required, to reside in one of the station-houses; and every constable, upon leaving the force, is to deliver up his uniform. The plaintiff, who was unmarried, upon being required by the defendant to reside in a station-house, refused to do so and resigned. The defendant sent another constable to demand his uniform, which he refused to give up. (*a*)

(*a*) See now 2 & 3 Vict. c. 47, s. 16. Antè, Vol. III. 125 n. (*a*)

Having in the course of the same day gone to the station-house, the serjeant on duty detained him in custody until the following day, when he was taken before a magistrate and discharged. The plaintiff recovered a verdict for 5*l*.: but the judge refused to certify. *Held*, that the plaintiff was nevertheless entitled to his costs, inasmuch as the action was not brought "for any thing done in pursuance of the act."

In a case within the statute, *quære*, whether advantage should be taken of it by suggestion or by motion.

The costs of an unsuccessful motion to review the master's taxation do not necessarily follow the general costs of the cause. And where the question as to such taxation involved the construction of a difficult statute, the court discharged the rule to review, without costs.

TRESPASS and false imprisonment by a constable of the metropolitan police force against a superintendent of that force.(*a*) The plaintiff recovered a verdict, with 5*l*. damages; but the learned judge who tried the cause did not certify his approbation of the action under sect. 41, of the stat. 10 G. 4, c. 44,(*b*) so as to *give the plaintiff his costs. The master having, notwithstanding, taxed the plaintiff his costs. [*613

Humfrey in last Michaelmas term obtained a rule nisi for a review of such taxation.

Bompas, Serjt., and *Martin*, in last Hilary term, showed cause. They contended that, inasmuch as the record was made up in the ordinary way, the master was bound to tax the plaintiff his costs, as he was entitled to have judgment for costs as well as for damages; otherwise there would be error upon the record, of which advantage might be taken by the defendant himself; 1 Wms. Saund. 46 b. n. (8.) If the judgment was not warranted by the previous proceedings on the record, the proper course would have been for the defendant to enter a suggestion on the roll, which the plaintiff might have demurred to, or traversed; *Burton* v. *Hunter*, 1 Hudson & Brooke's Rep. K. B. Ireland, 569, recognised in *Bartlett* v. *Pentland*, 1 B. & Ad. 704.(*c*) But the application for a suggestion would now be too late; *Barney* v. *Tubb*, 2 H. Bla. 353; *Watchorn* v. *Cook*, 2 M. & S. 348; *Calvert* v. *Everard*, 5 M. & S. 510; *Hippesley* v. *Layng*, 4 B. & C. 863, 7 D. & R. 265; *Baddley* v. *Oliver*, 3 Tyrwh. 145, 1 C. & M. 219. Even assuming, however, that the application is correct in form, and proper in point of time, still there is nothing to show that the act of which the plaintiff complained *was done by the defendant in pursuance of the 10 G. 4, c. 44; or even that the defendant had reasonable ground for supposing that it was, so as to bring the case with the decisions as to notices of action to privileged persons; *Cook* v. *Leonard*, 6 B. & C. 351, 9 D. & R. 399; *Wedge* v. *Berkeley*, 6 A. & E. 663, 1 N. & P. 665. And further, the facts not being presented to the court upon affidavit, they have no materials to act upon. (They were then stopped by the court.) [*614

Humfrey, in support of the rule. There was no dispute at the trial, as to the act complained of having been done under the supposed authority of the statute. It is not necessary to produce an affidavit when a certificate is applied for to give or deprive a party of costs; as the facts appear on the judge's notes. So, upon a motion to enter a suggestion; *Oakes* v. *Albin*, 13 Price, 783, M'Clel. 582. [TINDAL, C. J. An application to

(*a*) For the pleadings and facts in this case, see Vol. III. of these Reports, p. 125.

(*b*) See the former part of this section set out, *antè*, Vol. III. 126 n. (*a*) which relates to actions, &c., "commenced against any person for any thing done in pursuance of the act." By the latter part it is enacted, that "though a verdict shall be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant, unless the judge, before whom the trial shall be, shall certify his approbation of the action and of the verdict obtained thereupon."

(*c*) See *Bosanquet* v. *Ransford*, 11 A. & E. 520, 3 P. & D. 298; *Cross* v. *Law*, 6 M. & W. 217; *Harwood* v. *Law*, 7 M. & W. 203; *Whittenburg* v. *Law*, 6 N. C. 345, 8 Scott, 661.

enter a suggestion upon the record under a court of conscience act, is always upon affidavit.] The court would there have no other means of knowing the facts; but even in such cases a suggestion is not the only course. In Tidd's Practice, Pa. 961, 9th. ed., it is said, "where the intent is, to call upon the other party to pay costs, it is necessary to enter a suggestion; but where the intent is to exonerate the party applying, and the other party is not entitled to costs, a motion is sufficient to take them from him." In *Baildon* v. *Pitter*, 3 B. & A. 210, 1 Chitt. R. 635; *Robinson* v. *Vickers*, 1 Chitt. R. 636 n.; and *Fleming* v. *Davis*, 5 D. & R. 371, the parties were exempted from payment of costs, upon motion. [TINDAL, C. J. The rule in this case might be assimilated to those in the cases mentioned, if it should appear that the act in question was clearly done
*615] *in pursuance of the statute. Upon that point we will look into the act and the judge's notes; if it shall appear that the act was not of that nature, it is not a case in which the judge could certify, and then *cadit quæstio;* but if it appears that the act was done under the authority of the statute, we will then consider the form of the rule. I do not think, looking at the dates, that the application can be considered as out of time. *Martin.* In *Baildon* v. *Pitter* and *Fleming* v. *Davis*, it appeared that the application was made before judgment.] *Cur. adv. vult.*

TINDAL, C. J., now said that the court had looked at the learned judge's notes, and that they thought the act complained of was not within the meaning of the police act, but was quite wide of it, and could not be said to be done "in pursuance of" that statute, or of any power given thereby; and that the rule to review the master's taxation must be discharged.

Rule discharged.

Bompas, Serjt., in the following Michaelmas term, obtained a rule nisi to amend the above rule (discharing the rule to amend the master's taxation) by adding the words "with costs."

Humfrey showed cause (*a*) upon the ground that the question being one of great doubt and difficulty, the court would not have given costs, even if they had been asked for, at the time.

Bompas, Serjt., admitted he had not asked for costs at the time the judgment had been pronounced, which was not done till some time after the
*616] case had been argued, *when he was not present. He submitted that the motion to review taxation related as much to a matter in the cause as a motion to enter a suggestion; which, if discharged, would certainly have been so with costs. This was an appeal from the judgment of the master, which, having been supported by the court, the party who succeeded was entitled to the costs of the application.

TINDAL, C. J. The costs of a motion to review the master's taxation do not necessarily follow the general costs of the cause. The court will see whether there was any ground for the application. The question in this case turned upon a difficult and embrangled act of parliament, and the master might have been either right or wrong in his view of the matter. I think it was a proper case in which to apply to the court. The general rule is certainly as contended for by my brother *Bompas:* but I think that where a case turns upon the construction of an act of parliament, it is competent to a party to come to the court and ask whether the construction is this way or that. Upon the whole—especially considering the lapse of time in this case—I think this rule must be discharged; but we will say nothing about costs.

Per curiam, Rule to amend the former rule discharged.

(*a*) Thursday, 24th November, 1842.

*TANNER v. LEA and Others. [*617

The court, upon the application of the defendants, ordered the plaintiff's attorney to deliver his bill of costs, though upon the settlement of the action it had been expressly agreed between the attorneys of the respective parties, that, on certain accommodation being given to the defendants, the plaintiff's attorney should receive 60*l.* as an ascertained amount of costs between attorney and client.

The costs were directed to be taxed as between attorney and client.

Bompas, Serjt., on a former day in this term, on behalf of the defendants, obtained a rule, calling upon the attorney for the plaintiff to show cause why he should not deliver his bill of costs in the above cause.

It appeared from the affidavits on which the rule was obtained, that when the cause was at issue the proceedings were stayed under a judge's order, by consent, upon the defendants' undertaking to pay the debt and costs, to be taxed, within three weeks, or judgment. The debt and costs were paid, part of the payment being by a banker's draft at three months which the plaintiff's attorney consented to receive in consideration of an agreed sum of 60*l.* being paid to him for costs, without any bill being delivered. The attorneys for the defendants afterwards demanded a bill of costs, which demand had not been complied with.

Channell, Serjt., now showed cause, on affidavits, which stated that the sum of 60*l.* had been expressly agreed upon between the attorneys on both sides, as the ascertained amount of costs between attorney and client. He submitted that this being a bargain between the parties, the court would not interfere.

Bompas, Serjt., was heard in support of the rule.

TINDAL, C. J. This appears to have been a bargain made for the benefit, not of the client, but of the attorney. And I do not see how we can refuse to interfere, when applied to for that purpose.

*MAULE and CRESSWELL, JJ., expressed their concurrence; and the latter observed that as the defendants did not come to the court under any favourable circumstances, they ought not to have costs. [*618

Per curiam; Rule absolute without costs; the costs in the cause to be taxed as between attorney and client.

GEIKIE and Another v. HEWSON.

SAME v. MARTIN.

Pending an action of debt by A. against B., as acceptor of a bill for 468*l.* 1*s.* 9*d.*, and for 1500*l.* for goods sold and delivered, &c. A filed an affidavit in the court of Bankruptcy under the 1 & 2 Vict. c. 110, s. 8, stating B. to be indebted to A. in 468*l.* 1*s.* 9*d.* for goods sold and delivered, &c., and also upon a bill for 468*l.* 1*s.* 9*d.*

Afterwards, on the 11th of February, B., with C. and D. as his sureties, gave a bond to A. conditioned for the payment of such sum as should be recovered in the action for the alleged debt, or for the render of B. On the 15th of March a fiat in bankruptcy was awarded against B. On the 21st of March, A. signed judgment against B. for 1332*l.* 19*s.* 6*d.* On the 5th of April A. proved under the fiat, for 864*l.* 12*s.* 9*d.*, being the amount of the judgment debt excluding the 468*l.* 1*s.* 9*d.* On the 12th of April a *ca. sa.* against B. was lodged with the sheriff. On the 30th of May A. brought an action against C. and D. on the bond.

Held, that the proof under the fiat was an election to relinquish the action against B., and that B., being entitled to be discharged if rendered, C. and D. were entitled to have the proceedings stayed.

Sir *Thomas Wilde*, Serjt., had obtained a rule nisi to stay the proceedings in these actions upon affidavits stating the following facts:—

On the 1st February, 1842, the plaintiffs, as drawers and payees of a bill of exchange for 468*l.* 1*s.* 9*d.*, commenced an action of debt against James Gale and James Gale the younger, as the acceptors; the declaration *619] contained also counts for goods sold and delivered, for *money paid, and on an account stated; the sum of 1500*l.* being claimed in each of such counts. The plaintiffs subsequently filed an affidavit in the court of Bankruptcy, under the 1 & 2 Vict. c. 110, s. 8,(*a*) stating that the Gales were indebted to them in 468*l.* 1*s.* 9*d.*, for goods sold and delivered and money paid, and also upon a certain bill of exchange for 468*l.* 1*s.* 9*d.*, drawn by the plaintiffs upon and accepted by the Gales, at four months' date. A copy of this affidavit, and a notice demanding immediate payment of the debt, were duly served upon the Gales. On the 11th of February the Gales, (together with the defendants *Hewson* and *Martin* as their sureties,) executed the bond required by the same section of the act, conditioned for the payment by the Gales to the plaintiffs, of the sum to be recovered in the action, with costs, or for their render after judgment recovered. On the 12th of February, a judge's order was made, by consent, in the action against the Gales,—that, upon payment of 1332*l.* 19*s.* 6*d.*, the amount of debt due, and the costs, to be paid by instalments, all further proceedings in that cause should be stayed; and that in case default should be made in any payment, the whole should become due, and the plaintiffs be at liberty to sign final judgment, and issue execution for the whole amount unpaid, with costs, &c. &c. A fiat in bankruptcy having been awarded against the Gales, the plaintiffs, on the 21st of March, entered up judgment in the action against them, for 1332*l.* 19*s.* 6*d.*; and, on the 5th of April, they proved under the fiat a debt of 864*l.* 12*s.* 9*d.*, alleging that they had received no security or satisfaction for the same, except certain bills of exchange accepted by the bankrupts, "and a certain judgment in an action against the said bankrupts, signed on the 21st of *620] March last for the said *debt of 864*l.* 12*s.* 9*d.*, and a certain bill of exchange not included in the above debt" (namely, the bill for 468*l.* 1*s.* 9*d.*) On the 12th of April, the plaintiffs lodged a *ca. sa.* with the sheriff in the action against the Gales; and, on the 30th of May, they commenced the present actions upon the bond against two of the sureties, to recover the amount of the last mentioned bill.

The rule nisi was obtained upon the ground that, as the plaintiffs had proved for part of the debt, they had elected to relinquish the action, and had thereby released the sureties; and that, these sureties being in the nature of bail, they might render their principals, and were therefore entitled to summary relief on motion.

The learned serjeant referred to the stat. 6 G. 4, c. 16, s. 59; *Ex parte Glover*, 1 Glyn and Jam. 270, and *Owston* v. *Coates*, 10 Ad. & E. 193, 2 P. & D. 485.

Storks, Serjt., now showed cause. The bond in question having been given in the court of Bankruptcy established by the 1 & 2 W. 4, c. 56, that court has an equitable jurisdiction as to the sureties, and has power to afford them relief; but it is submitted that *this* court has no jurisdiction in the matter. [Tindal, C. J. No objection appears to have been made to the jurisdiction in *Owston* v. *Coates*.] The application in that case was merely to render the principal; not, as here, to stay the proceedings in an

(*a*) Vide antè, Vol. III. 159 n.

action against the sureties. Where a bankrupt is clearly entitled to his discharge, the court undoubtedly will relieve the bail on motion; *Ray* v. *Hussey*, Barnes, 104; *Linging* v. *Comyn*, 2 Taunt. 246; *Todd* v. *Maxfield*, 3 B. & C. 222, 5 D. & R. 258. But the present case is very different. Here, there is no render, no certificate, no discharge. The bail are fixed. [TINDAL, C. J. Have not the plaintiffs, *by proving under the fiat, elected to relinquish their action against the bankrupts, under 6 G. 4, c. 16, s. 59?] Only, it is submitted, as to the debt proved. The proof under the fiat excluded the debt for which the bond was given. In *Harley* v. *Greenwood*, 5 B. & Ald. 95, it was held that the election of the creditor to take the benefit of the commission was confined to the debt actually proved, and did not extend to distinct debts *ejusdem generis* due at the same time. *Watson* v. *Medex*, 1 B. & Ald. 121, is to the same effect. [Sir *T. Wilde*, Serjt. The result of the cases is, that where the action is brought first, there proof under the fiat discharges the action; where the proof is first, the debt proved is alone discharged. TINDAL, C. J. The question is, whether the judgment did not alter the nature of the debt. In this case, the whole demand has become one entire judgment-debt. Is it then competent to the plaintiffs to separate that debt into two parts, and to prove under the fiat as to the one part and to proceed against the sureties for the other?] The debts are distinct in their nature, though they were included in the same action. There is nothing compulsory in the act. [MAULE, J. When a writ of *capias ad satisfaciendum* has lain four days in the office to fix the bail, can that be said to be a proceeding to which the term "action" properly applies? TINDAL, C. J. The plaintiff should not mix up the two questions together.] But at any rate, the present application is not the form in which the sureties are entitled to relief, even assuming that they stand in the situation of bail; *Sanders* v. *Spincks*, Barnes, 105. In *Clarke* v. *Hoppe*, 3 Taunt. 46, where an action had been commenced, and the defendant afterwards became bankrupt, and then permitted judgment to be signed for want of a plea, the court would not relieve the bail on motion. There, the defendant had obtained his certificate. [*621

*Sir *T. Wilde*, Serjt., in support of the rule. In the present state of facts, it is clear that the sureties in this bond, being in the nature of bail, are not fixed; *Tidd's Practice*, p. 283, 9th ed. The 1 & 2 Vict., c. 110, s. 8, requires the giving of a bond which is to have the effect of a recognisance of bail. The defendants were discharged as to the action, by the proof under the fiat after the action had been brought; *Ex parte Dickson*, 1 Rose, 98; *Ex parte Hardenbergh*, 1 Rose, 204; *Ex parte Woolley*, 1 Rose, 394; *Ex parte Glover*, 1 Glyn. & Jam. 270. In *Watson* v. *Medex*, the proof was prior to the action. In *Harley* v. *Greenwood* the rule is laid down very clearly in the judgment of HOLROYD, J. The fifty-ninth section of the bankrupt act operates as a suspension of the proceedings in an action, defeasible in the event of the fiat being afterwards superseded. If this had been the ordinary case of bail, the principal, when rendered, being entitled to his discharge, the court would give relief to the bail on motion. Now, by the eighth section of the 1 & 2 Vict., c. 110, the bond to be given to the creditor is in the terms of the old recognisance of bail, and is to become void upon the render of the principal, according to the practice of the court: and the court will not put the parties to the unnecessary trouble and expense of a render. [MAULE, J. Might not the bankrupt say, discharge me, or expunge the debt?] Two cases only appear to have been decided upon the statute. *Owston* v. *Coates* is a distinct authority that the sureties in [*622

such a bond may discharge themselves by a render of the principal. But in this case, as the right of action against the principal is at least suspended by the proof under the fiat, the principal cannot be called upon to render;
*623] and the sureties have therefore a right to be relieved. In *Saunderson v. Parker, 9 Dowl. P. C. 495, a ca. sa. was sued out to fix the bail; but, the principal being in custody, the ca. sa. was held to be unnecessary and irregular, and the ca. sa. was set aside and the proceedings on the bond were stayed. If the plaintiff is bound to relinquish his action it is clear that the defendants, if rendered, would be discharged.

TINDAL, C. J. I am of opinion that this application ought to be granted. It appears to me, that the sureties in this case stand in the same situation as parties who have entered into a recognisance of bail, where the plaintiff has proved under the bankruptcy of the principal. In such a case the first question would be, whether the bail would not continue liable to be fixed until something had been done to discharge their liability, after a ca. sa. had issued. Here, however, the ca. sa. itself appears to be irregular; for if the case falls within the 6 G. 4, c. 16, s. 59, the proof of the debt would operate as a suspension of the action.(a) The point therefore comes to this—have the proceedings adopted by the plaintiffs that operation? And I am of opinion that they have.

The words of the act are very strong,—that no creditor who has brought any action against any bankrupt in respect of a demand prior to the bankruptcy, or which might have been proved under the commission, shall prove a debt under such commission, or have any claim entered upon the proceedings, without relinquishing such action; and the proving or claiming a debt under a commission shall be deemed an election by the creditor to take the benefit of the commission with respect to the debt proved or
*624] claimed. Now, in *this case, the creditors have not only brought an action to recover a large sum, but have gone so far as to sign judgment for the whole amount. After doing this they have proved under the fiat for that which forms a component part of the entire sum. In *Harley* v. *Greenwood* the main question was, whether the action was brought before or after the proof of the debt. In the present case no such question arises. The sum for which judgment has been signed includes both causes of action, and the plaintiffs have proved under the fiat upon one of those causes of action only. But in *Ex parte Glover* it was held, that proof by a creditor for one debt operated as a relinquishment of an action previously brought in respect of a distinct demand. Here, the party has done more, because the debt proved formed a part of the debt for which the action was brought. The plaintiffs, therefore, could not have enforced the claim against the bankrupt; with regard to that portion of the debt for which judgment had been obtained, which related to the bill for 468*l*. 1*s*. 9*d*. Nor am I aware of any authority they had, to sever that judgment, and to prove for one part and proceed to execution for the remainder. The two sums being united in the form of a judgment, cannot again be severed. To hold that the plaintiffs could recover against the sureties, would be directly contrary to the decision in *Ex parte Glover*. If bail would be entitled to relief in such a case, I cannot see why it should be refused to the sureties in this bond. As, therefore, in respect of these actions, the sureties would be entitled to relief if the bankrupts were rendered, they ought not to be driven to the

(a) A right of action, if *suspended by operation of law*, is not extinguished; if suspended *by the act of the party*, it is gone for ever. See 1 Roll. Abr. tit. *Extinguishment*, (L), (M); ante, 476 (c).

expense of that circuitous course. For these reasons, therefore, I think that the proceedings against them should be stayed.

COLTMAN, J. I am of the same opinion. The case falls precisely within the first portion of the fifty-ninth *section of the 6 G. 4, c. 16. The [*625 plaintiffs having proved a debt under the fiat, have elected to relinquish their actions against the bankrupt. And their sureties under the eighth section of the 1 & 2 Vict., c. 110, being in the nature of bail, are clearly entitled to relief on summary application to the court in which the action was brought. It was evidently the intention of the legislature, that the sureties in the bond described in that act should be entitled to discharge themselves upon rendering their principal. And the object of the present application is, to obtain relief under the equitable jurisdiction of the court. If we were to refuse to grant the application, the effect would be that the principals must be rendered, whereby the sureties would be discharged. But that would be a great hardship upon the bankrupts, as they would have a right to be immediately discharged out of custody. I think therefore that, as in the case of recognisance of bail, we ought at once to grant the relief; and that the rule must be made absolute to stay the proceedings against the sureties.

MAULE, J. I also am of opinion, that the obligors in this case, who are in the nature of bail, should have this summary relief. The meaning of "relinquishing such action or suit," in the first branch of the fifty-ninth section of the 6 G. 4, c. 16, is explained by the subsequent part of the clause to be "proceeding no further in the action." I had some doubt at first, whether this application should not have been made to the court of review instead of being made to this court. But, upon consideration, I think that the authority is properly exercised by the court in which the action is brought, since the act of parliament is silent as to the court which is to have jurisdiction over the subject. The court in which this action is brought, has therefore no right to withdraw from the duty *impliedly [*626 imposed upon it, and I think we are bound to administer the relief which the statute has provided. The action is not determined. The effect of the application is, that the sureties are not to be called upon to render their principals, until after the fiat is superseded, if that event shall ever happen.

CRESSWELL, J., concurred. Rule absolute.(a)

(a) See *Kymer* v. *Sydserf*, post, 636.

DAVIDSON, one of the Public Officers of the Commercial Bank of ENGLAND, v. BOWER.

The declaration described the plaintiff as one of the public officers of certain persons united in co-partnership *for the purpose of carrying on the trade or business of bankers* in England, according to the 7 G. 4, c. 46. The declaration contained a count for work and labour done by the co-partnership *as the bankers* of the defendant, and for commission due in respect thereof:

Held, on motion in arrest of judgment, that, looking at the whole record, it sufficiently appeared that the co-partnership were carrying on business *as bankers* under the statute.

ASSUMPSIT. The declaration commenced as follows: "*Alexander Davidson*, one of the present public officers of certain persons united in co-partnership *for the purpose of carrying on the trade or business of bankers* in England, according to the statute made and passed in the seventh year of the reign of his late Majesty George the Fourth, intituled 'An act for

the better regulating co-partnerships of certain bankers in England, and for amending so much of an act of the thirty-ninth and fortieth years of the reign of his late Majesty King George the Third, intituled An act for establishing an agreement with the Governor and Company of the Bank of England, for advancing the sum of 3,000,000*l.* towards the supply for the *627] service of the *year 1800, as relates to the same,' and called the Commercial Bank of England, which *Alexander Davidson* hath been duly nominated and appointed, and now is, one of the public officers of the said co-partnership, according to the force, form, and effect of the said act of parliament, complains, &c. The declaration then proceeded in the usual form of an *indebitatus assumpsit* for money lent,—for money paid,—for the price and value of divers shares in divers public companies bargained and sold by the co-partnership to the defendant,—for work and labour, care, diligence, and attendance of the co-partnership, done, performed, and bestowed as the bankers of and for the defendant at his request, and for commission and reward due and of right payable from the defendant to the co-partnership in respect thereof,—for interest,—and upon an account stated.

Pleas: as to 10*l.* parcel, &c. payment into court; as to all but 10*l.*—non-assumpsit—payment—and set-off.

The plaintiff took the 10*l.* out of court, joined issue on the second plea, and took issue on the third and fourth.

At the trial before ROLFE, B., at the last Liverpool assizes, it appeared that the plaintiff was registered as one of the public officers of a banking co-partnership, called "The Commercial Bank of England," of which the defendant was a shareholder, and had been a director. The action was brought to recover a balance of principal and interest in respect of 1500 shares of 5*l.* each, which, by an agreement among the directors for a division among them of the shares in the undertaking not disposed of, had been allotted to the defendant, credit having been given to him, from time to time, for the dividends declared on such shares. The jury having returned a verdict for the plaintiff, for 5182*l.*,

Channell, Serjt., in last Easter term, moved in arrest of judgment, on *628] the ground that it did not appear by *the declaration, that the company were carrying on the trade and business of bankers, so as to bring them within the provisions of the 7 G. 4, c. 46, s. 9(*a*,) and the 1 & *629] 2 Vict. c. 96.(*b*) It is inconsistent with what is *stated in the declaration, that the company may never have carried on business at

(*a*) Which enacts, "that all actions and suits, and also all petitions to found any commission of bankruptcy against any person or persons who may be at any time indebted to any such co-partnership carrying on business under the provisions of this act, and all proceedings at law or in equity under any commission of bankruptcy, and all other proceedings at law or in equity, to be commenced or instituted for or on behalf of any such co-partnership, against any person or persons, bodies politic or corporate, or others, whether members of such co-partnership or otherwise, for recovering any debts, or enforcing any claims or demands due to such co-partnership, or for any other matter relating to the concerns of such co-partnership, shall, and lawfully may, from and after the passing of this act, be commenced or instituted and prosecuted in the name of any one of the public officers, nominated as aforesaid, for the time being, of such co-partnership as the nominal plaintiff or petitioner for and on behalf of such co-partnership," &c. &c.

(*b*) Which, after reciting the foregoing provision, enacts, "that any person now being, or having been, or who may hereafter be or have been, a member of any co-partnership now carrying on, or which may hereafter carry on, *the business of banking* under the provisions of the said recited act, may at any time during the continuance of this act, in respect of any demand which such person may have, either solely, or jointly with any other person, against the said co-partnership, or the funds or property thereof, commence and prosecute, either solely, or jointly with any other person, (as the case may require,)

al.. The learned serjeant cited *Fletcher* v. *Crosbie*, 9 M. & W. 252, 1 Dowl. N. S. 149. A rule nisi having been granted,

Shee, Serjt., (with whom were *Knowles*, *Crompton*, and *Martin*,) now showed cause. It is submitted that the declaration is sufficient, being in the form used in *Spiller* v. *Johnson*, 6 M. & W. 570, 8 Dowl. P. C. 368, and *Christie* v. *Peart*, 7 M. & W. 491, 9 Dowl. P. C. 291, where the present point was not taken. Although the declaration might have been held bad on special demurrer, according to the case of *Fletcher* v. *Crosbie*, the objection cannot prevail when taken in arrest of judgment. It is clear, looking at the whole of the record, that the company were carrying on business as bankers. [MAULE, J. The declaration states, that the parties are united in partnership for the purpose of carrying on the trade or business of bankers, and their claim against the defendant is for a banking account. Surely that is sufficient.] In *Fletcher* v. *Crosbie* it did not appear on the record that the action was brought for banking business. Moreover, here the declaration is aided by the verdict, and the jury must be assumed to have found, that there was a balance due from the defendant to the co-partnership upon a banking account. *Besides, there has been a payment of money into court, which is an admission of a contract. [*630]

Channell, Serjt., (with whom were *Dundas* and *W. H. Watson*,) in support of the rule. This is an objection which may be taken as well in arrest of judgment as by special demurrer; for the defect is one of substance and not of mere form. To entitle the plaintiff to sue as one of the public officers of the bank, the co-partnership must have been actually carrying on business as bankers under the statute. [CRESSWELL, J. Suppose the company to comply with all the requisites of the act, and to open their bank and transact such business as they might have carried on without the intervention of the act.] It would not be sufficient for them *to act as private bankers*, they must *carry on business as bankers under the statute*. *Fletcher* v. *Crosbie* ought to govern this case. There, the declaration, which described the plaintiff "as one of the present public officers of certain persons united in co-partnership *for the purpose* of carrying on the trade and business of banking in England," according to the statute 7 G. 4, c. 46, was held bad on special demurrer, for not stating that the co-partnership was carrying on the trade and business of bankers or had carried on such trade. It is true, that here there is a count for commission; but that only shows that the company carried on business as private bankers, not that they carried it on *under the act*. The payment of money into court only operates as an admission to the extent of the sum paid in.

any action, suit, or other proceeding at law or in equity, against any public officer appointed or to be appointed under the provisions of the said acts, to sue and be sued on behalf of the said co-partnership, and that any such public officer may, in his own name, commence and prosecute any action, suit, or other proceeding, at law or in equity, against any person being or having been a member of the said co-partnership, either alone, or jointly with any other person, against whom any such co-partnership has or may have any demand whatsoever, and that every person being or having been a member of any such co-partnership shall, either solely, or jointly with any other person, (as the case may require,) be capable of proceeding against any such co-partnership, by their public officer, and be liable to be proceeded against by or for the benefit of the said co-partnership, by such public officer as aforesaid, by such proceedings and with the same legal consequences as if such person had not been a member of the said co-partnership, and that no action or suit shall in any wise be affected or defeated by reason of the plaintiffs or defendants, or any of them respectively, or any other person in whom any interest may be averred, or who may be in any wise interested or concerned in such action, being or having been a member of the said co-partnership, and that all such actions, suits, and proceedings shall be conducted and have effect as if the same had been between strangers."

TINDAL, C. J. When the plaintiff is described as a public officer of the co-partnership, the inference is that the co-partnership was carrying on business under the act. The ninth section of the 7 G. 4, c. 46, confers a
*631] great benefit on the public, not only authorizing the *bank to sue, but also allowing it to be sued. Looking at the whole record, it is fairly to be intended that the company were conducting the business of bankers under the provisions of the statute.

Per curiam; Rule discharged.

CHAPMAN *v.* ELEY.

Semble, that where a trial has taken place during term, the four days within which the parties may move for a new trial must be reckoned *inclusively* of the day of the return of the distringas.

THIS action was tried before ERSKINE, J. at the sittings for Westminster during this term, (Thursday, May the 26th,) when the plaintiff recovered a verdict for 40*s*. The distringas was returnable the following day (Friday the 27th.)

Shee, Serjt., on Wednesday, June the 1st, obtained a rule nisi for a new trial, on the ground of surprise. On the same day the plaintiff signed judgment.

Glover, Serjt., on Friday the 3d, obtained a rule nisi to set aside this judgment for irregularity; upon the ground that the defendant had four clear days from the return of the distringas, to move for a new trial. He referred to *Mason* v. *Clarke*, 1 Dowl. C. P. 288, 1 Tyrwh. 534, 1 C. & J. 411, Reg. Gen. Hil. 2 W. 4, r. 67, 8 Bingh. 297, (*a*) and to Archb. Prac. p. 1099, 7th. ed. [TINDAL, C. J., referred to *Kirkham* v. *Marter*, 2 B. & A. 613, 1 Chitt. Rep. 382, and observed that in cases of trials on
*632] the circuit, the distringas was *returnable on the first day of term, but the motion for the new trial must be made within the first four days of the term.]

Channell, Serjt., now showed cause. The distringas having been returnable on the 27th of May, the motion for a new trial, made on the 1st of June, was too late; for the plaintiff was entitled to sign judgment on that day, as the four days within which a party must move for a new trial are reckoned *inclusive* of the day of the return of the distringas. In the passage from Archbold's Practice, which was cited when the rule was obtained, it is said "the motion for the rule nisi must be made within four days after the distringas is returnable." For this, *Kirkham* v. *Marter* is cited as an authority. But it is afterwards added, "the four days are reckoned *inclusive* of the *first* and *last* days." But whether both days are included, or only one, the plaintiff was entitled to sign judgment in this case. The rule of Hilary term 2 W. 4, r. 67, leaves the time when judgment may be signed in some doubt, as it only fixes "the day after the appearance day of the return of the distringas;" but such appearance day is clearly ascertained by the 1 W. 4, c. 3, s. 2,(*b*) as being the third day

(*a*) "After the return of a writ of inquiry, judgment may be signed at the expiration of four days from such return; and, after a verdict or nonsuit, on the day after the appearance day of the return of the *distringas* or *habeas corpora*, without any rule for judgment."

(*b*) Which enacts "that all writs now usually returnable before any of His Majesty's courts of King's Bench, Common Pleas, or Exchequer respectively, on general return days, that shall be made returnable after the 1st day of January, 1831, may be made returnable on the third day exclusive before the commencement of each term, or on any

after the return of the distringas exclusive of the day of the return ; Tidd's New Practice, p. 45.

*There is another objection in this case. Where a rule nisi for a new trial has not been obtained in time—as from pressure of business in the court—the party who seeks to obtain it must give notice to the other party of his intention to move ; *Doe dem. Duncan* v. *Edwards*, 7 Dowl. P. C. 547. In this case the rule nisi was not served till twelve o'clock on the 2d of June, and no previous notice had been given. The learned serjeant stated these facts from affidavits. [*633

Shee and *Glover*, Serjts., in support of the rule. In the note to *Kirkham* v. *Marter*, in the report in Chitty, it is said, "In C. P., if a cause be tried in term time, the notice for a new trial must be made before or on the appearance day of the return of the *habeas corpora juratorum*, if returnable, as in actions by original, on a general return day ; or if returnable on a day certain, then within four days *exclusive* of the return day. [MAULE, J. The word "exclusive" in that passage must be a misprint for "*inclusive*." *Chitty* refers to *Imp. C. P.* 434, and *Tidd*, 6th ed. 934. The latter writer also refers to *Impey ;* and they both say that the four days are to be reckoned *inclusively* of the return day.] In *Young* v. *Higgon*, 6 M. & W. 49, 8 Dowl. P. C. 212, it was held that in the computation of the calendar month's notice of action to a justice, required by the 24 G. 2, c. 44, s. 1, the day of giving the notice and the day of suing out the writ, are both to be excluded.(*a*) [CRESSWELL, J. That case has no reference to the rule as to motions for new trials. The question would rather seem to turn on the words of the general rule, H. 2 W. 4, r. viii. by which it is ordered "that, in all cases in which any particular number of days, not expressed to be clear *days, is prescribed by the rules or practice of the courts, the same shall be reckoned *exclusively* of the *first* day and *inclusively* of the *last* day, unless the last day shall happen to fall on a Sunday, Christmas day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned exclusively of that day also."] Before the stat. 1 W. 4, c. 3,—when it was necessary to have a rule for judgment,—it was held that the rule should have four clear days, exclusively of the first and last, and of Sunday, before judgment could be signed ; *Roberts* v. *Stacey*, 13 East, 21.(*a*) [MAULE, J. There is no question but that the motion for a new trial might have been made at the sitting of the court on Friday, the 27th ; and, therefore, if the defendant was right in moving on the following Wednesday, he would have *five* whole days for the purpose, not reckoning the intervening Sunday ; and that is more than is allowed by the rules of the court.] [*634

TINDAL, C. J. I think that under all the circumstances of the case, as the defendant has obtained a rule nisi for a new trial, the judgment may be set aside on payment of costs.

Per curiam ; Rule accordingly.

day, not being Sunday, between that day and the third day exclusive before the last day of the term ; and the day for appearance shall, as heretofore, be the third day after such return, exclusive of the day of the return, or in case such third day shall fall on a Sunday, then on the fourth day after such return, exclusive of such day of return."

(*a*) See also *Mitchell* v. *Foster*, 12 A. & E. 472; and see antè, Vol. III., p. 166; *Gibson* v. *Muskett*, antè, p. 160.

(*a*) See also *Bromley* v. *Foster*, 1 Chitt. R. 562.

*635] *H. MIRFIN, Wife of —— MIRFIN, to ——.

Where a married woman, heir of a surviving trustee, lived apart from her husband, who was in a very nervous and excitable state, so as to render it difficult, if not impossible, to procure the execution by him of any legal instrument, the court refused to dispense with his concurrence in the conveyance of the property (under 3 & 4 W. 4, c. 74, s. 91,) until an application had been made to him to concur; although neither husband nor wife had any interest in the property to be conveyed.

Channell, Serjt., moved for an order to enable a married woman to convey certain property without the concurrence of her husband, under the stat. 3 & 4 W. 4, c. 74, s. 91.(*a*) It appeared from the affidavits that Mrs. *Mirfin* was the heir of the survivor of three trustees, in whom the property in question was vested; that neither she nor her husband had any interest in the property; that for the last four years they had been living apart by mutual consent; that Mr. *Mirfin* was in a very nervous and excitable state, and it was believed that it would be very difficult, if not wholly impossible, to procure the execution by him of any deed or other legal instrument.

TINDAL, C. J. I think that some application should be made to the husband for his concurrence; and that none being shown, the rule ought not to go.

Channell, Serjt., on a subsequent day, renewed his application, upon an
*636] affidavit stating that an application *had been made to the husband for his concurrence, and that he had refused to execute the conveyance: whereupon,

Per curiam; Rule granted.

(*a*) Which enacts "that if a husband shall, in consequence of being a lunatic, idiot, or of unsound mind, and whether he shall have been found such by inquisition or not, or shall from any other cause be incapable of executing a deed, or of making a surrender of lands held by copy of court-roll; or if his residence shall not be known, or he shall be in prison, *or shall be living apart from his wife*, either by mutual consent or by sentence of divorce, or in consequence of his being transported beyond the seas, or from any other cause whatsoever, it shall be lawful for the court of Common Pleas at Westminster, by an order, to be made in a summary way, upon the application of the wife, *and upon such evidence as to the said court shall seem meet*, to dispense with the concurrence of the husband, in any case in which his concurrence is required by this act or otherwise," &c.

KYMER *v.* SYDSERF.

A *ca. sa.* issued against the principal, for the purpose of fixing the sureties in a bond given under 1 & 2 Vict. c. 110, s. 8, had only fifteen days between the *teste* and return. *Held*, not irregular.

Channell, Serjt., moved to set aside a *capias ad satisfaciendum*, for irregularity. The writ of summons issued on the 8th of February last; on which day the defendant was served with a copy of an affidavit, filed under the 1 & 2 Vict. c. 110, s. 8,(*a*) stating that the defendant was indebted to the plaintiff in 160*l*., and that the defendant was a trader within the meaning of the bankrupt laws. At the same time a notice was delivered to the defendant (pursuant to the same statute) requiring payment of the debt. On the 22d of March, the defendant entered into the bond required by the statutes, with two sureties. On the 30th, final judgment was signed, and on the 31st, the costs were taxed. On the 6th of June, the plaintiff, (with the view of fixing the sureties,) sued out the *ca. sa.* in question, which bore teste of the 31st of May, and was returnable on the 13th of June

(*a*) Vide antè, Vol. III., p. 159 n.

The learned serjeant contended, that the *ca. sa.* was irregular, by reason of there not being fifteen days between the *teste* and the return of the writ. Assuming that the sureties in the bond given in pursuance of the stat. 1 & 2 Vict. c. 110, are in the nature of bail, in order to charge them, there ought, by the old practice in this court, to have been fifteen days between the *teste* and the return of the *ca. sa.*, which must have been sealed in or after the term in which the judgment was signed *against the principal; and the writ must have lain in the sheriff's office four days exclusive, before it was returnable. For the stat. 13 Car. 2, stat. 2, c. 2, s. 7,—whereby eight days between the *teste* and the return of the writ were made sufficient, where the proceedings were by bill—was not applicable to this court, where the proceedings were not by bill; *Tidd's Prac.* 1099, (9th ed.) The stat. of Charles II. has not been in terms repealed, though it possibly may be so in effect, by the uniformity of process act.(*a*) The difficulty however is, that the original writ is taken away by that statute. [MAULE, J. Suppose the rule to be, that where a writ is returnable on a day certain, eight days would be sufficient between the *teste* and the return. And as now all writs are made returnable on a day certain,(*b*) would not the rule be applicable?] Probably it must be so taken.(*a*) And undoubtedly in this case the writ was made returnable more than eight days, though less than fifteen. [MAULE, J. In *Owston* v. *Coates*, 10 A. & E. 193, 2 P. & D. 485, the sureties given in pursuance of the stat. 1 & 2 Vict. c. 110, were considered so far on the footing of bail, that it was held they might discharge themselves by a render of their principal. But that statute has put an end to bail in the old sense of the term. TINDAL, C. J. The writ being altered, the law no longer remains the same.] [*637

Per curiam; Rule refused.(*d*)

(*a*) By 2 W. 4, c. 39, s. 1, the process by which all personal actions are to be commenced, (subject to an exception since taken away,) is the writ of summons. This process, not being founded upon any antecedent matter, real or supposed, is, in truth, an *original* writ.

The delay of fifteen days between the *teste* (when the writ is supposed to issue.) and the return, was not, however, an indulgence granted to defendants sued by original, but a general privilege, subject to a special derogation by statute in the case of proceedings by bill.

(*b*) See 3 & 4 W. 4, c. 67, s. 2. (*c*) See *Giekie* v. *Hewson*, antè, 618.

*BENNETT v. DEAN. [*638

An order for the delivery of an attorney's bill may be made by a judge of a different court from that in which the action is brought, although a judge of the latter court is attending at chambers at the time such order is made.

Channell, Serjt., moved to set aside an order made by WIGHTMAN, J., at chambers, for the delivery of an attorney's bill in a cause in this court, upon the ground of want of jurisdiction, inasmuch as the order was made by that learned judge whilst a judge of this court was attending at chambers. [MAULE, J. The application is wholly groundless. The stat. 1 & 2 Vict. c. 45, s. 1,(*a*) gives a general and concurrent jurisdiction to the

(*a*) Which enacts "that every judge of the courts of Queen's Bench, Common Pleas or Exchequer, shall have equal jurisdiction, power and authority to transact out of court such business as may, according to the course and practice of the court, be so transacted by a single judge, relating to any suit or proceeding in either of the said courts of Queen's

judges of all the courts in any business which may be transacted out of court by a single judge.]

The rest of the court concurring, the learned serjeant Took nothing.

Bench or Common Pleas, or on the common law or revenue side of the said court of Exchequer, or relating to the granting writs of certiorari or habeas corpus, or the admitting prisoners on criminal charges to bail, or the issuing of extents or other process for the recovery of debts due to Her Majesty, or relating to any other matter or thing usually transacted out of court, although the said courts have no common jurisdiction therein, in like manner, as if the judge so transacting business had been a judge of the court to which the same by law belongs."

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*639] *ELLIS *v.* STEBBING.

Where issue is joined in a country cause in, or in the vacation before, an issuable term, the motion for judgment as in a case of a nonsuit, cannot be made until after the lapse of two assizes.

Talfourd, Serjt., on a former day in this term obtained a rule nisi for judgment as in a case of nonsuit, upon an affidavit stating that issue had been joined on the 8th of December, 1841.

Channell, Serjt., afterwards showed cause upon affidavits, by which it appeared that this was a country cause. He contended that the application for judgment as in case of a nonsuit was made too soon. The issue being joined in Michaelmas vacation, must be taken to refer to the following term; until which time the parties were not bound to join issue. He referred to *Duggan* v. *Wilbraham*,(*a*) and to the note to that case in 1 Scott, N. R. 213.

Talfourd, Serjt., admitted, that in *Heeles* v. *Kidd*, 10 M. & W. 76, 1 Dowl. N. S. 663, the court of Exchequer had overruled the case of *Higgins* v. *Stanley*.(*b*)

The court ordered the case to stand over in order that they might inquire into the case of *Higgins* v. *Stanley*, (which had not then been reported,) and stated on a subsequent day that the rule was now considered to be well settled according to the note supplied by ALDERSON, B (*c*); and that the motion for judgment as in case of a nonsuit in this case had been made too soon. Rule discharged.

(*a*) Antè, Vol. I. 240, 1 Scott, N. R. 212. See also *Doe dem. Balls* v. *Margrave*, antè, Vol. I. 334, 1 Scott, N. R. 213 n.

(*b*) Antè, Vol. II. 336, *Vide ibid*, 956. (*c*) Antè, Vol. II. 956.

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*640] *Ex parte FLEETWOOD.

The 2 & 3 Vict. c. 11, s. 8, provides that a register or index of debtors to the Crown shall be made by the senior master of this court. By sect. 9, whenever a *quietus* shall be obtained by a Crown debtor, and a copy thereof left with the master, he is required to enter in the index the name of the person whose estate is intended to be discharged.

Where it appeared that certain bonds, given to the Crown to secure an advance of exchequer bills. which had been duly endorsed, had been paid off, but no *quietus* had been obtained, by reason of the abolition of the pipe-office, the court, upon the production of a warrant by the attorney-general on behalf of the Crown, ordered the master to make a minute in the index of the Crown debtors that the bonds had been satisfied; *valeat quantum*.

Sir *T. Wilde*, Serjt., applied for an order, that the senior master of this

court might make a memorandum in the index to debtors and accountants to the Crown, that certain bonds given to the Queen by Sir *Peter Hesketh Fleetwood* had been satisfied. The application was made under the stat. 2 & 3 Vict. c. 11,(*a*) s. 9.

*The following facts appeared from the affidavits. In August, 1840, the commissioners for public works, appointed under the stat. 1 & 2 W. 4, c. 24, advanced the sum of 66,000*l.* in Exchequer bills to the Preston and Wye Railway Harbour and Dock Company, for the completion or in aid of the improvement of the harbour of Fleetwood, in the county palatine of Lancaster, upon the security of a mortgage by the company to the secretary of the commissioners of the railway, harbour, &c., and also all the works, freehold and leasehold messuages or tenements, lands, &c. belonging to the company; and upon the further security of two bonds dated the 10th August, 1840, from Sir *Peter H. Fleetwood* of Rossall Hall, in the said county, to Her Majesty, her heirs and successors, each in the penal sum of 132,000*l.* On the 14th of the same month memoranda containing the name, place of abode, and title of Sir *Peter H. Fleetwood*, and the sums for which *the bonds were given, and the dates of the same were, in pursuance of 2 & 3 Vict., c. 11, s. 8,(*b*) left with the senior master of this court, to be entered by him in the "Index" therein mentioned. On the 12th of February in this year, the principal sum of 66,000*l.*, with 4936*l.* 8*s.* 8*d.* interest thereon, was, upon the certificates of the commissioners, paid to one of the cashiers of the Bank of England, who, in pursuance of the 1 & 2 W. 4, c. 24, s. 13,(*c*) at the foot of such certificates had acknowledged *the receipt of the said sums respectively. The receipts of the cashier were afterwards taken to the office of the commissioners, [*641 [*642 [*643

(*a*) "An act for the better protection of purchasers against judgments Crown debts, *lis pendens*, and fiats in bankruptcy."

Sect. 8, enacts, "that no judgment, statute, or recognisance which shall hereafter be obtained or entered into in the name or upon the proper account of Her Majesty, her heirs, or successors, or inquisition, by which any debt shall be found due to Her Majesty, &c., or *obligation or specialty* which shall hereafter be made to Her Majesty, &c., in the manner directed by the act 33 Hen. 8, c. 39, or any acceptance of office which shall hereafter be accepted by officers whose lands shall thereby become liable for the payment and satisfaction of arrearages, under the provisions of the act, 13 Eliz. c 4, shall affect any lands, tenements, or hereditaments, as to purchasers or mortgagees, unless and until a memorandum or minute, containing the name and the usual or last place of abode, and the title, trade or profession of the person whose estate is intended to be affected thereby, and also in the case of any judgment, the court and the title of the cause in which such judgment shall have been obtained, and the date of such judgments, and the amount of the debt, damages and costs thereby recovered, and also in the case of a statute or recognisance, the sum for which the same was acknowledged, and before whom the same was acknowledged, and the date of the same, and also in the case of an inquisition the sum thereby found to be due, and the date of the same, and also, *in the case of an obligation or specialty*, the sum in which the obligor shall be bound, or for which the obligation or specialty shall be made, and the date of the same, and also in the case of acceptance of office, the name of the office, and the time of the officer accepting the same, shall be left with the senior master of the said court of Common Pleas, who shall forthwith enter the same particulars in a book to be intituled, 'The Index to Debtors and Accountants to the Crown,' in alphabetical order, by the name of the person whose estate is intended to be affected by such judgment, statute or recognisance, inquisition, obligation or specialty, or the acceptance of any office," &c.

Sect. 9, enacts, "that whenever a *quietus* shall be obtained by a debtor or accountant to the Crown, and an office copy thereof shall be left with the senior master of the said court of Common Pleas, together with a certificate, signed by the Accountant-General, that the same may be registered, the said master shall forthwith enter the same in the said book of debtors and accountants to the Crown, in alphabetical order, by the name of the person whose estate is intended to be discharged by such *quietus*, with the date," &c.

(*b*) Supra. 640 n.

(*c*) Which enacts, "that the Governors and Directors of the Bank of England are hereby required to continue the account now open in their books with the commissioners for

and entered in the proper book provided and kept for that purpose, and were afterwards attested by three of the commissioners under their hands, and returned to the persons producing the same, in the manner prescribed by the said statute. On the 24th of February the commissioners resolved that the said two bonds be delivered up to Sir *Peter H. Fleetwood*, and that he be acquitted and discharged from all claims and demands upon the said bonds, or either of them; and in pursuance of such resolution the bonds were delivered up to his solicitor. It further appeared that a *quietus* could not now be obtained, so as to comply with the requisition of the 2 & 3 Vict., c. 11, s. 9.(a)

The following consent of the attorney-general on behalf of the crown was also produced:

"The two bonds, bearing date respectively on the 10th day of August, *644] 1840, made to Her Majesty by Sir **Peter Hesketh Fleetwood*, of Rossall Hall, in the county palatine of Lancaster, Bart., each in the penal sum of 132,000*l.* having been satisfied, I consent to a rule or order of the court of Common Pleas being drawn up, directing the senior master of that court to enter a minute or memorandum in the index to debtors and accountants to the crown accordingly."

The learned serjeant stated in answer to a question from the court, that the application was made on behalf of the Exchequer Bill Loan Commissioners. The eighth section of 2 & 3 Vict., c. 11.(b) established a new mode of registering the crown judgments. The ninth section (c) requires the master to enter a memorandum of the discharge of the debtor upon the

the execution of the said recited acts, under the title of 'Commissioners for the issue of certain Exchequer Bills,' and shall carry to the credit of such account the several moneys by the said recited act or this act directed to be paid to the cashiers of the said Bank of England; and whenever the said commissioners for the execution of the said recited act and this act shall have advanced or lent any of the exchequer bills to be made out in pursuance of this act to any person or persons, body politic or corporate, the said commissioners shall, at some time before the sums contained therein shall be to be repaid, deliver to such person &c., at his or their request, one or more certificate or certificates, under the hands of any three or more of them, specifying the amount of the exchequer bills lent and advanced to such person, &c., and the amount of the money to be received on account thereof; and the said cashiers of the bank, or one of them, shall, upon the production of such certificate or certificates, accept and receive from the person or persons producing the same, the amount of the money therein mentioned to be receivable, and at the foot of such certificate or certificates shall acknowledge the receipt of the said money, without fee or reward; and every receipt so given as aforesaid shall be afterwards brought to the office of the said commissioners, and by them entered in proper books to be provided and kept for that purpose, and the said commissioners, or any three or more of them, shall attest the same under their hands, and return the same to the person or persons producing the same at the said office; and every such receipt so attested, and every such entry in any of the said books, shall respectively from thenceforth be a valid and effectual acquittance and discharge for the sum or sums expressed therein to have been received, as well against the said commissioners and every of them, their and every of their executors and administrators, as also to the person or persons to whom such receipt or receipts shall be given, and to all and every the person and persons who shall have entered into any security in respect of the exchequer bills mentioned in such certificate to which such receipt shall be subscribed, their and every of their heirs, &c., respectively, to all intents and purposes whatsoever; and all money which may be recovered by any legal or other proceedings directed by the said commissioners under the authority of the said recited acts, or any of them, or this act, shall be paid by the secretary of the said commissioners, or such other persons as may be appointed by them for that purpose, into the same account, upon a certificate to be signed by three or more of the said commissioners, specifying on what or on whose account the said money may have been recovered; and the said cashiers of the bank, or any one of them, shall, upon the production of such last-mentioned certificate, accept and receive from such secretary or other persons the moneys mentioned in such last-mentioned certificate, and at the foot of such certificate shall acknowledge the receipt of the said moneys, without fee or reward."

(a) Suprà, 641. (b) Suprà, 640. (c) Suprà, 641.

production by him of an office-copy of a *quietus*,(*a*) which was formerly given in the Pipe office;(*b*) but since the passing of that act, the Pipe office has been abolished, 5 & 6 Vict., c. 86, s. 1, and there are no means of complying with the requisitions of the statute in that respect. All the other formal proceedings are correct. The entry of the master is the only means of effectually discharging the estates in question. [MAULE, J. Is not a great part of the business formerly done at the Pipe office now done at the Treasury?] The duties of the clerk of the Pipe are now principally performed by the Queen's Remembrancer, 5 & 6 Vict., c. 86, s. 2. [TINDAL, C. J. Can we make the law? The act says, that the entry is to be made upon the party's producing an office copy of the *quietus*. How can that be dispensed *with? CRESSWELL, J. It does not appear that the court have any power given them by the statute to pronounce the discharge of the crown debtor. The master, however, may make the entry, *valeat quantum*.] [*645

TINDAL, C. J. There can be no objection to his making a minute of the facts; and we will order him to make that minute.

Per curiam; Rule accordingly.(*c*)

(*a*) A *quietus* obtained by a party who is an accountant to the Crown, is pleadable to all prior debts, although he continue to be an accountant, and become indebted afterwards to the Crown; *Rex* v. *Wilkinson*, Bunbury, 315.

(*b*) As to the entry of a *quietus* in the court of Exchequer by the clerk of the Pipe, or by the auditors of the receipt, see *Blount's Law Dict.*, sub voce.

(*c*) The rule was drawn up in the following form:—

"Upon reading the affidavits, &c., and on reading the consent of the attorney-general on behalf of the Crown, it is ordered, that the senior master of this court do make a memorandum or minute in the index to debtors and accountants to the crown, that the two bonds bearing date respectively on the 10th day of August, 1840, made to Her Majesty by the said Sir *P. H. Fleetwood* of Rossall Hall, in the county palatine of Lancaster, Bart., each in the penal sum of 132,000*l.*, (particulars of which, from the memorandum or minutes left with him on the 14th day of August, 1840, were entered by the said senior master in the said index, pursuant to the statute of 2 & 3 Vict., c. 11,) have been satisfied."

*MILLER v. NEWMAN. [*646

The mere delivery of goods by A. to B. will not support an action at the suit of A. for goods sold and delivered, where it appears that A. was to pay B. a commission upon the sale of the goods to B.

DEBT, for goods sold and delivered, and on an account stated. Plea, *nunquam indebitatus*.

The action was brought to recover the sum of 16*l.* 5*s.* for bread sold by the plaintiff, a baker, to the defendant. The cause was tried before the under-sheriff of Worcestershire. Two witnesses were called for the plaintiff. The first proved the delivery of the bread; but on cross-examination stated that the defendant was in the habit of selling bread for the plaintiff at a commission of 20*d.* in the pound. The second proved a demand of payment, when the defendant said he would pay as soon as he had money enough. The amount of the claim was not stated at the time. The under-sheriff, upon the authority of *Holland* v. *Hopkins*, 2 B. & P. 243, directed a non-suit, but reserved leave to the plaintiff to move to set it aside.

Channell, Serjt., now moved accordingly. He submitted, that although, where it was clear, as in *Holland* v. *Hopkins*, that the defendant had sold goods on commission for the plaintiff, the latter could not recover against him as for goods sold and delivered, yet in the present case, though there

might have been *evidence* that the bread was sent to the defendant on commission, yet the question should have been left to the jury; and at any rate there was evidence of an account stated. [Maule, J. The matter might have been equivocal perhaps, upon the evidence of the second witness;
*647] but it is explained *by the cross-examination of the first. Tindal, C. J. It does not appear from the second witness' statement that any amount was mentioned to the defendant: so that the count on an account stated cannot help the plaintiff. And then the first witness puts him out of court as to the first count.]

Per curiam; Rule refused.

MALONEY *v.* STOCKLEY.

Debt for money had and received, and upon an account stated; pleas *nunquam indebitatus*, payment and set-off.

An award that a verdict be entered for the defendant on all the issues, is insufficient, as not deciding the set-off.

Debt, for money had and received, and upon an account stated.

Pleas: first, never indebted; secondly, payment; thirdly, a set-off.

By an order of nisi prius, the verdict was entered for the plaintiff for the damages in the declaration, subject to the award of an arbitrator, to whom the cause and all matters in difference were referred, the costs of the cause to abide the event, and the costs of the reference to be in the discretion of the arbitrator. The arbitrator directed that the verdict should be set aside; that a verdict (generally) should be entered for the defendant; and that the plaintiff should pay the costs of the reference. It did not appear that there were any other matters in difference between the parties, except those in the cause.

Bompas, Serjt., on a former day in this term, obtained a rule nisi to set aside the award, upon the ground that it had not decided all the matters
*648] referred, and *that it was not consistent, final, or certain. He cited *England* v. *Davison*, 9 Dowl. P. C. 1052.

Channell, Serjt., now showed cause: Whatever may be the effect of the new rule of H. 2 W. 4, r. 74,(*a*) it is clear that, formerly, a general verdict for the defendant would have been good. In *England* v. *Davison* it was decided, that where a cause in which several issues are raised is referred, the arbitrator is bound to find expressly on each, although he is not requested to do so by the parties. And, therefore, where in such a case the arbitrator had awarded merely that the plaintiff had no cause of action, and directed a verdict to be entered for the defendant, the award was held to be bad. It is difficult to reconcile that case with other decisions; but even there the award was not set aside, but on the defendant allowing the costs on certain issues to be taxed for the plaintiff, and paying the costs of the rule, the award was permitted to stand. It may be, that the defendant in this case was never *legally* indebted to the plaintiff, but only *morally* so; and he may have thought fit to *pay* that debt or to *set-off* against it a *legal* debt due to himself. Here the arbitrator was not bound to direct that the verdict should be entered upon all the issues, unless distinctly requested so to do; *Dibben* v. *The Marquess of Anglesey*, 2 C. &

(*a*) By which it is ordered, that "no costs shall be allowed on taxation to a plaintiff, upon any counts or issues upon which he has not succeeded; and the cost of all issues found for the defendant, shall be deducted from the plaintiff's costs."

M. 722, 4 Tyrwh. 926, 10 Bingh. 568. In *Duckworth* v. *Harrison*, 4 M & W. 432, 7 Dowl. P. C. 71, an action of *assumpsit*, to which the defendant had pleaded the general issue, and a *set-off*, having been referred, and the arbitrator having found that the plaintiff was *not entitled to recover, and had no cause of action against the defendant, but having said nothing as to the set-off, it was held that the award was final. [*649] *Williams* v. *Moulsdale*, 7 M. & W. 134, is to the same effect. These are express authorities that an award to enter a verdict for a defendant upon the general issue, and upon a plea of set-off, is not inconsistent; and the plea of payment stands upon the same footing as that of set-off. [MAULE, J. Suppose at the trial the plaintiff had failed in the proof of his case; and the defendant had proved payment of 100*l*., would not the verdict have been entered for the defendant on both issues? TINDAL, C. J. But there is the plea of set-off. I cannot see how the arbitrator can have found for the defendant on the first plea, and also on the plea of set-off. MAULE, J. As to inconsistency, I think there is none. But as to the set-off, if the arbitrator had found a sum of money due from the plaintiff to the defendant, the plaintiff would have been bound to pay it; and the arbitrator should have made his award accordingly. Such would be the result, if the defendant never was indebted to the plaintiff, and there was a set-off due to the defendant; all matters in difference being referred to the arbitrator.] It may be said that the arbitrator ought to have found the amount due from the plaintiff to the defendant, and have stated the deduction that was to be made, if any; but no such objection is stated in the rule. [TINDAL, C. J. I do not see how the objection is to be got over, that the arbitrator has not decided all matters in difference between the parties. I think the rule must be made absolute.]

Channell, Serjt., then proposed to abandon the issue upon the set-off, on the authority of *England* v. *Davison*; and to consent that the verdict should be entered upon *that issue for the plaintiff, and that the plaintiff should have the costs of that issue and of the action; to which [*650]

Bompas, Serjt., consented. Rule accordingly.(*a*)

(*a*) And see *Bradbee* v. *The Governors of Christ's Hospital*, post.

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*The AYLESBURY Railway Company v. MOUNT. [*651]

By a railway act, 6 W. 4, c. lxxxvii. s. 95,) the company were empowered to sue subscribers for calls; and (sect. 96,) the directors were empowered to make calls from the subscribers and proprietors *for the time being;* and if any owner or proprietor *for the time being* should neglect to pay the call, the company might sue for the same, or the directors might declare the shares forfeited. And it was enacted, (sect. 98,) that in any action brought by the company against any proprietor *for the time being* for calls, it should be sufficient to declare and allege "that the defendant, *being a proprietor*, of a share in the said undertaking, *is* indebted, &c., for a call or calls, &c., whereby an action hath accrued to the said company by virtue of this act," without setting forth the special matter; and on the trial it should only be necessary to prove that the defendant, *at the time of making the calls*, was a proprietor, &c., and that the call was made and notice given. And, (sect. 101,) proprietors were enabled to sell their shares, subject to the rules and conditions therein mentioned; and it was provided that on every sale, the conveyance should be kept by the company, who were to enter in a book a memorial of such transfer and sale, and endorse the entry thereof on the deed of sale and on the certificate of the share sold; and that, until such memorial should have been made and entered, the seller should remain liable for all future calls, and the purchaser should have no part of the profits, nor any interest or vote in respect of such share; and no person, (102,) was to sell any share upon which a call should have been made after the

day appointed for the payment thereof, unless at the time of the sale he should have paid the full amount of the call.

Held, (in C. P.,) that the power to sue proprietors "for the time being," (under sect. 96,) did not extend to persons who were not original subscribers and were not proprietors *at the time the call was payable*; and therefore, that where a proprietor had transferred his shares, after a call had been made, but before it was payable, such transfer having been duly entered and endorsed, (under sect. 101,) the company had no right of action against such transferor.

In an action by the company for a call, the declaration was, that "the defendant, *before the commencement of the suit*, to wit, on, &c., *being the proprietor* of divers shares, *before and at the commencement of the suit*, *was* and still *is*, *indebted* to the company in, &c.; whereby, and by reason of the said sum being unpaid, the defendant *still is indebted*, and an action hath accrued, &c."

Plea, that true it is that the defendant on, &c., was the proprietor of the shares in the declaration mentioned, but that *after the making of the call, and before the same was payable*, to wit, on, &c., he transferred his shares to J. S., which transfer was duly entered and endorsed before the call was payable, whereby the defendant ceased to be proprietor of the shares, and to be liable to the call.

Held, in Cam. Scacc. in error, reversing the judgment of the court of C. P., on demurrer to the plea,—that the declaration was good, either as an *indebitatus* count, or as disclosing a liability under the circumstances stated.

Held, also in error, that the plea was bad, as amounting to an argumentative plea of *nunquam indebitatus*.

DEBT. The declaration stated that the defendant, *before the commencement of this suit*, to wit, on the 6th day of March, 1838, *being the proprietor*
*652] of divers, *to wit, fifty shares in a certain undertaking, mentioned in a certain act of parliament, &c., 6 W. 4, c. lxxxvii.,(a) *was*, and

(a) The following sections of this act were referred to in the argument:

Sect. 90, declares the time and manner in which dividends are to be made, and provides that no dividend "shall be paid, in respect of any share, after a day appointed for any call of money in respect thereof, until such call shall have been paid."

Sect. 91. enacts, "that the said company shall, and they are hereby required, at their first or some subsequent general meeting, and afterwards, from time to time as occasion may require, to, cause the names of the corporations, and the names and additions of the several persons, who shall then be, or who shall from time to time thereafter become, entitled to shares in the said undertaking, with the number of shares which they are respectively entitled to, and the amount of the subscriptions paid thereon, and also the proper number by which every share shall be distinguished, to be fairly and distinctly entered in a book to be kept by the said company; and, after such entry made, to cause their common seal to be affixed thereto."

Sect. 93, enacts, "that the said company shall in some proper book to be provided by the said company for that purpose, enter and keep a true account of the places of abode of the several proprietors of the said undertaking, and of the several persons and corporations who shall from time to time become proprietors thereof or be entitled to any share therein; and every proprietor of the said undertaking, &c., may at all convenient times have recourse to and peruse such book."

Sect. 95, enacts, "that the several parties who have subscribed, or shall hereafter subscribe, for, or towards the said undertaking shall, and they are hereby required to, pay the sums of money by them respectively subscribed for, or such parts or proportions thereof, as shall from time to time be called for by the directors of the said company, under and by virtue of the powers of this act, at such times and at such places, and to such persons, as shall be directed by the said directors; and in case any party shall refuse or neglect to pay as aforesaid the money by him so subscribed for, or the part thereof so called for, it shall be lawful for the said company to sue for and recover the same in any court of law or equity, together with interest on such unpaid sum of money, at the rate of 5*l*. per cent. per annum, from the time when the same was directed to be paid up to the day of actual payment."

Sect. 96, enacts, "that the said directors shall have power from time to time to make such calls of money from *the subscribers and proprietors* of the said undertaking *for the time being*, to defray the expenses of and to carry on the same, as they from time to time shall find necessary, so that the aggregate amount of calls made, or money paid for, or in respect of, any such shares shall not amount to more than the sum of 20*l*. on any such share, and so that no such call shall exceed the sum of 5*l*. upon each share which any person or corporation shall be possessed of or entitled unto in the said undertaking; and an interval of three calendar months at the least shall elapse between the day appointed for payment of one call and the day appointed for payment of another call, and twenty-one days' notice at the least shall be given of every such call [by advertisements in certain newspapers]; and all moneys so called for shall be paid to such persons, at such

the defendant before and at the time of the commencement * of this suit was and still is, *indebted* to the said company in the sum of 250*l*, for a call of a certain sum of money, to wit, the sum of 5*l*. upon each of the said *shares, &c., whereby, and by reason of the said sum of 250*l*. being and remaining wholly unpaid, the defendant *still is indebted* to the plaintiffs in the same, and an action hath accrued, &c. [*653 [*654

times and places, and in such manner as in the said notice shall be appointed; and *the respective owners* of shares in the said undertaking shall pay their ratable proportion of the money to be called for as aforesaid, to such persons, and at such times and places, and in such manner, as shall be appointed as aforesaid, &c. And if any owner or proprietor for the time being of any such share shall not so pay such his ratable proportion, then and in such case and as often as the same shall happen, he shall pay interest for the same, after the rate of 5*l*. per cent. per annum, from the day appointed for the payment thereof up to the time when the same shall be actually paid; and if any owner or proprietor for the time being of any such share shall neglect or refuse to pay such his ratable proportion, together with interest, if any, then, or at any time thereafter, it shall be lawful for the said company to sue for and recover the same in any of His Majesty's courts of record, by action of debt, or on the case, or by bill, suit or information, as the said directors may, and they are hereby authorised to declare the shares belonging to such owner to be forfeited, and to order such shares to be sold."

Sect. 98, enacts, "that, in any action to be brought by the said company against any *proprietor for the time being* of any share in the said undertaking, to recover any money due and payable for, or in respect of, any call, *it shall be sufficient* for the said company *to declare and allege* that the defendant, *being a proprietor* of a share in the said undertaking, *is* indebted to the said company in such sum of money as the calls in arrears shall amount to, for a call, or so many calls, of such sums of money upon a share belonging to the defendant, whereby an action hath accrued to the said company by virtue of this act, without setting forth the special matter; and, on the trial of such action, it shall not only be necessary *to prove that the defendant, at the time of making such respective calls, was a proprietor* of a share in the said undertaking, and that such call was in fact made, and that such notice was given, as is directed by this act, without proving the appointment of the directors who made such calls, or any other matter whatsoever: and the said company shall thereupon be entitled to recover what shall appear due, including interest, computed as aforesaid, upon such call, unless it shall appear that any such call exceeded 5*l*. per share, or was made payable before the expiration of three calendar months from the day appointed for the payment of the last preceding call, or that notice was not given as hereinbefore required: and, in order to prove that the defendant was a proprietor of such share in the said undertaking, as alleged, the production of the book in which the said company is by this act (sect. 93,) directed to enter and keep the names and additions of the several proprietors from time to time of shares in the said undertaking, with the number of shares they are respectively entitled to, and of the places of abode of the several proprietors of the said undertaking, and of the several persons and corporations who shall from time to time become proprietors thereof or be entitled to shares therein, shall be primâ facie evidence that such defendant is a proprietor, and of the number and amount of his shares therein."

Sect. 101, enacts, "that it shall be lawful for the several proprietors of shares in the said undertaking, and their respective executors, administrators and successors, to sell and dispose of any shares to which they shall be entitled therein, subject to the rules and conditions herein mentioned; and the conveyance of such shares shall be by writing, duly stamped, and may be in the following words, or to the like effect, varying the names and descriptions of the contracting parties as the case may require, that is to say, &c.: and on every sale the deed or conveyance (being executed by the seller and purchaser) shall be kept by the said company, or by the secretary or clerk of the said company, who shall enter in some book, to be kept for that purpose, a memorial of such transfer and sale, and endorse the entry of such memorial on the said deed of sale or transfer, for which entry and endorsement the sum of 2*s*. 6*d*., and no more shall be paid to the said company; and the said company, or the secretary or clerk as aforesaid, is hereby required to make such entry or memorial accordingly, and on demand, to make an endorsement of such transfer on the back of the certificate of each share so sold, and deliver the same to the purchaser for his security; and such endorsement, being signed by such secretary or clerk, shall be considered in every respect the same as a new certificate; and, until such memorial shall have been made and entered as before directed, the seller thereof shall remain and be held liable for all future calls, and the purchaser shall have no part or share of the profits of the said undertaking, nor any interest in respect of such share paid to him, nor any note in respect thereof, as a proprietor of the said undertaking."

Sect. 102, enacts, "that *no person* or corporation *shall sell or transfer any share* which he or they shall possess in the said undertaking, *upon which any call shall have been made, after the day appointed for the payment of the same, unless* at the time of such sale or transfer he or they *shall have paid the full sum of money which shall have been called for, in respect of such share*."

*655] *Plea: that true it is, that before the commencement of this suit, to wit, on the said 6th of March, 1838, in the declaration mentioned, the defendant was the proprietor of the said shares in the undertaking in the said declaration mentioned; and that the call in the declaration mentioned was made under and pursuant to the provisions of the said act, for an instalment of 5*l.* per share, to be paid by the proprietors or owners of the capital of the company *on or before the* 9th of April then next ensuing; but that afterwards, and before the commencement of this action, and before the said 9th of April thereinbefore mentioned, when the said call was payable as aforesaid, to wit, *on the* 7th of April, 1838, he, the defendant, so being such proprietor as aforesaid, sold and disposed of all his said shares in the said undertaking, (the said shares being the same shares in respect of which the plaintiffs claim to be paid the said call,) to one Charles Thompson, and the said C. T. then took and accepted the same; and the defendant then, to wit, on the said 7th of April, 1838, after the said
*656] call was *made, &c., and before the same was due and payable, by a deed under the seal of the defendant, and also under the seal of the said C. T., (and which deed then being in the possession of the plaintiffs, the defendant was unable to bring the same into court there,) in consideration of the sum of 5*l.* paid to the defendant by the said C. T. *did assign and transfer to the said* C. T. *the said shares in the declaration mentioned*, to hold to the said C. T., his executors, &c., *subject to the several conditions on which the defendant held the same immediately before the execution thereof*; and the said C. T. thereby then agreed to accept and take the said shares subject to the conditions aforesaid, as by the said deed, &c.: that the said deed was duly stamped before the same was executed by either party, and was made and executed according to the provisions of the act: that the defendant and the said C. T. then duly delivered the said deed (the same then, and before the said call was payable, being first duly executed by both the defendant and the said C. T.) to the said company, to be kept by the said company according to the provisions of the said act, and then requested the said company to enter in the said company's books kept for that purpose, a memorial of the said transfer and sale, and to endorse the entry of the memorial on the said deed; *which memorial and endorsement the said company then, and before the said call became due and payable, made*, according to the act: and thereupon and before the said call became due and payable, to wit, on the said 7th of April, the said company duly received the said deed on behalf of the said company, the plaintiffs in this action, and then duly entered the memorial in the said company's book, and then duly endorsed the entry of the memorial of the said deed according to the said act, and then accepted and received the said
*657] transfer of the said *shares of the defendant to the said C. T., whereby the defendant then, and before the commencement of this action, and before the said call had become due and payable, ceased to be the proprietor and owner of the said shares, and then ceased to be liable to the said call, under and by virtue of the provisions of the said act, in the declaration mentioned. Verification.

Demurrer: assigning for causes, that the plea did not traverse, or confess and avoid, the cause of action stated in the declaration, or that the defendant was indebted as therein alleged; that, if the plea was pleaded by way of traverse, then the same was an argumentative, and not a direct, denial of the matters charged in the declaration, and improperly concluded with a verification instead of concluding to the country; that the plea amounted to

a plea that the defendant never was indebted as in the declaration alleged, and should have been so pleaded; that, if the plea was intended to be pleaded by way of confession and avoidance, then the same did not sufficiently, or at all, confess that the defendant ever became or was indebted as in the declaration alleged; or, if it did sufficiently confess such liability, it showed no matter by which the same had been discharged: that the plea did not aver or show that C. T. ever became liable to pay the call; that the plea did not sufficiently admit or deny that the defendant was a proprietor of the shares in the declaration mentioned, or a subscriber to the undertaking at the time the call was made, or that due notice was given of the making of the call as required by the act, or that the defendant ever became or was liable to pay the same calls, or was indebted to the plaintiffs as in the declaration alleged: that the plea was wholly immaterial, and admitted the cause of action stated in the declaration; that no single, certain or material issue could be taken thereon, &c. Joinder.

The case was argued in last Michaelmas term by

**Channell*, Serjt., (with whom was *Bovill*,) in support of the demurrer. [*658] He contended that, although the defendant had transferred his shares, and such transfer had been registered by the company after the call had been made, and before it was payable, the defendant was not discharged from liability in respect of such call; that the words "subscribers to, and proprietors of, the said undertaking for the time being," in the earlier part of the 96th section of the act, must be taken to refer to parties who were subscribers and proprietors at the time of making the call; that a similar construction must be put upon the words "proprietors for the time being" in the 98th section; and there was nothing in the 101st and 102d sections repugnant to that construction. He referred to *The Aylesbury Railway Company* v. *Thompson*, 2 Railway Cases, 668, where the court of Queen's Bench had decided that the transferee of these very shares was not liable to be sued in respect of them, not being the proprietor of them at the time the call was made. He also cited *The Edinburgh, Leith and Newhaven Railway Company* v. *Hebblewhite*, 6 M. & W. 707, 8 Dowl. P. C. 802, 2 R. C. 237. See also *The South Eastern Railway Company* v. *Hibblewhite*, 12 A. & E. 497; *The Birmingham, Bristol and Thames Junction Railway Company* v. *Locke*, 1 Q. B. Rep. 256, and *The London and Brighton Railway Company* v. *Fairclough*, Antè, vol. ii, 674, as authorities to show that the plea was bad in form.

Stephen, Serjt., *contrà*, argued that the declaration was bad in substance, as it did not allege that the defendant was a proprietor at the time that the action was brought, as it should have done, if framed upon the 98th section of the act. [TINDAL, C. J. The company are not limited to any precise form of declaration by that section. It merely says that "it shall *be *sufficient* for them to declare and allege" so and so.] [*659] The plea shows a good defence under the act, viz., that although the defendant was the proprietor of the shares in question at the time the call was made, yet he had ceased to be so at the time the call became payable. [TINDAL, C. J. That construction would give great facilities for defrauding the company. A proprietor might transfer his shares just before the call became due, and take them back again immediately afterwards.] The contrary construction would bear equally hard in the case of a *bonâ fide* transfer. There is nothing in the act to restrain the transfer of shares between the making of the call and the time when it becomes payable. The company are bound to record the transfer, and before a transfer was recorded they

would look for payment to the party who held the shares at the time the call was payable. Or if, as decided in *The Aylesbury Railway Company* v. *Thompson*, they cannot recover against the transferee, it may be that their remedy is wholly lost. The present defence could not have been set up under the plea of "never indebted" under the rules of pleading, H. T. 3 & 4 W. 4, II. reg. 3. [TINDAL, C. J. The plea of "never indebted" denies that the plaintiff ever had a cause of action, which seems to be all that the defendant would require in this case.] The present plea confesses that the defendant was once a proprietor, and avoids the liability arising therefrom by showing that he ceased to be so before the call became due.

Channell, Serjt., was heard in reply. *Cur. adv. vult.*

TINDAL, C. J., now delivered the judgment of the court. This is an action of debt, brought by the *Aylesbury Railway Company* against *William Mount*, for a call upon certain shares in that company. The declaration,
*660] *in substance, states that the defendant having, before the commencement of the suit, been a proprietor of shares, was, and still is, indebted to the company for a call on each of his shares; and that, by reason of the call remaining unpaid, an action had accrued to the plaintiffs. The plea states, that the call was made payable on the 9th of April, and that the defendant transferred his shares by deed to one *Charles Thompson*, and that the company entered a memorial of the transfer according to the provisions of the act, before the call was payable. To this plea there is a demurrer; and the substantial question is, whether an action for a call can be maintained against a proprietor, who does not appear to have been an original subscriber, and who has transferred his shares, after an instalment of the subscription has been called for by the directors, and before the time appointed for payment of it.

It is clear that, at common law,—that is, independently of the railway act,—the matters stated in the declaration do not show a cause of action; it is therefore necessary to consider whether the act gives any right of action under the circumstances disclosed in the declaration. The act in question is the 6 W. 4, c. lxxxvii., for making the railway therein mentioned; and it is obvious that the present question must be determined solely by reference to the clauses of that act which bear upon it.

The proprietors of shares (not being subscribers—whose case is provided for, by s. 95) are made liable by s. 96, which provides that the owners of shares shall pay the calls at the time appointed, and that if any owner *for the time being* shall refuse to pay, he may be sued, or his shares may be declared to be forfeited. It is clear that the remedy by forfeiture is a remedy against the owner *for the time being*, and is wholly inoperative against a person who has transferred his shares; *the time being* must, therefore, in this
*661] place, as far as forfeiture *is concerned, mean *the time at which the call was payable;* for it is at that time that the default on which the forfeiture accrues takes place; and the right to sue is clearly given against the *same* owner for the same *time being*. This 96th section, therefore, which is the only section that gives an action against a shareholder, gives it in express terms against owners *for the time being*, and does not give it to any other description of persons. Section 90, which provides that no dividend shall be paid on any share after a call shall be made, unless it shall have been paid, confirms this view of the effect of sect. 96; for as sect. 101 enables shareholders to transfer without limitation as to time, and sect. 102 prohibits sales only after the day of payment of a call, unless it be paid, it is clear that a sale may lawfully be made, and the company be required to

enter a memorial of such sale, after a call has been advertised, and before the day for payment has arrived; and sect. 90, by giving a remedy against the owner under the transfer, clearly assumes that he, and not the party who has transferred, and who has ceased to have any right to the dividends, is to be considered as the party to pay the call. In addition to these considerations, it may be observed, that although sect. 98 does not prohibit actions other than such as are within its provisions, and although, if a clear right of action were given by some other part of the act against owners, other than those for the time being, it would not be taken away by this section, yet its provisions go far to show that an action against a shareholder who had ceased to be an owner when the right of action arose, was not in the contemplation of the legislature. This section is applicable in terms only to *any action against any proprietor for the time being:* the form of declaration given by this section is, that the defendant, *being a proprietor, is indebted* to the company for a call upon a share belonging to the defendant. *The case of a sale between the notice to pay an instalment and the [*662 day appointed for payment, is one so obviously likely to be of frequent occurrence, that it is probable that a form of proceeding applicable to such a case would have been provided, if it had been intended that in such a case the action should be against the former owner; and a similar or stronger remark arises from the absence of any express provisions for a continuing liability, if it were intended to exist. The provision in sect. 101, that the seller should continue liable till a memorial of the transfer is entered, and that in sect. 102, prohibiting a transfer after a call is payable, seem to show that if any further liability on a shareholder who had transferred, or any further restraint on alienation, had been intended, it would have been expressly provided.

We are aware that in an action brought by the *Aylesbury Railway Company* against *Thompson*, the party to whom the present defendant had transferred the shares after a call made and before it was payable, the court of Queen's Bench held that the defendant was not liable to pay the call, on the ground that the plaintiffs had not complied with the clause in s. 98, which provides "that on the trial of such action, (*i. e.* against a proprietor for the time being,) it shall only be necessary to prove that the defendant, at the time of *making such respective calls*, was a proprietor of a share in the said undertaking, and that such call was in fact made, and that such notice was given as is directed by this act, without proving the appointment of the directors who made such calls or any other matter whatsoever; and that the company shall thereupon be entitled to recover what shall appear due, including interest, computed as aforesaid, on such calls, unless it shall appear that any such call exceeded 5*l.* per share, or was made payable before the expiration of three calendar months from the day *appointed for payment of the last preceding call, or that notice was [*663 not given as hereinbefore required." The court of Queen's Bench appears to have considered that this clause restricted the plaintiffs from recovering, unless they gave such proof as is mentioned therein. It was not necessary for that court to decide whether an action would lie against a party situated as the present defendant is, nor did they decide that it was not necessary to *allege* and *prove*, (if it were denied,) as well that the defendant was a proprietor at the time of action brought, as at the time of the call. The 98th section indeed applies, in terms, only to *actions brought against a proprietor for the time being:* it assumes that it is established that the defendant is such a proprietor, and then makes the provision relied on

by the court of Queen's Bench, viz. "on the trial of *such action*, it shall only be necessary to prove," &c. In order that it may appear to be *such action*, the declaration is required to allege that the defendant, "*being* a proprietor, *is* indebted;" if that allegation be admitted, the admission shows it to be *such action;* if it be denied, the section immediately after the clause in question goes on to give a mode of proving it, in these words, viz., "and in order to prove that the defendant was a proprietor of a share in such undertaking, *as alleged*," the production of the book shall be *primâ facie* evidence, &c. This court is not called upon to say, whether the decision of the Queen's Bench is or is not correct; it is sufficient that it appears to us that no right of action for a call is given by the act, or exists independently of it, against a party who having held a share at the time the call was made, (but not appearing to be an original subscriber,) has transferred and entered a memorial of his transfer, before the call is payable. It is clear that the declaration in the present case is not in the form given in s. 98 of the railway act; for, to be within that section, it
*664] should allege that the *defendant, *being a proprietor of a share, is indebted* to the company; and there is no allegation in this declaration that the defendant, being a proprietor, is indebted.

But as it might be that a right of action might be given by some other part of the act, in a case such as that stated in this declaration, it was necessary to consider whether such right of action was in fact given. And it appears to us, on a review of all the material provisions of the act, that there are not more than three cases, if indeed there be so many, in which an action for calls can be maintained; and these are, first, against a party who is owner for the time being, under s. 96; secondly, against a party who was a subscriber, under s. 95; or, thirdly, against a party who, having transferred his shares, is no longer a shareholder, but whose liability is continued by s. 101, in consequence of no memorial of the transfer having been entered. It is clear that the present declaration does not state either the first or the second of these three cases; as it does not allege the defendant to be a proprietor or a subscriber; but it may be contended that it substantially shows a case of the third description; and that it must be taken, not being demurred to, to insist on the right, which under s. 101, may exist against a former shareholder probably upon a true construction of the act. Such a person ought to be treated as an actual shareholder.

But supposing this to be otherwise, and that the declaration is to be considered as showing a sufficient cause of action, the declaration is well answered by the plea, which, on this supposition, is good in substance, because it shows that the defendant, having transferred his shares and entered a memorial of the transfer before the call was payable, is not liable; and also good in form, because, as it admits all the matters of facts stated in the declaration, (which are only that the defendant was a proprietor, that a call was made, and that it remains unpaid,) and by introducing affirma-
*665] tive matter not inconsistent *with those facts, shows that notwithstanding those facts the defendant is not liable; it confesses and avoids the matters of fact stated in the declaration, and properly concludes with a verification, and not to the country.

It may be suggested that a party who becomes a shareholder, at once becomes liable to pay all the unpaid instalments that may be called for by the directors, and that consequently when an instalment is called for, it is *debitum in præsenti, solvendum in futuro*, and that the shareholder at the time the call was made being the debtor, should therefore be the party to

pay. But the general scope of the act is, to treat a shareholder, (at least one who takes by transfer, and is not an original subscriber,) as identified with his share, and as having nothing to do with the company, either with respect to rights or liabilities, before he becomes, or after he ceases to be, a shareholder; the express provisions of the act, giving remedies by action, by forfeiture, and by withholding dividends against those who held the shares at the time the call was payable, and the absence of any express provision continuing the liability of a shareholder of whose transfer a memorial is entered, show that the act considers the debt as not arising until the day appointed for payment. The duty of a shareholder who takes by transfer, to pay a call, is the creature of the act: the act requires the payment to be made at the time appointed by the directors; at that time, and not before, the duty arises; and it is a duty which, by the terms of the act, is cast on the owner for the time being.

On the whole, therefore, we think that this action cannot be maintained, and the judgment ought to be for the defendant.

Judgment for the defendant.

*A writ of error having been brought in the Exchequer Chamber upon the foregoing judgment, the case was argued after Hilary term, 1843.(a) [*666

Bovill for the plaintiffs in error. First, as to the liability of the defendant. The declaration states that he was and is indebted for calls, and by reason of the money being unpaid, still is indebted, and that an action hath thereby accrued by virtue of the act. By sect. 96, the liability is imposed upon proprietors for the time being; and calls are to be made upon them, and are made recoverable from them by action. By sect. 98, the proof required in such action is, that the party was proprietor at the time of making the calls; and this shows the meaning of the expression "for the time being," in sect. 96, which is repeated in sect. 98. The liability, the remedy and the proof are therefore complete. The defendant insists that he is discharged from his liability by the sale and transfer of his shares, and the entry of such transfer. The general right of sale is given by sect. 101, and by the same section the company are compelled to register the transfer; but such registry determines the liability of the seller as to *future* calls only. All the proceedings in this case appear to be regular. The act clearly contemplates a transfer of shares; but it contains no clause to the effect that a liability, once imposed, is discharged by the transfer. On the other hand, the express provision that the registry of the transfer is to protect from *future* calls, shows that it was not to have the effect of discharging a proprietor as to *prior* calls. The declaration states a liability once existing on the part of the defendant; and, his plea, to be good, must admit that statement. There is certainly *nothing in the act to discharge the entire liability; or to show that the call is not to be paid at all, but is to be wholly lost to the company. Then if the liability continues, the question is, on whom it rests.* The court of Queen's Bench have decided, in *The Aylesbury Railway Company* v. *Thompson*, 2 Railway Cases, 668, that the purchaser is not liable, because no liability is imposed upon him by the act. It follows that as the call, and the liability expressly imposed thereby, are not discharged by the proceedings which the act directs, the seller remains liable and is the only party who is so. [*667

The judgment of the court below, proceeds merely upon the ground

(a) Friday, February 3d. Before Lord Abinger, C. B., Parke, B., Alderson, B., Patteson, J., Coleridge, J., Rolfe, B., and Wightman, J.

that, as the company have the option of declaring a share forfeited in case of non-payment of the call, and that as such forfeiture can be enforced only against the holder of the share at the time the call is payable, the remedy by action must also apply to him. But the forfeiture is an additional remedy given against the share which the purchaser agrees to take subject to the rules and conditions mentioned in the act, this condition of forfeiture in case of the non-payment of the call being one of them. In such a case the purchaser would have a remedy over against the seller. In the same way, by sect. 90, no dividend is to be paid after a call is payable, until such call has been paid. So by sect. 71, the shareholder cannot vote until the call has been paid; but it is not said "paid *by him*." The liability is imposed upon, and the remedy by action is given against, the party who is the shareholder at the time the calls are made; and this is quite consistent with there being a remedy *also* against the purchaser, affecting the share in his hands, although there may be no remedy against him personally. The judgment of the court below, in throwing doubt upon that
*668] of the Queen's Bench in **The Aylesbury Railway Company* v. *Thompson*, *assumes* that the words "for the time being," apply to a proprietor at the time calls are *payable*, but that is in fact the whole question.

Secondly, as to the sufficiency of the declaration. The defendant being liable, the declaration properly describes his liability, which is imposed upon the proprietors at the time the call is made. The declaration follows the *substance* of the ninety-eighth section, which does not give any form in express words. It is good in substance therefore, and is not specially demurred to. It is also good as showing a liability, under sect. 101; for upon the face of it the defendant might be a proprietor who had sold his shares, but their transfer had not been registered. It is also good as a common *indebitatus* count.

Thirdly, as to the plea. It is bad, inasmuch as it does not *confess* any debt or liability to pay. If it offers any defence at all, it is upon the ground that, before the defendant's liability to pay arose, an event occurred, namely, the transfer and registry, whereby he *never became indebted;* it is to the same effect as the plea denying notice of the calls, in *The Edinburgh, Leith and Newhaven Railway Company* v. *Hibblewhite*, 6 M. & W. 707. The plea here confesses a matter of *inducement* only, but gives no colour and contains no confession of a cause of action. So, if the declaration is good under sect. 101. In any point of view the plea is bad for not confessing and avoiding.

Biggs Andrews was heard for the defendants in error, in support of the judgment below.

Per curiam. The plea is clearly bad, as amounting to a plea of never
*669] indebted. And the declaration may be *sustained upon one of the grounds put by Mr. *Bovill*, either as amounting to an ordinary *indebitatus* count, or as a count in the statutable form, disclosing a possible state of things under which the defendant might be liable by virtue of the act of parliament. Whether the defendant was or was not such a proprietor as to become liable to the call according to the act of parliament, would be matter of evidence at the trial. Judgment reversed.

STEWART v. STEELE.

In an action on a policy, the captain was detained to give evidence for the plaintiff at the trial, from May to December, 1836, and again from October, 1840, to March, 1841. The defendant having obtained a new trial on payment of costs, the master, on taxation, disallowed the first detention of the captain, but allowed for the second detention 150*l.*, at the rate of one guinea *per diem*. The court refused to interfere.

The master having allowed three counsel and only one copy of the short-hand notes of the evidence at the first trial. *Held*, right.

The master also allowed in the costs of the motion for the new trial, the fee paid to a barrister who conducted the case at the trial, and disallowed that paid to a junior barrister. *Held*, that as the leader, not being of the degree of the coif, was not entitled to be held in banc, the fee to him had been improperly allowed, and that the fee to the junior for taking notes should have been allowed.

Assumpsit on a policy of insurance upon a ship called the Sherburne, valued at 8000*l.*, from the 1st of May, 1835, to the 30th of April, 1836.

At the trial, before Tindal, C. J., at the sittings in London after Hilary term, 1841, a verdict was found for the plaintiff on one issue, and for the defendant on another.

At the sittings in banc after Hilary term, 1842, a rule obtained on behalf of the defendant for a new trial, on the ground that the verdict was against evidence, was made absolute on payment of costs.

The plaintiff's costs of the first trial having been *taxed, the following statement, which had been agreed upon by the parties, was submitted to the court upon a motion to review the master's taxation:— [*670

"That in the bill of costs submitted to the master for taxation under the said rule, a sum of 400*l.* was charged as having been paid to Captain Warren, the master of the ship Sherburne; that the said sum of 400*l.* was claimed as a payment made to him for detention from the 17th of May to the 31st of December, 1836, being 228 days; and for his further detention from the 10th of October, 1840, to the 1st of March, 1841, being 142 days, after the rate as stated in the affidavit, by an arrangement with the captain, of one guinea *per diem*. That the defendant's attorney contended before the master that, under the rule above mentioned, the charge of detention ought not to be allowed; that it was a charge not properly within the rule, and, if it could be supported, was and formed part of the general costs in the cause. That in the interval between the first and second detention, the defendant applied for and obtained an order for the examination of witnesses in Calcutta in the East Indies, and the plaintiff subsequently obtained a similar order to examine his witnesses; and that it appeared by the affidavit of Captain Warren that his presence in India during the execution of the commission was considered necessary, and he went to India and returned to this country in September, 1840, and was again detained as a witness in this cause from the 10th of October, 1840, until the 1st of March, 1841; that he was thereby prevented following his employment as such commander; and that his salary and profits whilst following his employment as commander of a merchant vessel in the East India trade, amounted to about 1000*l.* a year, exclusive of board and lodging. That the sum of 400*l.* was altogether exclusive of the payment made for his expenses to, from, and in India, and was totally unconnected therewith.

*"That it was admitted on the taxation that Captain Warren went out to India with the interrogatories, to collect the witnesses who had been employed in and about the repairs and other matters connected with [*671

the said ship; and the defendant's attorney submitted to the master that the question as to whether the witness was properly detained or not, or whether he should have been examined before the master or under the commission in India, did not arise under this rule, and the point was not discussed. That the master decided that the plaintiff was not entitled to the costs of detention on the first occasion under the rule; that if allowed at all, they should be allowed all costs in the cause; but in respect of the second detention, the master allowed the sum of 150*l.*, being after the rate of one guinea *per diem.*

"That in the said bill of costs the sum of 40*l.* 3*s.* was charged for the travelling expenses of G. D. Dale, a witness from Kendal, distant from London 276 miles, and for eleven days' detention, of which sum the master allowed 26*l.* That on the 13th of February the cause was appointed for trial on the 22d. That on the 15th of the same month, after some previous correspondence, it was arranged by the defendant's and plaintiff's attorneys, in consequence of the defendant's witnesses having to come from Scotland, and the cause being expected to occupy a considerable time, to apply to have it appointed for some particular day not earlier than the 26th of February, and counsel were instructed to make the necessary application. That such application was made on the 17th of February, by Mr. Serjt. *Wilde* and Mr. *Martin*, of counsel with the respective parties, and the Lord Chief Justice appointed the trial to take place on the 2d of March; but Sir *W. Follett*, the plaintiff's counsel, not being able then to attend, a second application was made on the 18th of February, and the
*672] cause fixed for *the 26th of February, on which and the following day the cause was tried. That in the affidavit of increase it is stated that the witness G. D. Dale left his residence on the 16th and arrived in London upon his subpœna on the 18th of February; but in consequence of the postponement the said G. D. Dale on the 19th returned to his residence, and again attended on his subpœna on the 25th of February. That the defendant's attorneys contended before the master that the said G. D. Dale was unnecessarily required to leave his residence so early as the 16th, and that the plaintiff's attorneys should have written to postpone his coming to London.

"That the master allowed to the plaintiff the whole fees paid to three of the counsel for the plaintiff, with the exception of Sir *W. Follett*, who was specially retained and brought in, from which 30 guineas were taken off, 70 guineas being considered by the master as a full fee had he not been so specially brought in.

"That the master disallowed one copy of the plaintiff's brief and other papers, and the fee of 33*l.* paid to Mr. *Martin*, with such brief on the part of the plaintiff.

"That the fees so allowed to counsel were as follows:—

"To Sir *W. Follett* 70 guineas.

"To Mr. *R. V. Richards* 50 guineas.

"To Mr. Serjt. *Wrangham* 40 guineas.

"That the master so allowed the sum of twenty guineas for the fee paid to Sir *W. Follett* on showing cause against the rule for a new trial, although Sir *W. Follett* did not argue on the said rule; and that a further sum of 2*l.* 4*s.* 6*d.* was also allowed for a refresher paid to Sir *W. Follett*, and for his clerk, and for the usual attendences upon him.

"That the master disallowed one copy of the plaintiff's brief to show cause against the rule nisi, and the fee of 8*l.* 13*s.* paid to Mr. *Martin* with
*673] such brief. That *the brief on the part of the plaintiff, to show cause against the rule nisi, consisted of nine sheets of paper, and

did not detail the evidence given upon the said trial; and that, as an appendix to such brief, a copy of the short-hand writer's notes of the evidence given upon the trial, was made for each of the plaintiff's counsel; and that the master disallowed three out of the four copies of such evidence, but allowed as for the one copy the sum of 31*l*."

R. V. Richards for the plaintiff. The master should have allowed the 400*l*. paid to Captain Warren, and not merely 150*l*. for the second detention. It is difficult to see how any distinction can be drawn between the two detentions, and how the first can be said to be costs in the cause, and the second costs under the rule for a trial. It is clear that both detentions were with a view to the first trial, for there is no pretence for alleging that the captain was detained in this country on account of the second trial. He may die before the next trial, or the plaintiff may not choose to call him. [TINDAL, C. J. The first detention was necessary for the real decision of the cause. MAULE, J. It may be argued, that if the first detention was applicable to the trial which has failed, it will be equally applicable to the second trial.] It was held in *Tremain* v. *Barrett*, 6 Taunt. 88, 1 Marsh. 463, that if a witness is *bonâ fide* sent from a foreign country for the sake of his testimony in an intended action, though the writ is not sued out until after his arrival, the plaintiff is entitled to the costs of bringing him over, his subsistence, and compensation for his loss of time spent here pending the suit, for the purposes thereof, and to the costs of his return. So, in *Lonergan* v. *The Royal Exchange Assurance*, 7 Bingh. 725, 5 M. & P. 447, it was decided *that a successful party is entitled to the expense of detaining a foreign witness in this country to await the trial of the cause, although opportunity is afforded of examination upon interrogatory. So in *Mount* v. *Larkins*, 8 Bingh. 195, 1 Moo. & Sc. 357, subsistence was allowed in costs in a policy cause to the master of a ship insured, a material witness, from the time of *subpœna* to the time of trial, although the witness resided in England, was not examined, was a master in the royal navy, and did not show the permission of the admiralty for him to engage in the merchant service. Also, in *Temperley* v. *Scott*, 8 Bingh. 392, 1 Moo. & Sc. 601, it was held that a captain of a ship was properly allowed for his subsistence according to his station, for the whole time during which he was detained to give evidence as a witness in the cause. [*674

With respect to the witness from Kendal, the master cannot be said to have allowed too much; there would have been nothing unreasonable if he had allowed the whole, 40*l*. 3*s*.

The allowance of only one copy of the evidence in a case where so much depended on the particular expressions of the witnesses, is clearly insufficient. It was as necessary that each of the counsel should be furnished with a copy, as that they should have separate briefs.

Sir *T. Wilde*, Serjt., *contrà*. The master ought to have disallowed the 150*l*. for the second detention of the captain, as well as the 250*l*. for the former detention. The costs of detaining a witness are costs in the cause, and ought to abide the ultimate event; for the detention of a witness, whether for a long or a short period, does not fall within the costs of the rule for a new trial. [TINDAL, C. J. I think the master was right *as to the first detention of the captain, for the matter is still *in fieri* COLTMAN, J. Suppose the captain had been detained only two days?] Where a witness is detained for a long period, his detention is referable rather to the general conduct of the cause than to any particular trial. As respects the witness Dale, too much has been allowed, for it is clear that [*675

he need not have been sent for so soon. With regard to the *amount* of fees to counsel, the court will not interfere with the master's discretion. But the allowance of Sir *W. Follett's* fees clearly cannot be supported, for he was not in a situation to be heard in this court.(a) [Tindal, C. J. The master says that he allowed the fee paid to Sir *W. Follett* under a belief that he was entitled to be heard.] There can be no doubt that one copy of the evidence was enough for the plaintiff's counsel. [Tindal, C. J. We all think that one copy of the evidence was sufficient.]

Richards replied.

Tindal, C. J. With respect to the fees to counsel, the ancient practice is, for the junior connsel to take notes, although he cannot be heard. The fee to Mr. *Martin*, therefore, should have been allowed. As Sir *W. Follett*, however, could not be heard by the court,(a) the fee paid to him should have been disallowed. With respect to the only remaining point, as to the 150*l.* allowed for the second detention of the captain, I cannot say that the master has exercised an improper discretion in allowing that sum; for the captain was not like an ordinary witness who could be sent for at any time.

The rest of the court concurred. Rule accordingly.

(a) Not having been, as Mr. *Richards*, engaged in the cause before the restoration of the practice of the court.

*676] *COLLYER *v.* STENNETT.

Case, by a tackle-house porter of the city of London, claiming a right to the landing and porterage of certain goods imported into the port of London. The declaration alleged, "that from time whereof, &c., the mayor and commonalty and citizens of the city of London have had, and have been used and accustomed to have, and ought of right to have had, and still of right ought to have, by themselves and the persons by them in that behalf deputed, appointed, and permitted, the work and labour of unshipping, landing, carrying, and loading, *except to the houses of aliens*, of all goods, wares, and merchandise imported into the port of London *and not consigned to aliens or an alien*, for reasonable reward in that behalf."

Among other documentary evidence the plaintiff put in an act of common council of the 6th of March, 1607, which, after reciting, "that the freemen tackle-house porters and street porters had vehemently complained against the porters under the packer (or alien porters) of the said city, for that they of late time had, contrary to usage, intruded into the labour and business of packing, shipping and unshipping, lading and taking np, as well of the goods of English merchants as of strangers, where they had been accustomed to deal only in the labour of packing, shipping, unshipping, lading, and taking up *of the goods and merchandises of merchants, strangers*," enacts, "that the porters to the packer of goods of merchants, strangers in the said city, shall not in anywise intermeddle or deal with the shipping, unshipping, &c. of any manner of goods, wares, or merchandises of any merchant or merchants, or of any other person or persons whatsoever English born, that is or shall be free of the said city or not free, but shall content themselves with the labour of packing, shipping, unshipping, &c. *the goods, wares, and merchandises of merchants, strangers only*." An inspeximus charter of Charles I. was also produced, granting and confirming to the mayor, aldermen, and commonalty of the city of London amongst other things, "the offices and occupations of carriage and porterage of all wools, &c. *and all other merchandises* whatsoever, *as well of a denizen* whose father is, was or should be an alien born out of the limits of our allegiance, &c., as of *an alien born beyond the seas*, &c., which shall be carried into London from the river of Thames *to the house or repository of such alien* aforesaid, and *from thence* to the same river." A subsequent clause provides, "that no other porter, &c shall presume to intermit or intrude, &c. to carry or lade any of the said goods or merchandises from any wharf or shore within the limits aforesaid, to any ship or vessel, or to unlade any goods or merchandises from any ship or vessel upon any wharf, shore, or land within the limits aforesaid, without the special appointment or license of the said mayor, &c.; and that the porter or carrier appointed by the mayor, &c. shall have, &c., from the said merchants, as well aliens born without the allegiance of us, &c. in parts beyond the seas, as of the said denizens born, &c. within the power or allegiance of us, &c., whose

father is or shall be an alien born without the allegiance of us, &c. for carriage or port age of the said goods, such sums of money, &c. as in a certain schedule to these presents annexed are mentioned," &c.

It appeared from parol evidence, that whenever goods *of aliens* had been imported into the port of London consigned to English merchants, they were taken by the tackle-house porters; but if the alien porters disputed their right, and it turned out that the goods *belonged to an alien*, they were given up to the alien porters.

Held, that the allegation in the declaration was not sustained, as the evidence showed that the rights granted or confirmed by the charter of Charles I. of the unshipping and porterage of aliens' goods, (all of which were abolished by the 3 & 4 W. 4, c. 66, and an agreement made in pursuance of that statute,) were not confined to goods landed and sent *to the houses of aliens*, but extended to *all goods of aliens imported into the port of London*.

CASE. The declaration stated that from time whereof the memory of man was not to the contrary, the mayor and commonalty and citizens of the city of *London have been used and accustomed to have, and ought of right to have had, and still of right ought to have by themselves and the persons by them in that behalf, deputed, appointed, and permitted, the work and labour of unshipping, landing, carrying, loading, and housing (*except to the houses of aliens*) of all goods, wares, and merchandise imported into the port of London, *and not consigned to aliens or an alien*, for reasonable reward in that behalf; that also from time whereof the memory of man was not to the contrary, the mayor, aldermen, and commons of the said city in common council assembled, have been used and accustomed to make and pass, and of right ought to have made and passed, and still of right ought to make and pass, when and as by them deemed meet, acts and ordinances for the distribution of the said work and labour, and the ordering and regulating of the persons deputed, appointed, and permitted as aforesaid; that also from time whereof the memory of man is not to the contrary, the mayor and aldermen of the said city with the consent of the commonalty in common council assembled, have been used and accustomed to make, and of right ought to have made, and still of right ought to make, when and as by them deemed meet, ordinances for remedying bad and defective customs and *matters newly arising and requiring amendment, and for which no remedy had been provided, such ordinances being reasonable, not prejudicial to the king or the people, and not repugnant to the laws or statutes of England; which same custom and all other customs, liberties, privileges, and franchises of the said city were by the authority of a certain parliament, held in the seventh year of the reign of King Richard the Second, ratified and confirmed to the then mayor, commonalty, and citizens of the said city and their successors; that also before the committing of the grievances thereinafter mentioned, to wit, on the 27th of March, 1798, by a certain act, and ordinance then made by the mayor, aldermen, and commons of the said city in common council assembled, it was enacted and established among other things, that the tackle-house porters belonging to the said city, and no other person or persons whatsoever, should have, enjoy, and perform the work or labour, with the assistance of such persons as should be employed by them respectively in manner thereinafter mentioned, of unshipping, landing, carrying, loading, and housing of all goods, wares, and merchandise whatsoever, which should be imported into the port of London in any ship or vessel which should come from all or any place north of the United States of America, (Hudson's Bay, Quebec, Canada, and Nova Scotia, only excepted,) France, Spain, Portugal, Holland, Hamburgh, Bremen, Germany, the countries called the East Countries, Russia, Italy, Turkey, Barbary, Morocco, Gibraltar, the Mediterranean, the South Seas, that part of America south of the United

[*677

[*678

States, the East Indies, Asia, and Africa, and of all lead, wine and brandy which should come from the British plantations, and all other parts and places; and it was also thereby further enacted, that it should be lawful for each tackle-house porter to employ one or more servant or servants, according as *the quantity of business might require, and that every such servant should be duly and regularly admitted one of the ticket-porters of the said city; and it was thereby also further enacted and established that the tackle-house and ticket-porters, or any or either of them, should not take for their work or labour more than was limited or appointed for the same, in and by the table schedule thereinafter inserted upon pain as therein mentioned; that also afterwards and before the committing of the grievances hereinafter mentioned, to wit, on the 11th of June, 1801, by a certain other act and ordinance then made by the mayor, aldermen, and commons of the said city in common council assembled, it was enacted and established, that from and after the 15th of June, 1801, the said clause in the said act of common council of the 27th of March, 1798, by which it was enacted, that the tackle-house porters belonging to the said city, and no other person or persons whatsoever should perform the work or labour of unshipping, landing, carrying, loading, and housing of all goods, wares, and merchandises whatsoever, which should be imported into the port of London, in any ship or vessel which should come from all and any place or places north of the United States of America, &c. as thereinbefore mentioned should be and the same was thereby repealed; and it was thereby further enacted and established that the tackle-house porters belonging to the said city, and no other person or persons whatsoever, should have and enjoy the work or labour with the assistance of such persons as should be employed by them respectively, in manner mentioned in the said act of the 27th of March, 1798, of unshipping, landing, carrying, loading, and housing of all goods, wares, and merchandises whatsoever, which should be imported into the port of London in any ship or vessel which should come from all and any place and places north of the United States of America, *(Hudson's Bay, Quebec, Canada, and Nova Scotia only excepted,) France, Spain, Portugal, Holland, Hamburgh, Bremen, Germany, the countries called the East Countries, Russia, Italy, Turkey, Morocco, Gibraltar, the Mediterranean, the South Seas, that part of America south of the United States, (Surinam, Demarara, and Berbice only excepted,) the East Indies, Asia, and Africa, and of all lead, wine or brandy which should come from the British plantations, and all other parts and places.

*679]

*680]

That after the making of the said several acts and ordinances, and after the said 15th of June, 1801, to wit, on the 8th day of January, 1836, divers, to wit, 163 casks of olive oil, *not consigned to aliens or an alien*, were imported into the said port of London, in and by a certain ship called the Susan and Anne which came with the said casks of olive oil on board thereof, into the said port from France, to wit, from Marseilles in the kingdom of France; that the said casks of olive oil then were in and on board of the said ship at a certain wharf within the said city called Botolph Wharf, and ready and about to be unshipped, landed, and carried *otherwise than to the house or houses of aliens or an alien;* that before the said casks of oil were so imported as aforesaid, the plaintiff was, and from thenceforth continually hitherto has been, and still is a tackle-house porter belonging to the said city, and that at the time when the said casks of olive oil were so ready and about to be unshipped, landed, and carried as here

inbefore mentioned, and also at the time when the said casks of olive oil were unshipped, landed, and carried as hereinafter mentioned, he the plaintiff was on the said wharf with divers, to wit, three servants, then being ticket-porters of the said city duly and regularly admitted, and then was ready and willing and offered to unship, land, and carry the said casks of olive oil, and no other tackle-porter belonging to the said city then was present to unship, land, or carry the said casks of olive oil; of all which premises the defendant *before and at the time of the committing of the grievances thereinafter mentioned had notice, yet the defendant, [*681 although he was not at the time of the committing of the grievances thereinafter mentioned, one of the tackle-house porters belonging to the said city, and well knowing that the plaintiff then was one of such tackle-house porters, and then was ready and willing to unship, land, and carry the said casks of olive oil, and that tackle-house porters belonging to the said city, and no other person or persons whatsoever, ought to have, enjoy, and perform such work and labour with such assistance as in the said recited ordinances in that behalf mentioned; but contriving, and wrongfully and injuriously intending, to deprive the plaintiff of the gains and profits which otherwise would have accrued to him from or by reason of his unshipping, landing, and carrying the said casks of olive oil, and otherwise to injure the plaintiff in that behalf, heretofore, to wit, on the day and year last aforesaid, wrongfully and injuriously hindered and prevented the plaintiff from unshipping, landing, and carrying the said casks of olive oil or any part thereof, and wrongfully and injuriously did then, to wit, by certain persons by him in that behalf employed, and which same persons were not, nor was any of them then tackle-house porters or a tackle-house porter belonging to the said city, *and otherwise than to the house or houses of aliens or an alien*, unship, land, and carry the said casks of olive oil; by means whereof the plaintiff then wholly lost, and was deprived of, all the gains and profits, amounting in the whole to a large sum of money, to wit, the sum of 100*l.* which might and ought to have accrued, and otherwise would have accrued to the plaintiff from and by reason of his unshipping, landing, and carrying the said casks of olive oil. To the plaintiff's damage of 100*l.*

Pleas: first, not guilty; secondly, that the mayor and *commonalty and citizens of the city of London have not from time whereof the [*682 memory of man was not to the contrary, had, nor have they been used and accustomed to have, nor ought of right to have had, nor still of right ought they to have by themselves and the persons by them in that behalf deputed, appointed, and permitted, the work and labour of unshipping, landing, carrying, loading, and housing, *except to the houses of aliens*, of all goods, wares, and merchandise imported into the port of London, *and not consigned to aliens or an alien*, for reasonable reward in that behalf, *modò et formâ;* concluding to the country.

Third plea, that from time whereof the memory of man was not to the contrary, the mayor, aldermen, and commons of the said city in common council assembled have not been used and accustomed to make and pass, nor of right ought they to have made and passed, nor still of right ought they to make and pass when and as by them deemed meet, acts and ordinances for the distribution of the said work and labour, and the ordering and regulating of the persons deputed, appointed, and permitted, as in the declaration admitted, *modo et formâ;* concluding to the country.

Fourth plea, that the said act and ordinance in the declaration mentioned, and therein supposed to have been made by the said mayor, aldermen, and

commons of the said city in common council assembled, was not made by the said mayor, aldermen, and commons in common council assembled, *modo et formâ;* concluding to the country.

The plaintiff, by his replication, joined issue on each of these pleas.

At the trial before TINDAL, C. J., at the sittings in London after Trinity term, 1840, the following facts appeared:—

*683] The plaintiff was a tackle-porter appointed by the *Mercers' Company, and the defendant, who was a wharfinger, was the occupier of Botolph Wharf in the city of London. A ship called the Susan and Anne of Ipswich, having arrived at the defendant's wharf from Marseilles with a cargo of olive oil, the plaintiff went to the wharf on the 8th of January, 1836, and claimed a right to land the cargo. The defendant, however, refused to allow him or his assistants to do so, and employed other parties to unload the vessel. The cargo belonged to alien merchants, who had consigned it to merchants in London, and had drawn bills on the consignees for the proceeds, which bills had been accepted.

The plaintiff put in the following documentary evidence to establish the right claimed:—

An act of common council of the 25th of October, 1570, granting to the company of cloth-workers four porters.

An act of common council of the 15th of August, 1579, which recited that certain parties had been appointed to give "their opynions touchinge the establishinge of a certeyn order for the nomber of tackle-houses for porters, and chieflye shoulde consider whether it be necessarye that the companyes latelye erected shoulde so continue or not." The report of the persons so appointed, set forth, among other things, that "it is thought good that theis tackle-houses alreadye erected shall stande in force as followeth: first, whereas in reason of the Packers' Companye, forasmuch as they have *the onely worke of strangers*, ought in equytye to be restrayned from workinge to anye cytizens, yet for that it is convenyent that all men maye make choise of his owne workemen, the saide porters shall be at libertye to worke as well to cytizens as forryners, alwayes provided that such persons as shall hereafter be admitted into the saide socyetye of porters shall be freemen and no forrens."

*684] *"And forasmuch as it appeareth to the saide L. Maior, aldermen, and common counsell that the saide orders so devised and reported by the persones so appoynted as is afforesaide, be good and beneficiale to the cytye to be observed: It is therefore ordeyned and enacted by the L. Maior and his worshippfull brethren the aldermen and the common counsell assembled, and by aucthorytye of the same, that the saide orders above recyted shal be dulye kept, obayed, and performed accordinge to the forme, tenor, and purport thereof, anye other acts of common counsell, ordenances, usage, or other matter heretofore had or made to the contraye in anye wise notwithstandinge."

An act of common council of the 26th of March, 1607, by which, after reciting "that the freemen tackle-house porters and street porters had vehemently complained against the porters under the packer of the said city, for that they at late time had, contrary to usage, intruded into the labour and business of packing, shipping, and unshipping, landing, and taking up as well of the goods of *English* merchants as of strangers, where they had been accustomed to deal only in the labour of packing, shipping, unshipping, lading, and taking up of *the goods and merchandises of merchant strangers*," it was amongst other things "ordeyned and established by the

Right Honourable the Lord Maior, the aldermen his brethren, and the commons in common counsell assembled, and by the authoritye of the same, that no person or persons whatsoever shall at any tyme hereafter be admytted or allowed in any of the tackle-houses in the said cyttie as a maister or fellow porter, unless hee bee a freeman of the said cyttie, and shall be thereunto admytted and allowed by master, wardens and courts of assystantes, of such worshipful companye of this cyttie as shall have a tackle-house, or hath had *usuall porters apperteyninge to a tackle-house in the said cyttie." [*685

"And it is likewise ordeyned, enacted, and established by authoritye aforesaid, that the porters commonlye called the porters to the packer of the goodes of merchaunte straungers in the said cyttie, or any of them, shall not at any tyme or tymes hereafter in anywyse intermeddle or deal with the shipping, unshipping, ladinge, unladinge, packinge, taking upp, carriage or housinge of any manner of gooddes, wares, or merchandizes of any merchaunte or merchauntes, or of any other person or persons whatsoever, *English* borne, that is or shall bee free of the said cyttie or not free, but shall content themselves with the labour of packinge, shippinge, unshippinge, ladinge, unladinge, taking upp, portage, and housing of *the goodes, wares, and merchandizes of merchant strangers onlye.*"

An extract from the proceedings at a common council held on the 26th of January, 1608, whereby a tackle-house which had then lately been erected by the Mercers' Company, was ratified and confirmed.

An act of common council of the 16th of October, 1766, for adjusting the differences which then existed between the tackle-house porters and ticket porters.

An act of common council of the 6th of December, 1712, enacting, that instead of two only one governor of the fellowship or society of porters of the city, should in future be appointed.

An act of common council of the 27th of March, 1798, for settling the differences between the tackle-house and ticket porters, and to prevent obstructions and delay in the business of the merchants, which enacted among other things, "that the tackle-house porters belonging to this city, and no other person or persons whatsoever, should have, enjoy, and perform the work or labour,—with the assistance of such persons *as should be employed by them respectively in manner thereinafter mentioned,—of unshipping, landing, carrying, loading, and housing of all goods, wares and merchandises whatever which should be imported into the port of London in any ship or vessel which should come from all and any place or places north of the United States of America, (Hudson's Bay, Quebec, Canada, and Nova Scotia only excepted,) France, Spain, Portugal, Holland, Hambro, Bremen, Germany, the countries called the East Countries, Russia, Italy, Turkey, Barbary, Morocco, Gibraltar, the Mediterranean, the South Seas, that part of America south of the United States, the East Indies, Asia and Africa, and of all lead, wine, and brandy which should come from the British Plantations, and all other parts and places, and all prize goods captured on board any ship or vessel, and which should be brought to the port of London and condemned by the Court of Admiralty in England; and also all prize goods which should be imported from the places thereinbefore respectively allotted to the said tackle-house porters." [*686

And it was further enacted, "that every person who should act as a tackle-house porter, ticket porter, or packer's porter, otherwise alien porter, or who should intermeddle with the work or labour or either of them within

the city of London or liberties thereof, or receive or take any of the emoluments of any or either of them not being duly authorized so to do, should forfeit and pay for every such offence the sum of 5*l*."

And it was also enacted, "that the packer's porters, otherwise called alien porters, or any of them, should not in anywise intermeddle in the labour of packing, shipping, unlading, or otherwise intermeddle with any goods, wares and merchandises *except such as belong to merchant* strangers; and should not employ any person or persons under them, except such as should be duly *and regularly admitted ticket porters of this city, upon pain of forfeiting and paying for every such offence the sum of 5*l*."

*687]

And it was further enacted amongst other things, "that if any porter whatsoever should at any time or times refuse to pack, lade, ship, unlade, land, carry, load, unload, or otherwise deliver any goods, wares, and merchandises of any merchant or merchants whatsoever (*other than and except such as belong to merchant strangers*) upon every reasonable request from time to time for that purpose made, every porter so offending without reasonable excuse, to be allowed and certified by the governor of the said society for the time being (who was thereby authorized and required to allow and certify the same from time to time if he in his discretion should think proper), should forfeit and pay for every such offence a sum of money not exceeding 5*l*., nor less than 40*s*.; and such merchant and merchants should, and lawfully might also from time to time when, and as often as the case should happen (if no porter was in attendance and ready to perform the work of which the declaration of such merchant and one other person then present should be sufficient evidence), employ any person or persons whatsoever, to pack, lade, ship, unlade, land, carry, load, unload, or otherwise deliver his or their goods, wares, and merchandises aforesaid," &c.

An act of common council of the 11th of June, 1801, whereby it was, amongst other things, enacted, "That the tackle-house porters belonging to this city, and no other person or persons whatsoever should have, enjoy, and perform the work or labour (with the assistance of such persons as should be employed by them respectively in manner mentioned in the said act of the 27th of March, 1798) of unshipping, landing, carrying, loading, and housing of all goods, wares, and merchandises whatsoever, which should be imported into the port of *London in any ship or vessel which should come from all and any place and places north of the United States of America (Hudson's Bay, Quebec, Canada, and Nova Scotia only excepted), France, Spain, Portugal, Holland, Hambro, Bremen, Germany, the countries called the East Countries, Russia, Italy, Turkey, Barbary, Morocco, Gibraltar, the Mediterranean, the South Seas, that part of America south of the United States (Surinam, Demarara, and Berbice only excepted), the East Indies, Asia, and Africa; and of all lead, wine, and brandy which should come from the British plantations, and all other ports and places, and all prize goods captured on board any ship or vessel, and which should be brought to the port of London, and condemned by the Court of Admiralty in England; and also all prize goods which should be imported from the places therein-before respectively allotted to the said tackle-house porters." And it was further enacted, "That all and every other the clauses, powers, provisions, and authorities and table of rates contained or referred unto in the said act of the 27th of March, 1798, and not thereby varied or repealed should be, and the same were thereby declared to be, and remain in full force and effect, as fully and effectually to all intents and

*688]

purposes whatsoever as if the same several clauses were therein repeated and thereby respectively enacted, established, and ordained, any thing therein-before contained to the contrary thereof in anywise notwithstanding."

Extracts from the charter granted to the city by King Charles the Second in the sixteenth year of his reign, setting out, by *inspeximus*, a charter of Charles the First, were also put in, among which were the following:—

"To all to whom these present letters shall come greeting: Whereas our well beloved the mayor, commonalty, and citizens of the city of London and their predecessors within the port of London, within the *liberties and franchises of the city of London and suburbs thereof, have [*689 had, exercised, and enjoyed, or claimed to have, exercise, and enjoy, the office of package of all cloths, wools, woolfells, calf-skins, goat-skins, bales of tin, and all other merchandises whatsoever to be packed, casked, piped, barrelled, or otherwise vesselled out of the said port, or to be transported to any of the parts beyond the seas of the goods and merchandises as well of aliens and persons born under any foreign allegiance in any parts beyond the seas, wheresoever they should be customed; and also the office as well for surveying or scavage of all goods or wares of any merchant, either alien or denizen, whose father was or should be an alien born without Our allegiance, and from the parts beyond the seas, to be brought to the said port by way of merchandise, as also for the surveying, delivering, or balliage of all goods and wares of any such merchants aforesaid, to be exported from the said port into the parts beyond the seas, or otherwise, on the account of merchandises upon and through the river Thames within the said port, in any ship, boat, barge, or vessel whatsoever floating, laden, remaining, or being off any shore of the said river of Thames, and upon any wharf or shore of the said river which should happen there to remain or be delivered or unladen, as well by water as by land, within the port aforesaid, within the franchises and liberties of the said city and suburbs thereof; all which they have enjoyed time out of mind, and by virtue of several charters or letters patent of Edward the Fourth late King of England, in the first and eighteenth years of his reign to them granted, and also by virtue of a certain other charter or letters patent of Henry the Eighth, late King of England, to the said mayor and commonalty and citizens aforesaid, granted in the third year of his reign, by whatsoever name or names the same are called in the said letters patent, by authority of *parliament confirmed, or [*690 by colour of the same letters patent, or any of them, or by the prescription aforesaid, with divers fees and rewards to the said offices belonging and appertaining: And whereas divers questions and differences have of late arisen and about and concerning the offices aforesaid, and the execution thereof within the port aforesaid, within the liberties and franchises of the city aforesaid, and suburbs thereof, whereby the said mayor, and commonalty, and citizens of the city of London aforesaid have been hindered and disturbed in the offices aforesaid and in the exercise of them: Know ye that We, for the moving and utter taking away all doubts and questions about the said offices, and likewise for the corroborating, amplifying, increasing, declaiming, and establishing the liberties and privileges of the said city, of Our special grace, certain knowledge, and mere motion, and also for and in consideration of 4200*l.*, &c., have for Us, Our heirs, and successors, created, ordained, and constituted, and by these presents do create, ordain, and constitute that from henceforth for ever hereafter there shall be within the said port of London and the limits and bounds thereof.

within the liberties and franchises of the said city and suburbs thereof, the office and offices, employment and employments of package of all woollen cloths, woolfells, calf-skins, goat-skins, bales of tin, and all other merchandises whatsoever, to be packed, casked, piped, barrelled, or any ways vesselled, with a survey of the measure, number, and weight of the said merchandises; and also the survey of all customable merchandises to the said port within the liberties and franchises of the said city and suburbs thereof coming, and out of the said port going, as well by land as by water, within the liberties and franchises of the said city aforesaid and suburbs thereof, as well of the goods of any denizen whose father is or shall be an alien, as of
*691] *the goods of aliens*, wheresoever *the same shall be customed, as also an office or employment of carriage and portage of all wools, woolfells, bales of tin, and of all other merchandises whatsoever, as well of any denizen whose father is or shall be an alien born, without the allegiance of Us, Our heirs or successors, and under any foreign allegiance, in any the parts beyond the seas which shall be carried into London from the river of Thames *to the house or warehouse of such alien*, and from thence to the said river, together with the fees, sums of money, profits, and emoluments of the said office or employments and other the premises in two tables or schedules hereunto annexed mentioned, and respectively limited and appointed, all and singular which fees, sums of money, profits, and emoluments in the said tables or schedules expressed as due and lawful fees to the said several offices of package or portage annexed and belonging, and in the execution of the same offices and either of them respectively to be had and taken, We do, for Us, Our heirs, and successors, ratify, establish, and confirm by these presents; and the same fees, sums of money, profits, and emoluments as the said tables or schedules before mentioned, We do, for Us, Our heirs, and successors, grant unto the said mayor, commonalty, and citizens of the city aforesaid, and their successors for ever by these presents. And furthermore, of Our special grace, certain knowledge, and mere motion, and for the consideration aforesaid, We do, for Us, Our heirs, and successors, give and grant to the said mayor, commonalty, and citizens of the city aforesaid, and their successors, the said office or employment of package of all and all manner of woollen cloths, woolfells, calf-skins, goat-skins, bales of tin, and all other merchandises whatsoever to be packed, casked, piped, barrelled, or any ways vesselled, with the survey of the measure, number, and weight of the said merchandises, together with the fees, sums of money,
*692] profits, *and emoluments aforesaid, and also the office or employment of carriage and portage of all wools, woolfells, bales of tin, and all other merchandises whatsoever, as well of any denizen whose father is or shall be an alien born without the allegiance of us, Our predecessors, heirs, or successors, as *of any alien born without the allegiance of us, Our predecessors, heirs, or successors, and under any foreign allegiance in parts beyond the seas*, which shall be carried into London from the river of Thames *to the house of such alien*, and *from* thence to the said river, together with the fees, sums of money, profits, and emoluments aforesaid; to hold and exercise the offices and employments aforesaid, and either of them, with their appurtenances and the dispositions, orderings, surveyings, and corrections thereof, and of either of them, together with all fees, sums of money, profits, and emoluments whatsoever to the said offices or employments, or either of them, in the said tables or schedules to these presents annexed and respectively appointed to the said mayor and commonalty and citizens of the said city, and their successors for ever: and also to exercise and occupy

the said offices and employments, and every and either of them, by themselves or by their sufficient minister or ministers, deputy or deputies, without any account or other things to be therefore rendered or made to Us, Our heirs, or successors (besides the rent hereafter by these presents mentioned to be reserved and paid to Us, Our heirs, and successors), and without incurring any penalty or forfeiture of the offices aforesaid, or either of them, or of any parcel thereof, although they or their deputies, officers, or servants do not pack the said goods or merchandises when they are ready, and upon reasonable request and notice thereof given for the performing the said services; and that no other porter or carrier, or any person or persons whatsoever, shall presume to intermit *or intrude him or themselves to [*693 carry or lade any of the said goods or merchandises from any wharf or shore within the limits aforesaid, into any ship or vessel, or to unlade any goods or merchandises from any vessel upon any wharf, shore, or land within the limits aforesaid, without the special appointment or license of the said mayor and commonalty and citizens of the said city aforesaid, or of their officers or deputies for that purpose first had and obtained; and that the porter or carrier appointed, and from time to time to be appointed, by the said mayor, and commonalty, and citizens, and their successors, or by their sufficient officers or deputies for the time being shall have, take, or receive of and from the said merchants as well aliens born without the allegiance of Us, Our predecessors, heirs, and successors, and under any foreign allegiance in parts beyond the seas as of the said denizens born or to be born within the power or allegiance of Us, Our predecessors, heirs, or successors, whose father is or shall be an alien born without the allegiance of Us, Our predecessors, heirs, and successors, for carriage or portage of the said goods and merchandises, such sums of money for their labour aforesaid as in a certain schedule, to these presents annexed, are mentioned and appointed, without any account or other thing to be therefore rendered or made to Us, Our heirs or successors, (besides the rents hereafter in these presents mentioned to be paid to Us, Our heirs, and successors), &c. &c.

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"And whereas We are informed that, with intent to defraud and deceive the said mayor, and commonalty, and citizens of the city aforesaid of the fees and profits to the said several offices belonging and appertaining, several goods and merchandises have been fraudulently laden and unladen by divers persons at certain wharfs or places commonly called St. Katharine's, Tower, Southwark, *Beck Shore, Wapping, Redrith, Deptford, Greenwich, and Blackwall, and all other places between [*694 Blackwall and London Bridge on both sides of the river Thames aforesaid, supposing the same places to be without the port of London aforesaid and the liberties, franchises and suburbs thereof, We will and by these presents for Us, Our heirs and successors, do ordain and declare that for ever hereafter all and singular merchant strangers born without Our allegiance in parts beyond the seas and under foreign obedience, and also the sons of such merchant strangers who henceforth shall lade or unlade any goods or merchandises customable in the port of the city of London aforesaid, or in any of the said places or wharfs above mentioned shall from time to time render and pay or make, and cause to be rendered and paid unto the said mayor, commonalty, and citizens of the city aforesaid, and their successors, or their officers, deputies, and servants such wages and fees as are in the said tables or schedules mentioned and expressed: and further, because We are given to understand that divers goods and merchandises of mer

chants, as well aliens born without Our allegiance, under foreign obedience in parts beyond the seas, as also such denizens whose father is or shall be an alien and born under foreign allegiance in parts beyond the seas, which are carried out of the port of the said city and brought into the said port from foreign parts and beyond the seas, are very often subtilly concealed and coloured under the names of other persons, to defraud Us of Our customs and other things to us belonging for such goods and merchandises to the prejudice and loss of Us, Our heirs and successors, and also of the said mayor, and commonalty, and citizens of the said city of the fees and sums of money so as aforesaid respectively limited, appointed, and ordained by reason of the exercise of the offices aforesaid, or any of them: We there-
*695] fore, being willing to look after *Our indemnity in this behalf, and also to the intent that the said mayor, and commonalty, and citizens may the better detect the frauds, covins, and deceits of all persons so concealing and withdrawing the said goods and merchandises, and the fees aforesaid, We do for Us, Our heirs and successors, give, and, by these presents, grant to the said mayor, and commonalty, and citizens, and their successors, that the mayor of the city aforesaid for the time being, and the sufficient deputies, servants, or officers of the said mayor, commonalty, and citizens of the city aforesaid, in that behalf from time to time duly assigned, shall and may have full power and authority to give and administer the oath upon the Holy Evangelists, from time to time, to all such persons suspected, or to be suspected of the said withdrawings, concealments, colourings, frauds, or covins, and that it shall and may be lawful to the said mayor, his minister and deputy, or officers for the time being, by all lawful ways and means, to compel all such persons suspected, or to be suspected, as shall refuse or deny to take the same oath, although express mention of the true yearly value or of the certainty of the premises or any of them, or of any other gifts or grants by Us, or by any of Our progenitors or predecessors to the said mayor and commonalty and citizens of the city aforesaid, or any of them heretofore made, is not made by these presents, or any statute, act, ordinance, provision, proclamation, or restraint to the contrary thereof, heretofore, had, made, published, ordained, or provided, or any other thing, cause, or matter whatsoever, in any wise notwithstanding."

It was clearly proved that the corporation had exercised the right to appoint what were called alien porters, by whom all goods of aliens brought into the port of London, were landed and packed. Evidence was also
*696] given that the port of London extends from Yantlet *Creek to Staines Bridge, including the whole of the Thames and both banks of the river; that besides many private wharfs, there are certain sufferance wharfs appointed by the commissioners of customs for the reception of certain goods liable to duties. That there are between the Tower and London Bridge, eight or ten wharfs or quays called legal quays, Botolph Wharf being among the number, for shipping and landing goods liable to duties; that oil from the South Seas and tallow are for the most part landed and warehoused on the Surrey side of the Thames; and that certain other goods are generally discharged in the stream. It was not shown that the tackle-porters had ever interfered in the case of vessels unloading on the Surrey side, or unshipping in the stream, or had exercised their office at the sufferance wharfs or anywhere, except at the legal quays.

It also appeared that the tackle-porters had been in the habit of taking the goods of aliens consigned to English merchants, but if the alien porters

came and disputed the right, and it turned out on inquiry that the goods belonged to an alien, the tackle-porters gave way to the alien porters. No tackle-houses were shown to be now in existence.

The only instance of "carrying" proved was, with respect to a quantity of tea belonging to the East India Company, which had been landed by tackle-house porters from a vessel in Long Reach, and carried by them, in town carts, to the warehouses of the company.

Several tackle-house porters and freemen, were called as witnesses on the part of the plaintiff, but were withdrawn on its being objected by the defendant's counsel, that they had a direct interest in the event of the suit. Other witnesses who were freemen were also objected to; some on the ground of their being *freemen* and of the interest they had in maintaining *the alleged rights of the city, and others on the ground that in addition to being freemen they were *ticket-porters*, and consequently [*697 interested in sustaining the right in question, inasmuch as the act of common council of the 27th of March, 1798, provided that none but ticket-porters should be employed as assistants to the tackle-house porters. The Lord Chief Justice overruled the objection to these witnesses, and they were examined, their names being endorsed on the record at the request of the plaintiff's counsel.

At the close of the plaintiff's case, on its being objected by the counsel for the defendant that there was no proof of the exercise of the alleged right to the *housing* of goods, the plaintiff's counsel applied to amend the declaration by striking out that word. Leave to amend was given, liberty being reserved to the defendant to move to enter a nonsuit, if the court should be of opinion that the amendment was not warranted by the 3 & 4 W. 4, c. 42, s. 23. It was also contended on the part of the defendant that any rights formerly exercised by the corporation with respect to the landing, porterage, &c., of *aliens' goods*, were surrendered by the agreement made between the government and the corporation pursuant to the statute 3 & 4 W. 4, c. 66; (a) for that the *offices confirmed by the charters referred to in that act, were not limited to the porterage, &c., of goods [*698 *consigned to aliens*, or carried *to the houses of aliens*, but extended *to all goods imported into the port of London, which were *the property* [*699 *of aliens*, and consequently that the exception to the custom, as stated in the declaration, was too narrow.

(a) Which, after reciting that "it was expedient that the offices, occupations, or employments of package, scavage, balliage and porterage given, granted, or confirmed by divers charters of His Majesty King Edward the Fourth and of His Majesty King Charles the First, and by the 5 Hen. 8, c. 8, to, and now held and enjoyed by. the mayor and commonalty and citizens of London, and the duties, fees, and emoluments thereof should be abolished, and that the mayor, aldermen, and commons of the city of London in common council assembled were willing and had consented that the said offices and the duties, fees, and emoluments thereof should be relinquished and abolished in consideration of a sum of money to be paid to them for the same, and provided they were authorized to lay out and invest the same in the purchase of land and other hereditaments," enacts (sect. 1.) "that it shall be lawful for the Lord High Treasurer or the Commissioners of His Majesty's Treasury, or any three or more of them, to pay, from and out of all or any of the duties, revenues, and incomes composing the consolidated fund of the United Kingdom of Great Britain and Ireland, or out of the growing produce of the said fund, to the chamberlain of the city of London, on behalf of the said mayor and commonalty and citizens, such sum of money as may be agreed upon between the said commissioners and the said mayor and commonalty and citizens as a compensation or satisfaction for the said offices, occupations, or employments of package, scavage, balliage, and porterage, and the fees and emoluments thereof, and also to pay out of the said fund or the growing produce thereof, the costs and charges in any manner incident or relating to the preparing and passing this act."

Sect. 2. enacts, "that the said sum to be paid as aforesaid shall be paid and received

Under the direction of the Lord Chief Justice a verdict was returned for the plaintiff with nominal damages, leave being reserved to the defendant to move to enter a nonsuit, if the court should be of opinion that the evidence did not sustain the declaration as amended.

Channell, Serjt., in Michaelmas term, 1840, obtained a rule nisi to enter a nonsuit on the ground that the amendment made at the trial was not authorized by the 3 & 4 W. 4, c. 42, s. 23, inasmuch as it altered the character of the right which was in issue between the parties; and also that the declaration as amended was not supported by the evidence; *Fazakerley* v. *Wiltshire*, 1 Str. 462, 10 Mod. 338, the exception being limited to *goods consigned to aliens*, whereas the evidence showed that it applied to all goods *the property* of aliens to whomsoever consigned. He also obtained a rule for a new trial on the ground that the freemen ticket porters were not admissible witnessess; *Burton* v. *Hinde*, 5 T. R. 174; *Davies* v. *Morgan*, 1 C. & J. 587; *The Bailiffs, &c. of Godmanchester* v. *Philips*, 4 Ad. & E. 550, 6 N. & M. 211, and that the verdict was against the evidence, the claim embracing the whole of the port, and the evidence being restricted to an exercise of the right at the legal quays; and that there was not sufficient evidence of any exercise of the right of *carrying*. He also obtained a rule to arrest the judgment, on the ground that the custom
*700] alleged in the *declaration as amended was bad for uncertainty, the carrying being alleged without limit, and that the remuneration was not averred to be reasonable, or the amount set out, so as to enable the court to judge whether it was reasonable or not; *Laybourn* v. *Crisp*, 8 C. & P. 397, 4 M. & W. 320, and, further, that the declaration contained no averment that the persons employed in unloading the cargo in question were not ticket-porters, it being merely alleged that they were not tackle-porters.

Talfourd, Serjt., and *John Henderson* in last Michaelmas term showed cause.(a) The important question is, what were the rights of the city of London with regard to the goods of aliens, which were purchased by the government under the provisions of the 3 & 4 W. 4, c. 66. The

as full satisfaction and compensation to the said mayor and commonalty and citizens for the loss of the said offices and of the fees and emoluments thereof, and that on the day after the day on which the said sum shall be paid as aforesaid, the offices, occupations, or employments of package, scavage, balliage, and porterage, granted or confirmed to the said mayor and commonalty and citizens by the said charters and act of parliament, or intended so to be, and the future duties, fees, and emoluments thereof, and all the estate and interest of the said mayor and commonalty and citizens, and their successors, of, in, and to the same, whether they may be entitled thereto respectively by virtue of the said charters and act of parliament, or by virtue of any other charters or acts of parliament, or by presumption or otherwise, and every of them, shall cease and determine, and be utterly void to all intents and purposes whatsoever."

"Provided always (sect. 3,) that nothing in this act shall abridge, prejudice, or otherwise affect, or be deemed or construed to abridge, prejudice, or otherwise affect, any of the rights of the said mayor and commonalty and citizens of the city of London to which they are or may be entitled under or by virtue of the aforesaid charters or act of parliament, or otherwise, to have and exercise any of the offices or employments granted or confirmed to the said mayor and commonalty and citizens by the aforesaid charters or act of parliament, except the said offices or employments of package, scavage, balliage, and porterage, or any of them, or to receive and enjoy the duties, fees, profits, and emoluments to such offices, or any of them (except as aforesaid) belonging or appertaining, or any other rights or privileges to which the said mayor and commonalty and citizens are entitled; but that the same shall be and continue in full force and virtue, and may be enforced and recovered by the same remedies and claimed or pleaded in the same manner as if this act had not been passed."

Sects. 4 and 5, empower the corporation to lay out the money in the purchase of land or of ground-rents.

(a) As the judgment of the court turned upon one point only, the argument upon the others is omitted.

right here claimed is by prescription, whereas the right of the city to the porterage of alien's goods depends, not on immemorial custom, but on the charters referred to in the 3 & 4 W. 4, c. 66; and with respect to the latter right, there can be no doubt, it was included in that statute. [MAULE, J. You say that this right is prescriptive, and not granted by charter; but if prescriptive and also intended to be granted by the charters, do you allow that it was purchased by government?] The charter of Edward the Fourth grants, among other things, "the office of portage of all wools, &c., which shall be carried in London from the river Thames *unto the houses of strangers;* and, contrariwise, *from the said houses* unto the said water," &c. These words were clearly meant to apply only to goods conveyed to the houses of aliens resident in London, and not to goods the property of foreign merchants; for it is an indispensable condition that the goods shall be carried "into the houses of *strangers," in order to [*701 give the corporation of London a claim to the porterage. So, the charter of 16 Car. 1, grants "the office, &c., of carriage and porterage of all wools, &c., as well of a denizen whose father is, was, or should be an alien born out of the limits of our allegiance, or that of our predecessors, &c., as of an alien born beyond the seas out of the limits of our allegiance, or that of our predecessors, &c., and under any foreign allegiance, which shall be carried into London from the river of Thames, *to the house or repository of such alien as aforesaid,* and *from thence* to the same river." Under this charter, to give the city of London a right to the carriage of goods, it is manifest that they must not only be the goods of aliens, but must be conveyed to their houses. The acts of common council of the 26th of March, and the 27th of March, 1798, treat the right to the porterage of goods consigned to English subjects, and that of goods consigned to aliens, as distinct. It is true, that the latter ordinance directs that the alien porters shall not intermeddle with goods, "except such as belong to merchant strangers;" but that expression may be taken to mean goods belonging to merchants living in London as strangers, and not goods the property of merchants living abroad. Where goods were consigned to English merchants the duties of scavage and package were not taken, but such goods were entered at the custom-house as British, and were not liable to the alien duties. [TINDAL, C. J. Upon that point the evidence was contradictory.] It is submitted that the right now claimed is not affected by the 3 & 4 W. 4, c. 66; for that statute is evidently limited to the purchase of alien dues charged upon goods imported by foreign merchants resident in London.

Channell, Serjt., (with whom were *W. H. Watson* and *Montague Smith*,) in support of his rule. It is *impossible to contend successfully that [*702 the large sum given by government to the corporation of London, was in respect of a right of such a limited description as that suggested. The legislature in passing the 3 & 4 W. 4, c. 66, clearly sought to encourage the importation of foreign goods; but it cannot be supposed, that they would seek to effect that object by encouraging consignments to foreign rather than to English merchants. It is clear, that it was intended by the statute to abolish the offices of package, scavage, balliage, and porterage, granted or confirmed by the charters of Edward IV. and Charles I. With respect to the latter charter, the words "house or repository of such alien," on which so much reliance is placed by the other side, are not necessarily confined to the residences of aliens, but may mean any places made use of by the consignee for the deposit of aliens' goods; and it is observable that the subsequent provisions in this charter do not restrict its operation to

goods carried to the houses of aliens. The acts of common council of the 26th of March, 1607, and 27th of March, 1798, place the question beyond doubt, and show clearly that the right of alien porters extended to all goods the property of aliens, to whomsoever they might be consigned. And this view is confirmed by the evidence given at the trial, by which it appeared, that in case of any dispute arising between the tackle-house porters and the alien-porters, as to the right to carry goods, if it turned out that such goods were the property of an alien, the former gave way to the alien-porters. It therefore follows, that the exception to the right claimed in the declaration is too narrow, and consequently, that the defendant is entitled to have his rule made absolute, for entering a nonsuit. *Cur. ad. vult.*

TINDAL, C. J., now delivered the judgment of the court.

*703] *This was an action brought to assert a right claimed by the tackle-house porters of the city of London, to the landing and porterage of certain goods imported into the port of London. Upon the trial of the cause a verdict was given for the plaintiff, but leave was reserved to the defendant to move to enter a nonsuit on two grounds; first, that an amendment, which was made in the course of the cause, ought not to have been made; secondly, that a material allegation of the declaration, as amended, was not proved; and a rule nisi for a nonsuit on these grounds, and for a new trial on other grounds, was subsequently granted.

The allegation in the declaration, as amended, was, that from time whereof the memory of man is not to the contrary, the mayor and commonalty, and citizens of the city of London, have had, and have been used and accustomed to have, and ought of right to have had, and still of right ought to have, by themselves, and the persons by them in that behalf deputed, appointed, and permitted, the work and labour of unshipping, landing, carrying, and loading, *except to the houses of aliens*, of all goods, wares, and merchandises imported into the port of London, *and not consigned to aliens or an alien*, for reasonable reward in that behalf.

It was objected to this allegation, that the exception was too narrow; for it was contended that, by the act of 3 & 4 W. 4, c. 66, and the agreement made in pursuance of it, the rights of the city (on whatever foundation they rested), to the unshipping and porterage of aliens' goods were abolished, and in consequence that the exception in the allegation ought to have extended to all goods of aliens imported into the port. That act, after reciting that it is expedient that the offices of package, scavage, balliage, and porterage given, granted, or confirmed by divers charters of Edward the Fourth, *704] and of his Majesty King Charles the First, and by an act *passed in the 5 Hen. 8, to, and now held and enjoyed by the mayor and commonalty, and citizens of the city of London, and the duties fees, and emoluments thereof should be abolished, and that the mayor, &c., had consented, in consideration of a sum of money, authorizes the commissioners of the treasury to pay such sum as shall be agreed on as a compensation for the said offices. It then enacts, that on the day after the day on which the said sum shall be paid, the offices, occupations, or employments of package, scavage, balliage, and porterage granted or confirmed to the said mayor and commonalty, and citizens, by the said charters and act of parliament, or intended so to be, and the future duties, &c., thereof, and all the estate and interest of the said mayor, &c., of and to the same,—whether they may be entitled thereto by virtue of the said charters and act of parliament, or by virtue of any charters or acts of parliament, or by prescription or otherwise,

and every of them, shall cease and determine, and be utterly void to all intents and purposes whatsoever.

The money agreed upon having been paid, it could not be disputed that the offices granted or confirmed, or intended so to be by the several charters referred to, were abolished; but the question was, what the offices were which were so granted or confirmed by those former charters: it being contended on the part of the defendant, that the offices granted or confirmed by those charters related to all *goods of aliens* imported; and on the part of the plaintiff, that they related only to *goods carried to aliens' houses*, or *consigned to aliens*. The terms of the charter of Charles the First, which is the material charter, are, "the offices and occupations of the carriage and porterage of all wools, woolfells, bales of tin and all other merchandises whatsoever, as well of a denizen whose father is, was, or should be an alien born out of the limits of our allegiance or that of our *predecessors, heirs [*705
or successors, as of an alien born beyond the seas, out of the limits of our allegiance, or that of our predecessors or successors, and under a foreign allegiance which shall be carried into London *from the river of* Thames *to the house or repository of such alien* as aforesaid, and from thence to the same river, together with the fees, sums of money, profits and emoluments of the said offices or occupations, and other premises mentioned and respectively limited and appointed in two tables or schedules annexed to that charter;" and it was contended on the part of the plaintiff, that by the words "house or repository of such alien," must be understood, "house of such alien or repository belonging to or occupied by such alien;" and, the rather because, in a subsequent part of the charter, the more general term "repository" is omitted; the terms used in describing the office, being "the offices and occupations of the carriage and porterage of all wools, &c., and all other merchandise whatsoever, as well of denizens whose fathers are, were, or should be born out of the limits of our allegiance, as of aliens born beyond the seas out of the limits of our allegiance, which shall be carried into London from the river of Thames to the house of such alien, and from thence to the same river." On behalf of the defendant, it was on the other hand contended, that any place made use of by the alien as a place of deposit of his goods, whether occupied by himself or belonging to another whom he chose to entrust with the management of his goods, might properly be considered as the repository of such alien within the meaning of the charter. In favour of the more extended construction contended for by the defendant, the subsequent provision of the charter was referred to, by which it is ordered, that no other carrier or porter, or any person whatsoever, shall *intrude or interfere in carrying or lading any such [*706
goods or merchandise *from any wharf or shore within the limits aforesaid to any ship or vessel, or to unlade any goods or merchandises from any ship or vessel upon any wharf, shore, or land* within the limits aforesaid, without the special appointment or license of the said mayor, &c., and that the carriers or porters appointed by the mayor, &c., may take and receive from the like merchants, as well aliens born in parts beyond the seas, as of the like denizens born within the dominions, &c., whose fathers were aliens born without the limits of our allegiance, for the carriage and porterage of the like goods, such sums of money as are mentioned in a schedule annexed to these presents.

This provision contains nothing to restrict its operation to goods carried *to* the houses of aliens. A similar remark may be made with respect to other provisions of the charter, by one of which, after reciting that, in order

to defraud the mayor, &c., of the fees appertaining to the aforesaid offices, certain goods have been craftily laden and unladen at certain wharfs and places called St. Katharine's, Tower Wharf, Southwark, &c., supposing that the same places are not within the port of London, it is ordained and declared that henceforth for ever, all and singular foreign merchants born beyond the seas out of the limits of our allegiance, and also the sons of such foreign merchants who shall hereafter lade or unlade *any goods or merchandises* upon which customs are taken *in the port of the city of London aforesaid, or in any of the places or wharfs aforesaid,* shall from time to time render and pay to the aforesaid mayor and commonalty &c., or their officers, deputies, and servants such above-named wages and fees as are mentioned and expressed in the aforesaid table or schedule.

*707] *By another clause, after reciting that divers goods and merchandises, as well of aliens as of denizens whose fathers were aliens, carried out of the port of London to foreign parts, or brought from foreign parts to that port, are frequently kept back, *concealed, and coloured under the names of other persons,* to defraud us of our customs, and the aforesaid mayor and commonalty, &c., of the fees and sums of money for them as aforesaid respectively limited by reason of and for the exercise of the offices aforesaid, power is given to the mayor of the city, and the sufficient deputies, servants, or officers of the mayor, commonalty, and citizens to administer an oath to all such persons who shall be suspected of the aforesaid withholding, concealments, coloring fraud and covin. This provision appears to us to furnish strong grounds for inferring, that it was not intended that any alien's goods should be exempt from the payment of the fees due under the charter to the mayor and commonalty and citizens, on the score of their being consigned to one not being an alien, and that such consignment would have been looked upon at the time this charter was granted, as a concealing and colouring the goods of the alien under other persons' names. That such was the interpretation put on this clause of the charter, is clear from the evidence given on the trial of the cause, by which it appeared, that where the goods of any alien have been imported, consigned to an English merchant, the tackle-house porters have taken them; but, if the alien porters came and disputed the right, and upon inquiry it turned out that they were aliens' goods, then the alien porters took them.

What the rights of the alien porters were previously considered to be, appears from the ordinance of the common council of the 6th March, 1607.
*708] That ordinance recites, amongst other things, that the freemen *tackle-house porters, and street porters, had vehemently complained against the porters under the packer of the said city, (meaning the alien porters,) for that they of late time have, contrary to usage, intruded into the labour and business of packing, shipping, and unshipping, lading, and taking up of the goods and merchandises of merchant strangers only; and it enacts, that the porters to the packer of goods of merchant strangers in the said city, shall not in any wise intermeddle or deal with the shipping, unshipping, lading, unlading, packing, taking up, carriage, or housing of any manner of goods, wares, or merchandises of any merchant or merchants, or of any other person or persons whatsoever English born, that is or shall be free of the said city or not free, but shall content themselves with the labour of packing, shipping, unshipping, lading, unlading, taking up, porterage and housing of the goods, wares, and merchandises of merchant strangers only.

This ordinance being general in its terms, recognizes the right of the alien porters to the shipping and unshipping of all goods of aliens without

restriction; and there is no reason for supposing that the right to the office was intended to be confirmed by the charter to the mayor, commonalty and citizens, to a narrower extent than that in which it had been previously enjoyed by their deputies and servants.

These considerations seem to us to show, that the rights granted or confirmed by the charter, are not confined to goods landed and sent to aliens' houses, but extend to all goods of aliens imported, from which the necessary result is, that the plaintiff has failed to make out the allegation of the custom to the extent stated in his declaration; or, in other words, that the exception stated to the custom is too narrow, for it excepts only the carrying of goods *to the houses of *aliens, and goods consigned to aliens*, [*709 whereas it ought to have been an exception, generally, of all *aliens' goods;* and, on this ground, we think a nonsuit ought to be entered.

The view we have taken of this point, renders it unnecessary for us to say any thing respecting the other points which were discussed on the argument of the case. Rule absolute accordingly.

MORRISON and Others v. TRENCHARD.

A declaration in assumpsit stated "that the defendant and J. S., by a certain promise in writing, promised the plaintiffs in the words and figures following, that is to say," &c. It then set out a joint and several guarantee, *in hæc verba*. *Held*, on special demurrer, that it was no objection to the declaration that it appeared that another contracting party was not sued.

Held also, that the mode of stating the promise was sufficient.

ASSUMPSIT. The declaration stated, that the defendant and one William Turtle, by a certain promise in writing, signed by the defendant and the said W. T., and addressed to the plaintiffs, addressed and promised the plaintiffs in the words and figures following, that is to say, "gentlemen (meaning the plaintiffs) opening an account with, and giving credit in your (meaning the plaintiffs') trade, to William Lacey, of, &c., at our (meaning the defendant's and the said W. T.'s) instance, we (meaning the defendant and the said W. T.) hereby jointly and severally guarantee to you (meaning the plaintiffs) from time to time, until further notice." Averment: that the plaintiffs opened an account with W. L., in the way of their trade of haberdashery, and gave credit to him, at the instance of the defendant and W. T.; and that on the 1st of July, A. D. 1841, there was a running balance due to the plaintiffs on the said *account, amounting to [*710 65*l*. 17*s*. 9*d*., and that the said W. L., though requested, had not paid the said balance, of all which premises the defendant had notice, and was requested to pay the same, but had wholly refused, &c.

Demurrer: assigning for causes, that no consideration for the defendant's promise was shown in the declaration; and that the promise, on the face of it, was made jointly with the defendant and W. T.; and that the declaration shows upon the face of it, that the writ was abateable, and ought to be abated by reason of the nonjoinder of the said W. T.; and also, that no promise by the defendant was distinctly alleged; also, that the declaration stated matter of evidence, and that the promise ought to have been stated according to its legal effect;(a) also that either the declaration should have been against the defendant and W. T., or the plaintiffs should have mani-

(a) Vide Com. Dig. Pleader, (C.) 37, 1 Chitt. Rep. 28, 60 a, 68, 5 Mann. & R. 451, and Vol. I., 281, Vol. III., 780, Vol. IV., 4.

fested their intention to treat it as the several promise of the defendant; omitting all mention of W. T.

Joinder in demurrer.

Channell, Serjt., in support of the demurrer.

One objection to the declaration is, that no consideration is shown for the alleged promise, and that the promise, as stated, is joint, though only one promisor is declared against. The declaration, though it might be good on general demurrer, is certainly informal. Where a promise is joint and several, a plaintiff undoubtedly may treat it as either, but here the plaintiffs, whilst they treat the promise as several, show that it was in fact joint. [TINDAL, C. J. That would be ground for a plea in abatement.] Probably that would be so, as the plaintiffs do not show that Turtle was alive.

*711] Another objection is, that no precise promise is *stated. It is said that the defendant promised the plaintiffs "in the words and figures following, that is to say," and the declaration then sets out the guarantee. (The court intimated an opinion that that was sufficient.)

Per curiam; Judgment for the plaintiffs.

FAGAN *v.* DAWSON and JOHNSON.

An unsealed issue-roll is not a record of the court; and therefore the entry of a *nolle prosequi* thereon against one of two defendants, is not the proper evidence of such *nolle prosequi*, to show that as against such defendant, the action is at an end.

TRESPASS *de bonis asportatis*. Pleas; by the defendant *Dawson*, not guilty, and leave and license; by the defendant *Johnson*, not guilty.

At the trial before TINDAL, C. J., at the sittings for Middlesex, after last Hilary term, the plaintiff's counsel proposed to call the defendant *Johnson* as a witness; and with a view of removing any objection as to his admissibility,(*a*) the issue-roll in the cause was produced, with a *nolle prosequi* as to *Johnson* entered thereon. This document was not sealed with the seal of the court, but it was marked with an ink stamp, bearing the name of the court, and the number of the roll.(*b*) It was objected by the counsel for *712] the other defendant, that there *was no evidence of the *nolle prosequi*, inasmuch as the issue-roll was not a record, not being properly under seal. *Johnson* was admitted as a witness upon an understanding between the parties, that in case the court should be of opinion that the document was not sufficient evidence of a *nolle prosequi*, a nonsuit should be entered.

Bompas, Serjt., in last Easter term, obtained a rule nisi to enter a nonsuit accordingly.

Channell, Serjt., now showed cause. He submitted that, under the circumstances, the document was the proper issue-roll. [TINDAL, C. J. It

(*a*) It is conceived that *Johnson*, being a party to the record, could not have been made a witness against his will, by entering a *nolle prosequi*; and that if he was willing to be examined, his co-defendant could not object, whether a *nolle prosequi* was entered or not Vide *Worrall* v. *Jones*, 7 Bingh. 395, 5 M. & P. 251; *Hall* v. *Curzon*, 9 B. & C. 646, 4 M. & R. 565; *Pipe* v. *Steele*, 2 Q. B. Rep. 337.

(*b*) It was stated by Channell, Serjt., on showing cause, that the parchment on which the proceedings in a cause were entered, was sold stamped as above mentioned, by stationers appointed for that purpose by a judge of the court; which statement was confirmed by one of the masters.

cannot be considered as the roll until it is brought in.] It is laid down in *Archbold's Practice*, p. 918, 4th ed., that "in actions *ex delicto*, the plaintiff may enter a *nolle prosequi* as to some of the defendants, and proceed against the others, *at any time before final judgment*, even though they all join in the same plea, and be found jointly guilty."(a) A similar rule is laid down in *Phillips on Evidence*, p. 67, 9th ed., as to criminal prosecutions. "Upon an information by the Crown against two or more, if a *nolle prosequi* be entered by the attorney-general either before or *at the trial*, as to one of the defendants, such defendant may be called as a witness for the Crown, against his co-defendant."(b) The court will, if necessary, compel the proper entry to be made on the roll; *Bloomfield* v. *Blake*, 2 Dowl. P. C. 237. [TINDAL, C. J. The question here is, whether an entry has been made at all,—whether the plaintiff is in a condition by legal proof to satisfy the judge that a *nolle prosequi* has been entered.] It may have been done *by agreement; or it may have been entered at nisi prius. [TINDAL, C. J. In the latter case I should have ordered the officer to enter it.] In *Gree* v. *Newell*, 1 Ld. Raym. 716, 1 Comyns' Rep. 113; (*Gree* v. *Rolls*) 2 Salk. 456; (*Gree* v. *Rolle*) 12 Mod. 651; (*Greeves* v. *Rolls*), it was decided that the judge of *nisi prius* might record a *nolle prosequi*. But the nisi prius record would contain nothing more than a minute or memorandum by the officer; and the roll is the proper place whereon to enter the *nolle prosequi*. [*713

Bompas, Serjt., in support of the rule, was stopped by the court.

TINDAL, C. J. Even if *Johnson* had remained on the record as a defendant, he might have been admitted as a witness, supposing him to have had no interest.(c) But as he was called as a witness only upon the understanding that he was off the record, and as I think the evidence of the *nolle prosequi* was not sufficient, a nonsuit must be entered, unless the plaintiff will consent to a *stet processus*.

The plaintiff having consented to the entering of a *stet processus*, a rule was drawn up accordingly.

(a) Citing *Coux* v. *Lowther*, 1 Ld. Raym. 597; *Dale* v. *Eyre*, 1 Wils. 306; *Parker* v. *Lawrence*, Hob. 70; *Lover* v. *Salkeld*, 2 Salk. 455.

(b) Citing *Bull. N. P.* 285, c.; *Rep. temp. Hardw.* 163; *Ward* v. *Man.* 2 Atk. 229.

(c) See *Worrall* v. *Jones*, 7 Bingh. 395, 5 M. & P. 251; *Pipe* v *Steele*, 2 Q. B. Rep. 733, 1 *Phill. Ev.* 50, 9th ed. (overruling *Green* v. *Sutton*, 2 Moo. & Rob. 269.) See also, *Atwood* v. *Small*, 6 Clark & Finn. 232, 293; *Bell* v. *Banks*, antè Vol. III. pp. 258, 261.

*BRADBEE v. The MAYOR, &c. of London, Governors of CHRIST'S HOSPITAL. [*714

Declaration that the plaintiff was possessed of a messuage in London in which he carried on a certain trade, and that the defendants were possessed of a house adjoining thereto; that the defendants, purposing to pull down their house and seven others adjoining thereto, and to erect another house on the site of their first-mentioned house, preparatory to their so doing, erected a hoarding in front of their houses; that the hoarding enclosed a public footway, and thereby obstructed the footway and the approach to the plaintiff's messuage, and the passage of persons on that side of the street; that the defendants pulled down the eight houses and erected a house adjoining to the plaintiff's messuage.

First grievance: that the defendants wrongfully, and without reasonable cause, delayed pulling down and rebuilding for an unreasonably long time after the erection of the hoarding, and wrongfully continued the hoarding so obstructing the footway and approach, for a long and unreasonable time, whereby customers were prevented from frequenting the plaintiff's shop.

Second grievance: that the defendants by their agents and workmen, conducted them

selves so carelessly, negligently and improperly in pulling down the first-mentioned house of the defendants, that by and through the carelessness, &c. of the defendants and their agents, &c. in pulling down that house, and in neglecting to use reasonable and proper precaution, large quantities of bricks, tiles, &c. fell from the same house into and upon the plaintiff's messuage, and upon and through divers skylights, &c., breaking the glass and damaging goods, &c. &c.

Third grievance: that the defendants, by their agents, &c. conducted themselves so carelessly, &c. in digging and clearing the ground for the foundation of the house so built, and in underpinning, removing a part of, shoring up, and doing other works to the party wall and connected therewith, that by and through the carelessness, &c. of the defendants and their agents, &c., the party wall and all the walls, floors, &c. of the plaintiff's messuage sunk, cracked, &c., and the messuage was damaged and lessened in value, &c.

Pleas: first, not guilty; secondly, (as to continuing the boarding,) an immemorial custom in London, that if any person hath had occasion to erect or pull down any building within the city, near to any public way, and hath had occasion for those purposes to erect and continue any boarding in such a manner as to obstruct or enclose any part of a public way within the city, and hath applied to the Lord Mayor for his license to erect and continue such boarding in such manner and for such purpose or purposes as aforesaid, such Lord Mayor hath had full power and authority to license such person, &c. to erect and continue any such boarding for such purpose or purposes aforesaid, and of such dimensions and in such manner and for such time or times as he hath thought reasonable; and the person so applying and having obtained such license, hath lawfully and of right erected and continued and been used and accustomed of right to erect and continue for such purpose or purposes in any such public way so as to enclose or obstruct the same, such boarding in such manner and of such dimensions and for such time or times as he had been so licensed to do by the Lord Mayor, except so far as such custom, power, or authority hath been affected by the 57 G. 3, c. xxix. The plea then set out a license from the Lord Mayor conditioned upon obtaining the license of the surveyor of the pavements, and the granting of such license by the surveyor of the pavements.

To this plea the defendants, taking the custom by protestation, replied *de injuriâ, absque residuo causæ.*

Held, that the second grievance charged in the declaration constituted a good cause of action.

Held also, that the custom set out in the second plea was not unreasonable.

Held also, that the plea was sufficiently proved by the production of a license from the Lord Mayor, for the erection, before the defendants' houses, of "*a hoard* containing in front sixty-four feet, projecting from the same four feet, and to continue four weeks;" and a license from the surveyor of the pavements, "to erect and continue *four hoards* in manner and for the time above mentioned."

Held, that as the second plea was pleaded generally to the continuing of the hoarding erected as in the declaration mentioned, the plaintiff was not entitled to damages in respect of the maintenance of that hoarding, or to recover in respect of damages sustained by the reason of the delay in pulling down and rebuilding the defendants' houses, otherwise than by the keeping and continuing of the hoarding.

The cause having been referred to a barrister, who was empowered to direct "that a nonsuit or a verdict for the plaintiff or the defendants should be entered, as he should think proper," and who was, at the request of either party, to state any point of law upon the face of his award for the opinion of the court;—

Held, that it was not incumbent on the arbitrator to decide finally as to the amount of damages to be recovered, and to direct how the judgment should be entered up; but that having by his award disposed of all the issues joined on the record, and assessed damages separately in respect of each subject matter of complaint stated in the declaration, and having referred to the court the question as to the right of the plaintiff to recover damages in respect of some of the grievances stated in the declaration, at the request of the defendants, and, at the request of the plaintiff, the question as to the validity of custom and the allegations in the second plea, and as to the plaintiff's right to judgment *non obstante veredicto* on the second plea, should the issue thereon be found for the defendant, he had properly discharged his duty, and that he was not bound definitively to determine as to the validity of the custom.

The arbitrator having, as to the party wall, found "that the carelessness, negligence, and unskilfulness of the defendants and their agents, &c., in and about the underpinning of the party wall, consisted in their underpinning the wall partially and not underpinning the whole. and that the plaintiff's messuage thereby sunk and sustained damage; and that the plaintiff's messuage was an ancient messuage, entitled to be supported at the east end thereof by the party wall;—"

Held, that the defendants had no right to underpin the party wall, either partially or wholly, unless they could do so without injury to the plaintiff's messuage; and that whether the plaintiff had a several interest in half of the wall, or was tenant in common with the defendants of the whole, the defendants were liable for the injury resulting from their mode of dealing with it.

CASE. The declaration stated that the plaintiff, before and at the times of the committing of the several grievances by the defendants thereinafter mentioned, was *possessed of a messuage with the appurtenances, [*715
situate in Newgate street, in London, in part of which messuage the plaintiff during that time carried on the trade and business of a fancy-trimming, lace, and fringe manufactory, and that the defendants during the time aforesaid, *were possessed of another house in London aforesaid in [*716
the same street, and next adjoining to the said messuage of the plaintiff; that before the committing of the said several grievances, to wit, on the 1st of April, 1833, the defendants were purposing to pull down their said house; and also divers, to wit, seven other houses of the defendants in the same street, adjoining and near to their first mentioned house, and to erect another house on the site of their first mentioned house, and preparatory to their so doing, then erected and placed a certain hoarding in front of their said houses in such a manner, that the said hoarding enclosed a part of a public footway in the said street, running in front of the said messuage and houses of the plaintiff and defendants respectively, to wit, that part of the said public footway which was immediately in front of the said eight houses of the defendants, and thereby in part obstructed the said footway, and the approach to the said messuage of the plaintiff, and the passage of persons passing and repassing on foot on the side of the said street on which the plaintiff's messuage was situate; that the defendants afterwards, to wit, on the 1st of May, 1833, and on divers other days and times between that day and the commencement of the suit, *pulled down their said eight houses, [*717
and erected on the site of their said first mentioned house, another house adjoining to the said messuage of the plaintiff: yet the defendants, contriving and intending to injure the plaintiff in this behalf, wrongfully, wilfully, and injuriously, and without any reasonable or probable cause, delayed and retarded the pulling down of the said eight houses, and the rebuilding of their said first mentioned house, for an unreasonably long time, to wit, three years, after they had so erected the said hoarding, and on that occasion wrongfully, wilfully, and injuriously kept and continued the said hoarding so erected and placed as aforesaid, and so obstructing the said footway and the approach to the plaintiff's said messuage as aforesaid, for a long and unreasonable time, to wit, three years, the same being longer, to wit, two years longer, than was reasonable or necessary for them to have done in that behalf; whereby during the time last aforesaid, divers customers were hindered and prevented from frequenting the plaintiff's said messuage in the way of his said business, and the plaintiff, by reason of the premises lost divers great gains and profits, in the whole amounting to a large sum, to wit, 2000*l.* which he would otherwise have procured in the way of his said business: and the defendants further contriving and intending to injure the plaintiff, to wit, on the the 1st of May, 1833, and on divers other days and times between that day and the commencement of the suit, by their agents and workmen in that behalf, behaved and conducted themselves so carelessly, negligently, and improperly in pulling down the said first mentioned house of the defendants which adjoined the said messuage of the plaintiff, that, by and through the carelessness, negligence, and improper conduct of the defendants and their agents and servants in that behalf, in pulling down the said first mentioned house of the defendants, and in *neglecting to use reasonable and proper precaution in that [*718
behalf, divers large quantities of bricks, tiles, mortar, wood, dust, and rubbish fell from the last mentioned house, into and upon divers parts

of the said messuage of the plaintiff, and upon and through divers skylights and windows, to wit, two skylights and two windows, of the plaintiff, into a room of the plaintiff, part and parcel of the said messuage of the plaintiff, and used by him as a counting-house and warehouse, and thereby broke divers, to wit, twenty panes of glass of the plaintiff, of and belonging to the said skylights and windows, and of great value, to wit, of the value of 10*l.*, and thereby also divers goods, to wit, 100 pounds weight of raw silk, 100 pounds weight of unwound silk, 100 pounds weight of dressed silk, and 100 pounds weight of other silk, which were then in the said room so used as a counting-house and warehouse as aforesaid, and of great value, to wit, of the value of 200*l.*, were greatly spoiled, damaged, and destroyed, and also, by reason of the premises, divers large quantities of rain water on the several days and times aforesaid, penetrated and flowed into all the rooms and apartments of the said messuage respectively, and by reason thereof divers other goods of the plaintiff, to wit, &c. &c., then being in the said rooms and apartments respectively, and of great value, to wit, of the value of 400*l.*, were greatly spoiled, damaged, and destroyed, and thereby also the plaintiff and his family were greatly incommoded and annoyed in the enjoyment and habitation of his said messuage, and the plaintiff was also thereby greatly disturbed and annoyed in his said business, and was greatly impeded and hindered from carrying on the same in his said messuage.

Second grievance, that the defendants on the several days aforesaid by their agents and workmen in that behalf, behaved and conducted themselves
*719] so carelessly, *negligently, and improperly, in and about digging and clearing the ground for the foundation of the said house so built on the site of their first mentioned house as aforesaid, and in and about underpinning the party-wall between that house and the said messuage of the plaintiff, and in and about removing a certain part of the said party-wall, &c. and connected therewith, that, by and through the carelessness, negligence, and unskilfulness of the defendants and their agents and workmen in the premises last aforesaid, the said party-wall and all the walls, floors, beams, ceiling, roof and other parts of the said messuage of the plaintiff, on the several days last aforesaid, greatly sunk, cracked, and gave way, and were greatly weakened and injured, and the same messuage was thereby greatly damaged and lessened in value, and put in danger of falling and rendered unsafe for habitation, and, by reason of the premises, the plaintiff was forced and obliged to cause, and necessarily did, to wit, on the 22d of October, 1834, cause the said messuage to be surveyed, shored up and propped, and amended and repaired in divers parts thereof, both inside and outside, and in so doing was necessarily put to great expense of his moneys, in the whole amounting to a large sum, to wit, 500*l.*, and the plaintiff also, by reason of the premises, and by reason of his said messuage being, by means of the premises, rendered unsafe for habitation, was forced and obliged to remove, and did remove himself and his family and servants, and part of his furniture, out of his said messuage, to wit, on the day and year last aforesaid, into another place, and was, by reason of the premises, hindered and prevented from inhabiting in his said messuage, and for a long time, to wit, for the space of six months then next following, and was thereby forced and obliged during all that time to inhabit himself and his family, another house; and, by reason of the premises last aforesaid, the plaintiff
*720] was forced and *obliged to lay out and expend, and did necessarily lay out and expend divers large sums of money in the whole,

amounting to a large sum, to wit, 200*l.*, and was also thereby put to great trouble and inconvenience and greatly injured in his said trade and business; and also, by reason of the premises, the plaintiff during all the time aforesaid lost and was deprived of the benefit, profit, and advantage of a certain lodger, to wit, Charles Elmsley, who, before and at the time of the committing of the said grievances, was a lodger in the said messuage of the plaintiff, from which lodger he the plaintiff would otherwise have derived great profit, in the whole amounting to a large sum, to wit, 100*l.* To the damage of the plaintiff of 2000*l.*, &c.

The defendants pleaded—first, not guilty.

Secondly—as to so much of the declaration as related to the keeping and continuing of the said hoarding so erected and placed as in the declaration mentioned, and so obstructing the said footway and the approach to the plaintiff's said messuage, for the said space of time in the declaration mentioned,—that from time whereof the memory of man is not to the contrary, until and at the time of the committing of the grievances in the introductory part of that plea mentioned, there had been, and was, and from thence had been, and still was, within the city of London a certain ancient and laudable custom there used and approved of, that is to say, that if any person or persons, body corporate or politic, had at any time or times during the time aforesaid, had occasion to erect or pull down any building or buildings within the said city, near to any public way within the said city, and had had occasion for those or either of those purposes, to erect, place, and continue any hoarding in such a manner, as thereby to obstruct or enclose any part of any public way within the said city, and had applied to the Lord Mayor of the *said city for the time being, for his permission, license, or authority to erect, place, and continue such hoarding in such manner, and for such purpose or purposes as aforesaid, such Lord Mayor, for the time being of the said city, had during all the time aforesaid, had full and free power and authority to authorize, license, and permit, and had lawfully authorized, licensed, and permitted, and been used and accustomed to license, authorize and permit such person or persons, body corporate or politic, to erect, place, and continue any such hoarding for such purpose or purposes as aforesaid, and of such dimensions, and in such manner, and for such time or times as he hath thought reasonable or proper for such purpose or purposes, and the person or persons, body corporate or politic, so applying as aforesaid, and having obtained such permission, license, or authority as aforesaid, had, during all the time aforesaid, lawfully and of right erected, placed, and continued, and been used and accustomed of right to erect, place, and continue for such purpose or purposes in any such public way, so as to enclose or obstruct the same, such hoarding, in such manner and of such dimensions, and for such time or times as he or they have been so authorized, licensed, and permitted to do by the said Lord Mayor, for the time being, of the said city as aforesaid, except so far as such custom, power, or authority hath been affected by the statute made and passed in the fifty-seventh year of the reign of his late Majesty King George the Third, intituled "An act for better paving, improving, and regulating the streets of the metropolis, and removing and preventing nuisances and obstructions therein:" that the defendants, having occasion to pull down the said houses in the declaration mentioned, and to erect another house on the site of the said house of the defendants in the declaration first mentioned, the whole of such houses and *sites thereof, and of the said footway in the said declaration, being then within the city of London, and the houses and sites thereof [*721] [*722]

being near to the said public footway in the declaration mentioned, and the defendants also then having occasion for that purpose, to erect, place, and continue a hoarding in such manner as thereby to enclose and obstruct a part of the said footway, theretofore and before the erection and placing the said hoarding as in the declaration mentioned, and before any of the said times when, &c., to wit, on the 1st of March, 1823, applied to Sir *Peter Laurie*, Knight, then being the Lord Mayor of the said city, for his permission, license, and authority to erect, place, and continue certain hoardings in such manner as aforesaid; and that the said Sir *Peter Laurie* so then being such Lord Mayor of the said city as aforesaid, did then duly authorize, license, and permit the defendants to erect and place certain hoardings of certain dimensions, and in certain manners, and to continue the same for certain spaces of time, provided the defendants should also obtain the license of the surveyor of the pavements, appointed under and by virtue of an act of parliament made and passed, &c., intituled, &c., (57 G. 3, c. xxix;) that afterwards, and after the defendants had obtained such licenses and authority as aforesaid, and before the erection of the said hoardings, and before any of the said times when, &c., to wit, on the same 1st of March, 1833, the defendants did obtain the leave and license of Richard Kelsey, who was then the surveyor for the time being of the pavements of the city of London and liberties thereof, under his hand, to erect and continue such hoardings of such dimensions, and in such manner, and to continue the same for the said spaces of time so authorized and permitted by the said Lord Mayor as aforesaid; wherefore the defendants
*723] having obtained such leave, license, permission, and *authority as aforesaid, did theretofore, to wit, on the 1st of April, 1833, erect and place certain hoardings for such purposes as aforesaid, of the dimensions and in manner so authorized by the said licenses as aforesaid, and did thereby and therewith necessarily enclose and obstruct the said part of the said footway in the declaration mentioned, and did, for the purpose aforesaid, keep and continue the said hoarding so erected and placed as aforesaid, and so enclosing and obstructing the said part of the said footway as aforesaid, for the said spaces of time in the said leave and licenses, permissions and authorities mentioned, and as it was lawful for them to do for the cause aforesaid; which are the supposed grievances in the introductory part of the plea referred to, and in the said declaration mentioned; doing no unnecessary damage to the plaintiff on the occasion aforesaid. Verification.

Thirdly—as to breaking the said panes of glass in the declaration mentioned; that after, they, the defendants, shortly after the said panes of glass were so broken as in the declaration mentioned, and before the commencement of the suit, to wit, on the 1st of May, 1833, caused and procured the said panes of glass so broken as aforesaid, to be replaced with new panes of glass at their costs and charges, in full satisfaction and discharge of the damages sustained by the plaintiff, by reason of the breaking thereof; and which replacing of the said panes of glass, the plaintiff then agreed to accept and receive, and then accepted and received, in full satisfaction and discharge of the last mentioned damages. Verification.

The plaintiff joined issue on the first plea.

To the second plea, the plaintiff, after taking the custom by protestation, replied *de injuriâ, absque residuo causæ*, concluding to the country.

*724] *To the third plea the plaintiff replied, that the defendants did not cause and procure the said panes of glass so broken as in the

declaration mentioned, to be replaced with new panes of glass at their costs and charges, in full satisfaction and discharge of the damages sustained by the plaintiff by reason of the breaking thereof, and that the plaintiff did not agree to accept and receive, and did not accept and receive the replacing of the said panes of glass, in full satisfaction and discharge of the damages in the same plea mentioned; concluding to the country. Verification.

On the last two replications the defendant joined issue.

Upon the cause coming on for trial before TINDAL, C. J., at the adjourned sittings in London, after Trinity term, 1839, a verdict was taken for the plaintiff for 2000*l.* by consent, subject to the award of a barrister, who by the order of nisi prius was empowered to direct that a nonsuit should be entered, or that a verdict should be entered for the plaintiff, or the defendants, as he should think proper, and who was, at the request of either party, to state any point of law upon the face of his award for the opinion of the court,—the costs of the suit to abide the event of the award, and the costs of the reference and award to be in the discretion of the arbitrator.

Several meetings took place before the arbitrator, attended by counsel on both sides, at the last of which it was arranged, that each party should send in a written statement of such questions of law as he or they required to be stated or raised by the arbitrator, by or on the face of his award.

Pursuant to this arrangement, the arbitrator was requested, on the part of the defendants, to raise on the face of his award the following questions:—

*1st. Whether the defendants' wrongfully, wilfully, and injuriously, and without any reasonable or probable cause delaying, and [*725 retarding the pulling down of the said eight houses, and the rebuilding of this said first mentioned house, for an unreasonably long time, was, either of itself or coupled with the fact of the erection or continuance of the shore in front of the plaintiff's messuage, a cause of action under the present declaration, independently of the fact of the keeping up of the hoarding as alleged in the declaration:—provided the arbitrator was of opinion that the same amounted to cause of action, and that the plaintiff was entitled to recover in respect thereof.

2d. Whether the custom set out in the second plea was a bad custom,—if the arbitrator himself considered it so.

3d Whether the plaintiff was, under the pleadings in the cause, entitled to enter into evidence, or recover damages, in respect of the continuance of any hoard erected after the houses were pulled down, as well as the continuance of a hoard before and preparatory to their being pulled down—provided the arbitrator himself should be of opinion that the plaintiff was entitled to recover damages in respect thereof.

4th. Whether Mr. Kelsey's license did not justify the erection of one hoard, pursuant to the license of Sir *Peter Laurie*—provided the arbitrator should be of opinion that it did not.

5th. Whether the defendants were bound to underpin more than their own half of the party-wall, and whether they were liable, under the present declaration, for underpinning only their own side, provided they were not guilty of negligence in so doing—if the arbitrator should be of opinion upon the evidence, that they underpinned only their own side of the wall.

6th. Whether the defendants were bound to shore *up the plaintiff's messuage—if the arbitrator should be of opinion, that they [*726 were liable, under the present declaration, for not doing so, it not being alleged that the plaintiff's messuage was an ancient messuage, or entitled

to any support from the defendants' house, or that the defendants by reason of their house, were bound to shore up the plaintiff's messuage, whenever it should become necessary to pull down the defendants' house.

On the part of the plaintiff, the arbitrator was requested, with reference to the points desired to be raised by the defendants for the opinion of the court, to find as follows:—

1st. With reference to the first point, to find and state the facts, whether or not the shore in front of the plaintiff's house was continued for an unreasonable length of time, and whether or not that continuance was not a substantial grievance, independently of the continuance of the hoarding, and to assess the damages sustained by the plaintiff by reason thereof, separately.

2d. With reference to the second, third, and fourth points, to raise the point, whether, if the custom was bad, the plaintiff was not entitled to judgment *non obstante veredicto*, and in case the arbitrator found the issues on the license for the defendants, also to assess the damages by reason of the continuance of the boards separately; and to set forth Sir *Peter Laurie's* license including the license of the surveyor of pavements, so as to raise the point of law, whether the latter was a compliance with the condition on which the former was granted, and to state the fact, that the hoard complained of was erected, and continued for the purpose of pulling down the houses.

3d. With reference to the fifth and sixth points, to state the fact, whether or not the plaintiff's house was an ancient house, and whether it had not always been supported at the east end thereof by the party-wall in
*727] *question, and whether or not, the sinking, &c., of the plaintiff's house was not occasioned by defective underpinning on the part of those employed by the defendants, and also to state the facts, whether or not the party-wall was certified to be a sound wall, and of proper thickness under the building act, and whether the defendants did not underpin the wall in some parts all through, comprising that part of the wall which belonged to the plaintiff's messuage, and to raise the point of law, whether if the defendants underpinned the party-wall under the above circumstances and in manner above described, they were not bound to shore up the party-wall in such a manner as to prevent damage to the plaintiff's messuage, and to assess the damages sustained by reason of the sinking, &c., of the plaintiff's messuage separately; and the arbitrator was also requested on the part of the plaintiff, to assess the damages sustained by reason of the negligence in pulling down the house separately, if he should be of opinion that the plaintiff was entitled to recover in respect thereof.

The arbitrator was also requested, with reference to the last issue, viz.: the plea of accord and satisfaction in regard to the breaking of the glass, if he should be of opinion that that issue should be found for the defendants, to state the fact, whether or not the plaintiff did not sustain damage, as alleged in the declaration, by reason of the breaking of the glass beyond the mere costs of repairing of the glass, and whether or not there was any evidence of the plaintiff's acceptance of the repairs of the glass by the defendants in satisfaction of all the damage sustained by the plaintiff, by reason of the breaking thereof.

On the 20th of October, 1841, the arbitrator made his award in these terms:—

*728] "As to the first issue joined between the said parties, *I award and find that the defendants, except as to the alleged careless, negli-

gent, and improper conduct of the defendants in shoring up the party-wall between the house of the defendants in the declaration first mentioned and the said house of the plaintiff, are guilty of the premises in the declaration in the said cause mentioned, and I do assess the damages sustained by the plaintiff, by reason of the keeping and continuing of the hoarding so erected and placed as in the declaration is mentioned, and so obstructing the said footway and the approach to the plaintiff's house, at the sum of 100*l.* in respect of the space of time mentioned in the license of Sir *Peter Laurie* in the second plea of the defendants mentioned, parcel of the time in the declaration in that behalf mentioned, and at the sum of 50*l.* in respect of the residue of the time in the declaration in that behalf mentioned; and I do assess the damages sustained by the plaintiff, by reason of the delaying and retarding of the pulling down and rebuilding of the said houses in the said declaration in that behalf respectively mentioned, otherwise than by the keeping and continuing of the said hoarding, at the sum of 100*l.*; and I do assess the damages sustained by the plaintiff, by reason of the carelessness and negligence and improper conduct of the defendants, their agents, and workmen in that behalf, in pulling down the house of the defendants in the declaration first mentioned, and in neglecting to use reasonable and proper precaution in that behalf, at the sum of 500*l.*; and I assess the damages sustained by the plaintiff, by reason of the carelessness, negligence, and unskilfulness of the defendants, their agents, and workmen in and about digging and clearing the ground for the foundation of the house so built on the site of the house of the defendants in the declaration first mentioned, and in and about underpinning the party-wall between that house and the messuage of the plaintiff, and *in and about re- [*729
moving a certain part of the said party-wall and connected therewith, at the sum of 200*l.* And as to so much of the premises in the declaration contained as relates to the alleged careless, negligent, and improper conduct of the defendants in shoring up the party-wall between the house of the defendants in the declaration first mentioned, and the said messuage of the plaintiff, I award and find that the defendants are not guilty thereof.

"And as to the second issue joined between the said parties, I find that the defendants having occasion to pull down the houses in the declaration in that behalf mentioned, and to erect another house on the site of the house of the defendants in the declaration first mentioned, the whole of such houses and of the sites thereof, and of the footway in the declaration mentioned, being then within the city of London, and the said houses and sites thereof being near to the said public footway in the declaration mentioned, and the defendants also then having occasion for that purpose to erect, place, and continue a hoarding in such manner as thereby to enclose and obstruct a part of the said footway, before the erection and placing of the said hoarding as in the declaration mentioned, and before any of the said times when, &c., applied to Sir *Peter Laurie*, Knight, then being the lord mayor of the said city, for his permission, license, and authority, to erect, place and continue certain hoardings in such manner as aforesaid; and the said Sir *Peter Laurie*, so then being lord mayor of the said city as aforesaid, did then duly authorize, license, and permit the defendants to erect and place certain hoardings of certain dimensions and in a certain manner, and to continue the same for certain spaces of time, provided the defendants should also obtain the license of the surveyor of the pavements

appointed under and by virtue of an act of parliament passed in the 57 G.
*730] 3, *(c. xxix.,) for better paving and regulating the streets of the metropolis; and removing and preventing nuisances and obstructions therein: and I do further find that after the defendants had obtained such licenses and authority as aforesaid, and before the erection of the said boardings and before any of the said times when, &c., the defendants did obtain the leave and license of Richard Kelsey, who was then the surveyor of the pavements of the city of London and liberties thereof, under his hand, to erect and continue such boardings of such dimensions and in such manner, and to continue the same for the said spaces of time so authorized and permitted by the said lord mayor as aforesaid. And I do further find that the defendants having obtained such leave, license, permission, and authority as aforesaid, did on the 1st of April, 1833, erect and place certain hoardings for such purposes as aforesaid, of the dimensions and in manner authorized by the said licenses as aforesaid; and did thereby and therewith enclose and obstruct the said part of the said footway in the said declaration mentioned, and did for the purpose aforesaid, keep and continue the said hoardings so erected and placed as aforesaid, and so enclosing and obstructing the said part of the said footway as aforesaid, for the space of time in the said leaves and licenses, permissions, and authorities mentioned.

"And as to the third issue joined between the said parties, I find that the defendants did not cause or procure the said panes of glass so broken as in the declaration mentioned to be replaced with new panes of glass at their costs and charges, in full satisfaction and discharge of the damages sustained by the plaintiffs by reason of the breaking thereof; and that the plaintiff did not agree to accept and receive, and did not accept or receive the replacing of the said panes of glass, in full satisfaction and discharge of the damages in the same plea mentioned.

*731] *"And I do certify that this cause was proper to be tried before a judge of the superior court, and not before the sheriff or judge of an inferior court, and likewise that the cause was proper to be tried by a special jury.

"And I do award and order that the costs of the reference and of this my award, be paid and borne by the defendants.

"And I do, at the request of the respective parties, state the following matters for the opinion of the court.

"I state that the hoarding in the declaration mentioned, was erected and placed by the defendants in front of their said houses preparatory to their pulling down their said houses in such manner, that the said hoarding enclosed a part of the public footway in the said street running in front of the messuage and houses of the plaintiff and defendants, and thereby in part obstructed the said footway, and the approach to the said messuage of the plaintiff, and the passage of persons passing and repassing on foot on the side of the said street on which the plaintiff's messuage stood; and that after the said houses of the defendants had been pulled down, the defendants took down the said hoarding and removed the same to a distance of five feet, and there erected and placed the same in front of the site of the last mentioned house, and adjoining the said messuage of the plaintiff in such manner that the said hoarding no longer enclosed any part of the said public footway; and that afterwards the defendants, preparatory to their building another house on the site of the house in the declaration first mentioned, again

removed the said hoarding, and re-erected the same in such a manner that the same hoarding again enclosed a part of the public footway in the said street running in front of the messuage and houses of the plaintiff and the defendants, and thereby again in part obstructed the said public footway and the approach to the messuage of the plaintiff, and the passage *of persons passing and repassing on foot on the side of the said street on which the plaintiff's messuage stood. [*732

"I further state that the defendants in their second plea, set out the following custom, that is to say that from time whereof the memory of man is not to the contrary, until and at the time of the committing of the grievances in the introductory part of the defendants' second plea mentioned, there had been and was, and from thence until the time of the pleading of the said plea there had been, and still was, within the city of London, a certain ancient and laudable custom there used and approved of, that is to say that if any person or persons, body corporate or politic, hath or have at any time or times during the time aforesaid, had occasion to erect or pull down any building or buildings within the said city near to any public way within the said city, and hath or have had occasion for those or either of those purposes to erect, place, and continue any hoarding in such a manner as thereby to obstruct or enclose any part of any public way within the said city, and hath or have applied to the lord mayor of the said city for the time being, for his permission, license, or authority, to erect, place, and continue such hoarding in such manner and for such purpose or purposes as aforesaid, such lord mayor for the time being of the said city hath during all the time aforesaid had full and free power and authority to authorize, license, and permit, and hath lawfully authorized, licensed, and permitted, and been used and accustomed to license, authorize and permit such persons, body corporate or politic, to erect, place and continue any such hoarding for such purpose or purposes as aforesaid, and of such dimensions and in such manner, for such time and times as he hath thought reasonable or proper for such purpose or purposes; and the person or persons, body corporate or politic, so applying as *aforesaid, and having obtained such permission, license, or authority as aforesaid, hath and have during all the time aforesaid, lawfully and of right erected, placed, and continued, and been used and accustomed of right to erect, place, and continue, for such purpose or purposes, in any such public way, so as to enclose or obstruct the same, such hoarding in such manner and in such dimensions, and for such time or times as he or they have been so authorized, licensed, or permitted to do by the lord mayor for the time being of the said city as aforesaid, except so far as such custom, power, or authority hath been affected by the statute made and passed in the 57 G. 3, (c. xxix.) intituled, &c. And I further state that the said custom was admitted by the replication to the second plea, the plaintiff having only traversed the *residuum causæ* as therein set forth. And if the court shall be of opinion that the second plea of the defendants setting up and justifying under the said custom is not sufficient to bar the plaintiff from recovering his damages in respect to the grievances confessed by the second plea, then, so far as I have power and authority so to do, I award and direct that judgment be entered for the plaintiff for the amount of the damage, by him sustained by reason of such grievances, notwithstanding the finding of the said second issue for the defendants. [*733

"And I further state that the license granted by the said Sir *Peter Lau-*

rie, including the license of the surveyor of pavements, and given in evidence before me by the defendants, was and is as follows:—

"'London, to wit.—Whereas application hath been made to me Sir *Peter Laurie*, Knight, Lord Mayor of the city of London by Mr. Long, builder, to erect a hoard before premises being in Newgate street, London, and the sergeant and yeoman of the channell having returned to me that they have viewed the premises, and consider that a hoard containing in front sixty-two feet, projecting from the same four feet, is necessary to be erected there
*734] *in order that the premises may be rebuilt with safety to the public, I do, therefore, hereby give liberty that *a hoard* of the dimensions aforesaid may be erected before the said premises and continue four weeks from the date hereof, provided that the said Mr. Long shall also obtain the license of the surveyor of the pavements appointed under and by virtue of an act of parliament, made and passed in the fifty-seventh year of His late Majesty's reign, intituled, &c.

"Given under my hand and seal, this 25th of June, 1833.

"*P. Laurie*, Mayor (L. S.)"

"I do hereby give leave and license to the above named Mr. Long, to erect and continue *four hoards* in manner, and for the time above mentioned.

"*Richard Kelsey*.

"Surveyor of Pavements' Office, Guildhall.

"N. B.—The pavements that shall be broken or damaged must be made good by the commissioners' workmen at the expense of the parties.

"And if the court shall be of opinion that the license so given in evidence does not support the allegation of license contained in the said second plea, or is not a justification of the matters in the introductory part of that plea mentioned, then, instead of the above finding for the defendants upon the second issue, I award and find that the defendants, of their own wrong, and without the said residue of the said cause, committed the grievances in the introductory part of the said second plea mentioned and thereby confessed.

"And I further state that the carelessness, negligence, and unskilfulness of the defendants and their agents and workmen, in and about the underpinning of the said party wall, consisted in their underpinning the said party
*735] wall partially, and not underpinning the whole *of the said wall, whereby the plaintiff's messuage sank, and sustained damage.

"And I further state that the said messuage of the plaintiff was and is an ancient messuage, and had been and was entitled to be supported at the east end thereof by the said party wall. And I state that the said party wall was duly certified to be a sound wall, and of proper thickness, under the building act shortly before, and with reference to, the taking down of the same."

In last Michaelmas term the plaintiff obtained a rule, calling upon the defendants to show cause why judgment should not be entered up for him upon the second issue, *non obstante veredicto* with 150*l*. damages, or why the verdict should not be entered for the plaintiff upon that issue with 150*l*. damages, upon the ground that the custom set out in the second plea was not good in point of law; and that the licenses set out in the award did not support the defendants' plea,—or why, in case the court should be of opinion that judgment should not be entered for the defendants on that part of the declaration professed to be justified by the second plea, the judgment should not be entered for the plaintiff, on the general issue, for the

50*l.* awarded in respect of the continuance of the hoarding beyond the time covered by the licenses, on the ground that such continuance was not justified by the licenses.

A rule nisi was also obtained by the defendants to set aside the award on the following grounds.

1. "Because the arbitrator has not thereby directed how the verdict is to be entered up, or whether the plaintiff is entitled to recover the whole, or any, and what portion or portions of the damages assessed by the said arbitrator.

2. "Because the arbitrator has not awarded, determined, *or directed, whether judgment is to be given or entered up for the plaintiff for the whole, or any, and what portion or portions of the damages so assessed by the said award, or upon any and which of the issues joined in the said action, or whether judgment is to be arrested in respect of all or any of the supposed causes of action in respect of which he has assessed damages by his said award. [*736

3. "Because the arbitrator has not determined by his said award, whether judgment is to be given or entered up for the plaintiff in respect of the causes of action in the introductory part of the second plea mentioned, and by that plea attempted to be justified, *non obstante veredicto*, or notwithstanding his finding upon the second issue, or whether judgment is to be entered up for the defendants thereon, or whether the finding of the second issue is a bar to the plaintiff's recovery of the sum of 50*l.* mentioned in the award, and thereby assessed as damages, as well as the sum of 100*l.* in the said award first mentioned.

4. "Because the arbitrator has not determined as to the validity of the second plea, independently of the question of the validity or invalidity of the custom therein set forth, as he ought to have done; but has, without being requested so to do by either of the said parties, raised as a question for the said court, the validity or invalidity of that plea generally.

5. "Because the arbitrator has not determined or directed, whether, in the event of the court's being of opinion, that the second plea of the defendants is not sufficient to bar the plaintiff from recovering his damages in respect of the grievances confessed by the second plea, judgment is to be entered for the plaintiff, notwithstanding the finding of the second issue for the defendants, for the sum of 100*l.* in the said award first mentioned only, or for that sum and also for the sum *of 50*l.* in the said award also mentioned, and thereby assessed as damages. [*737

6. "Because the arbitrator has not determined or decided by his said award, whether in the event of the court's being of opinion that the custom set out in the second plea is a good custom, the plaintiff is to recover the sum of 50*l.* in the said award secondly mentioned, or to have judgment for the same, or whether the second plea is a bar to the plaintiff's recovery of the said sum of 50*l*, as well as of the said sum of 100*l.* in the said award first mentioned, the plaintiff not having new assigned.

7. "Because the arbitrator has not determined by his award, whether, in the event of the court's being of opinion that the license so given in evidence as in the said award mentioned, does not support the allegation of license mentioned in the second plea, or is not a justification of the matters in the introductory part of that plea mentioned, judgment is to be given or entered up for the plaintiff for the said last mentioned sum of 100*l.* only, or for that sum and the said last mentioned sum of 50*l.*

8. "Because the arbitrator has not determined or decided by his said award, whether the plaintiff is to recover or have judgment for the said sum of 50*l*., in the event of the court's deciding that the second plea is good.

9. "Because the arbitrator has not awarded or directed by his said award, whether a verdict is to be entered up for the plaintiff for the sum of 100*l*. assessed by the award, as the damages sustained by the plaintiff by reason of the delaying and retarding of the pulling down and rebuilding of the said houses in the said declaration in that behalf respectively mentioned, otherwise than by the keeping and continuing of the said hoarding;
*738] and because he has not awarded, determined, or *directed whether judgment is to be given for the plaintiff for such last mentioned damages, or whether the judgment is to be arrested in respect of so much of the declaration as relates to the delaying and retarding of the pulling down and rebuilding of the said houses in the said declaration in that behalf mentioned, otherwise than by keeping and continuing the said hoarding.

10. "Because if the court shall be of opinion that the said award does substantially direct a verdict and judgment to be entered up for the plaintiff for such last mentioned damages, the award is bad for giving damages for that which is not a legal, or any, cause of action.

11. "Because the arbitrator has not stated or raised, by or on the face of his said award, the point of law, whether the defendants' wrongfully, wilfully, and injuriously, and without any reasonable or probable cause, delaying and retarding the pulling down of the said eight houses, and the rebuilding of the said first mentioned house for an unreasonably long time, is a cause of action.

12. "Because he has not stated or raised by or on the face of his said award, the point of law first mentioned in the paper writing, &c. &c., (the defendants' points, antè, p. 725.)

13. "Because, if the court shall be of opinion that the award does substantially direct a verdict and judgment to be entered for the plaintiff, for the sum of 500*l*. in the said award mentioned, and thereby assessed as damages, the award is bad for giving damages for that which is not a legal or any cause of action, namely, for the defendants' neglecting to use reasonable and proper precaution in pulling down the house of the defendants in that count first mentioned; and, because it cannot be ascertained from the award how much of that sum of 500*l*. is awarded in respect of such last mentioned neglect of the defendants.

*739] *14. "Because it is uncertain, upon the facts stated by the arbitrator upon the said award, whether the plaintiff is entitled to recover the sum of 100*l*. in the said award first mentioned, and the sum of 50*l*. therein mentioned, or either of those sums.

15. "Because the facts stated by the arbitrator on the face of his said award are not sufficient to enable the court to decide the points of law thereby intended to be raised, or the several points of law which he was requested, on behalf of the defendants, to raise by his said award.

16. "Because the award is inconsistent, in directing that if the court shall be of opinion that the second plea is not sufficient to bar the plaintiff from recovering his damages in respect of the grievances confessed by the said second plea, judgment shall be entered up for the plaintiff for such grievances, notwithstanding the finding of the second issue for the defendants; and also finding, that if the court shall be of opinion that the license so given in evidence as set out in the award, is not a justification of the

matters in the introductory part of that plea mentioned, the defendants of their own wrong, and without the residue of the said cause, committed the grievances in the introductory part of the second plea mentioned.

17. "Because the arbitrator has, by his said award, directed and awarded, that if the court shall be of opinion, that the license so given in evidence as mentioned in the said award, is not a justification of the matters in the introductory part of the second plea mentioned, the defendants of their own wrong, and without the residue of the said cause, committed the grievances in the introductory part of the second plea mentioned.

18. "Because the arbitrator ought, himself, to have determined by his said award, whether the custom set *out in the second plea was a valid custom or not; and also whether the second plea was a good or sufficient plea, so as to have enabled the parties to act upon his said award without taking the opinion of the court; the arbitrator having been requested to raise the question, whether the custom so set out was a bad custom, only in the event of his finding and considering it so himself. [*740

19. "Because he has not raised or stated, upon the face of the said award, the points of law, thirdly, fifthly, and sixthly mentioned in the said paper-writing, &c. &c., (the defendants' points, antè, p. 725;) and he has not found or stated in his said award sufficient facts to enable the court to determine whether the plaintiff is entitled to recover both or either, and which, of the said sums in and by the said award assessed as damages, for keeping and continuing the hoarding in the declaration mentioned.

20. "Because the matters and facts stated by the said arbitrator, by and on the face of his award, and which, by his said award, he has alleged that he has stated, at the request of the respective parties, for the opinion of the court, are not sufficient to enable the court to form any opinion or to give any judgment thereon.

21. "Because the arbitrator has not stated, in or by his said award, upon what points of law the court are to give their opinion with respect to the facts and matters thereby stated, or what points of law he has stated or raised for the opinion of the court, or referred to them for their decision and determination.

22. "Because the arbitrator has not found or stated, in or by his said award, how long the hoarding erected by the defendants in front of their houses, preparatory to their pulling down the same, remained before the same was removed, so as no longer to enclose any part of the said public footway as mentioned in the said *award, or how long it remained in the state last mentioned, before it was again removed and re-erected as in the award mentioned, or how long it enclosed a part of the said footway, or in part obstructed the same, or whether the party-wall mentioned in the said award belonged wholly to the plaintiff or to the defendants, or partly to one and partly to the others, or whether it belonged to them as tenants in common. [*741

23. "Because the arbitrator has not, by his said award, raised the points which, on the part of the plaintiff, he was requested to raise, whereby the award is not binding on the plaintiff, and therefore not mutual.

24. "Because the arbitrator has not, by his said award, determined the cause referred to him, or made his award concerning all the matters referred to him; and because it is impossible from the said award to ascertain how the costs of the suit, which are to abide the event of the said award, are to be taxed, or what costs of the suit the plaintiff is entitled to recover.

25. "Because the award is not final, but imposes on the parties, or one of them, the necessity of applying to, and taking the opinion of, the court before the award can be acted upon; whereas the said arbitrator ought to have made a final award, so that the parties might have acted upon the same without being forced to apply to the court, and should then have raised, upon the face of his award, such points, and such points only, as he was requested to raise by the respective parties in the events mentioned by them, so that they, or either of them, might have taken the opinion of the court upon those points, if they or either of them had thought fit so to do.

26. "Because the award is not final, certain, or mutually binding; because it raises points for the opinion of the court, which the arbitrator was not re-
*742] quested by either party to raise or state on the face of his award, *and omits to raise or state other points which the arbitrator was requested to state and raise upon the face of his said award; and because those points of law which are thereby raised are raised in such a manner that it is impossible for the court to form any opinion thereon, or to decide the same."

Channell, Serjt., showed cause against the defendants' rule. The principal argument in support of the rule, obtained for setting aside this award, will, no doubt, be that the award is not final. In considering that objection it becomes necessary to look at the sort of finality which the parties have stipulated for in their submission. The degree of finality required will be greater in the case of an ordinary reference, than in one where the parties have agreed to take the opinion of the court. Where the arbitrator is, by the terms of the submission, to raise points for the decision of the court upon the face of his award, all that the parties require of the arbitrator is, that he shall find facts which will place the court in a situation to decide. It is perfectly competent to those who enter into an agreement of reference to agree that the arbitrator shall have power so to delegate his authority. There is nothing to prevent the parties to a submission from stipulating that the award shall not be final.

As regards the first and third issues no question is raised upon this point. With respect to the second issue, it is sufficient to say that the arbitrator has disposed of the issue, although he may not have directed in what manner the verdict shall be entered. At all events, it is sufficient in connexion with the direction to enter up judgment *non obstante veredicto*, and with the matters found for the plaintiff.

With respect to the second objection the arbitrator was not bound to direct in what manner the judgment should be entered up. He had no
*743] power to do more *than to enable the court to direct the entering up of judgment.

The third objection is merely a repetition of one of the matters contained in the first.

With respect to the fourth objection, the arbitrator has raised a question as to the validity of the custom; and this he was requested by the parties to do; but he has raised no other question as to the validity of the plea.

The fifth objection is founded upon the supposition of the plea being bad. [Cresswell, J. The damages are not assessed by the arbitrator upon this issue, but upon the general issue.]

With respect to the sixth and seventh objections, the result of the finding, though conditional, is sufficiently clear, and no new assignment was necessary.

The eighth objection has no foundation in fact.

With respect to the ninth objection, when the arbitrator speaks of damages occasioned by the proceedings of the defendants, *preparatory* to pulling down the houses, it is evident that he means those which took place before the houses were pulled down.

With regard to the tenth objection, the defendants may have the benefit of the reduction.

With respect to the eleventh objection, the arbitrator was not bound to decide.

With respect to the twelfth objection, the arbitrator has referred the points raised by the defendants to the decision of the court, which he was justified in doing.

As to the thirteenth objection, the arbitrator has properly awarded damages for the neglect on the part of the defendants to use reasonable and proper precaution in taking down their house; *Dodd* v. *Holme*, 1 A. & E. 493, 3 N. & M. 739.

The fourteenth objection is already answered.

*The plaintiffs are relieved from the necessity of answering the fifteenth objection, that objection not being stated with sufficient certainty as required by the rule of court, *Boodle* v. *Davies*, 3 A. & E. 200, 4 N. & M. 788. [*744

With respect to the sixteenth objection, there is no inconsistency in the direction contained in the award.

As to the seventeenth objection, the arbitrator was not bound to decide upon the matter in arrest of judgment.

With respect to the nineteenth objection, a special verdict is the act of the jury, not the act of the parties. Here, the whole proceeding is matter of contract. [CRESSWELL, J. I think there is a case in which it was held that the award must be such as can be enforced.] That would be *Barton* v. *Ranson*, 3 M. & W. 322, S. C. not S. P., 6 Dowl. P. C. 38. There, no power was given to the arbitrator to refer any matter to the decision of the court, or at least he was not required by either of the parties to act upon any such power.

The points raised by the twenty-second objection are not material. No damages are given for the re-erection of the hoarding, and the arbitrator was not requested to raise any point as to the party-wall.

The twenty-third and twenty-fourth and twenty-sixth objections are too general. As to the twenty-fifth objection the arbitrator was not bound, by the terms of the reference, finally to determine the matters referred.

On the following day *Channell*, Serjt., resumed his argument by consent.

With respect to the third point requested to be raised on the part of the defendants, the delaying and retarding would create no damage, except what was occasioned by the hoarding. [COLTMAN, J. The second 100*l.* is given independently of any hoarding.]

**Addison* on the same side. The rule was moved on seven grounds. After being kept back twelve days, it was found when served to contain twenty-six objections. [TINDAL, C. J. The plaintiff should have applied to amend the rule, if not drawn up agreeably to the motion as made in court. *Peacock.* It was mentioned that there were other points, and the court said that they might be included in the rule.] [*745

The case of *Barton* v. *Ranson* does not apply; there can be no finality, where it is agreed that the points shall be raised on record. Here the arbitrator has nothing to do with the judgment, beyond furnishing the co-

with the materials for deciding. The power given to him is to enter a nonsuit or a verdict. The judgment of nonsuit is the only judgment which the arbitrator has any authority to direct to be entered, though it was formerly considered that a nonsuit could not be awarded because it was not final. In cases not referred, but taking the ordinary course, the judgment resulting from the facts stated is to be entered by the court, whose act it is. An arbitrator represents not the court, but the judge at nisi prius and the jury. Here, the arbitrator has, in fact, drawn the *postea*, which will be entered on the record as in other cases. He has found damages, because he thinks that the custom may be decided to be bad. If the cause had been tried, the judge, under such circumstances, would have said to the jury, "I think the custom which has been pleaded is a bad custom, and, therefore, you will please to assess the damages which the plaintiff has sustained by the wrongful acts attempted to be covered by the plea of custom."

The first objection is answered, by saying that the arbitrator *has* decided by assessing damages. [CRESSWELL, J. That answer would apply to many of the objections. But the separate assessment of damages is made *diverso intuitu*.]

*746] *With respect to the sixth and seventh objections, the arbitrator was not requested by either party to raise any question as to the necessity for a new assignment. But, in fact, he has decided. Whether a new assignment was necessary, would depend upon the evidence. It was a question of fact. If no power had been reserved, the court could not have inquired into the propriety of the decision of the arbitrator upon this point. [CRESSWELL, J. Here, the arbitrator has assessed the damages separately.] That was done at the request of the parties. The case of *Chadwick* v. *Trower*, 6 New Cases, 1, 8 Scott, 1, is far from supporting the thirteenth objection. The arbitrator was not requested to raise the point. The objection cannot now be taken unless the declaration would be bad in arrest of judgment. This case is rather within the principle of *Tuberville* v. *Stamp*, 1 Salk. 13. S. C. 1 Ld. Raym. 264, Carthew, 425, 1 Comyns' Rep. 32; *Westbourne* v. *Mordant* Cro. Eliz. 191; *Rex* v. *Franklin*, 5 Price, 614.

Peacock in support of the rule. A submission to arbitration is a contract between the submitting parties, and must be construed, like all other contracts, according to the apparent intention of the contracting parties. No power to refer to the court a point of law arising out of matter submitted to an arbitrator can be inferred. Unless such a power is expressly given by the terms of the submission, it is part of the duty which the arbitrator undertakes, to decide all questions of law incidental to the matters referred to him. In *Anderson* v. *Fuller*, 4 M. & W. 470, the rule is clearly laid down by ALDERSON, J.; and the previous case of *Barton* v. *Ranson*, 3 M. & W. 322, is an authority to the same effect. If the arbitrator, without coming to *any decision himself, refers to the court that which he was never requested by the parties so to refer, the award is bad. The arbitrator was bound to show in what manner judgment was to be entered up. In case of arrest of judgment, or of judgment *non obstante veredicto*, the costs depend upon the form of the judgment which is to be entered up.

*747]

Upon the first objection, therefore, it is submitted that the court cannot enter up judgment, the arbitrator not having directed a verdict to be entered.

The second objection stands upon nearly the same ground.

Upon the third objection it is submitted that the defendants were justified in stating in their plea what was the right which they considered to be derived from the licenses. If the plaintiff had new assigned, the defendant might have set up a second license. The award is not final as to the 50*l*. [CRESSWELL, J. Must we not understand that the arbitrator awards that sum absolutely?] The fourth and fifth objections rest upon the same point as the third.

As to the sixth objection, it was held in *Barnes* v. *Hunt* (*a*) that to support a plea of leave and license, it was necessary to prove a license co-extensive with the acts of trespass. But suppose that the defendants had pleaded a license to do the acts on three days, concluding their plea with the allegation of *quæ est eadem*, a new assignment would have been merely a traverse of the *quæ est eadem*, and the defendants might have pleaded other defences to acts of trespasses committed on other days.

The seventh and eighth objections raise substantially the same objection as the fifth.

*The plaintiff is not entitled to the 100*l*. which form the subject of the ninth, tenth, eleventh, and twelfth objections. (The court intimating an opinion that the claim to this 100*l*. could not be supported, it was agreed at the bar that it should be struck out of the award.) [*748

With respect to the thirteenth objection, the arbitrator had no power to award damages to the plaintiff on account of the want of precaution charged in the declaration. The defendants were not bound to use precaution. The declaration contains no allegation that the defendants had notice that the plaintiff had any silk upon his premises; *Chadwick* v. *Trower*, 6 New Cases, 1, 8 Scott, 1.

Peacock, on a subsequent day in the same term, showed cause against the rule obtained on the part of the plaintiff.

The first question is, as to the validity of the custom. It will be contended that it is bad, inasmuch as it leaves it to the lord mayor to determine the length of time during which the hoarding shall be erected. The soil, however, of the streets is vested in the corporation of London;(*b*) and it is not unreasonable that the parties who dedicated the streets to the public should appoint their chief officer to decide how long the streets shall be blocked up. Independently, however, of the soil belonging to the corporation, any party on dedicating a street to the public has a right to reserve such a power as is here reserved to the lord mayor. An individual forming a new street may dedicate it partially to the public, that is to say, subject to the right to stop up a portion of it for the purpose of rebuilding the houses on each side. If that may be done now, it might have *been done in former times, and consequently the custom may have had a reasonable commencement. [*749

The custom in question is referred to in Bohun's Privilegia Londini, p. 61, in the following terms, "every builder of houses ought to come to the mayor, alderman, and chamberlain for a special license for hoard by him to be made in the high streets, and no builder to encumber the streets with any manner of thing taking down for the preparing of his new building, except he makes a hoard, under pain of 40*s*." So, in Comyn's Digest,

(*a*) 11 East, 451. In that case, the license was from the plaintiff in the action; here from a third person (the Lord Mayor) under a custom. And see 5 Nev. & M. 27.

(*b*) By charter of 23 Hen. VI., confirmed by the first charter of Charles I. Vide Pulling, Laws, Customs, and Regulations of London, 2d edition, 307. *x*

London, (M) it is said, "By the st. M. Ch. 9 H. 3, *civitas* London *habeat omnes libertates suas antiquos et consuetudines suas*. By the st. 7 R. 2, Rot. Par. nu. 37, (not printed,(a), the citizens of London shall enjoy all their privileges whatsoever, *licet usi non fuerint*, *vel abusi fuerint*, and notwithstanding any statute to the contrary. So that they may claim liberties by prescription, charter or parliament, notwithstanding any statute made before 7 R. 2, 4 Inst. 250. 253. But this is intended of franchises that are by lawful title, and not forfeited, and franchises and customs sufferable by, and not repugnant to law, 2 Inst. 20." It is apprehended that this is one of the customs confirmed by the 7 R. 2. It is said by Lord TENTERDEN in *The King* v. *The Mayor and Aldermen of London*, 9 B. & C. 1, 4 M. & R. 36. "Further, all ancient customs and prescriptions are to be considered with reference to the rules of the common law; if found to be repugnant to those rules and contrary to law, on any ground, they have always been held to be invalid. And an act of parliament confirming, in general terms, the ancient usages and customs of a city, must, as I apprehend, be considered to confirm those only which have not such repugnance or contrariety. Many matters are good and valid by custom and prescription, which would other-
*750] wise *be invalid; and to such only ought a general confirmatory statute be understood to relate." There is nothing repugnant or contrary to the rules of common law in this custom; for the discretion reposed in the lord mayor must be vested in some one.

Then, assuming the custom to be good, it will be said that if it be admitted by the plea, or proved before a jury that the hoard was kept up for an unreasonable time, the defendants are not justified in what they have done. With respect to the plea, the arbitrator, instead of submitting the point to the court, should himself have decided whether the plea is good. The charge in the declaration is that the defendants were intending to pull down certain houses and erect others, and continued the hoarding for an unreasonable time. It is conceived that for the purposes of the declaration, and for a justification to such declaration, the reasonableness of the time is immaterial. The claim is for special damage for obstructing a public footway, and whether the obstruction be for a reasonable or an unreasonable time the defendants will be liable, unless they can justify such obstruction. In *Bonafous* v. *Walker*, 2 T. R. 126, which was an action against the marshal of the Marshalsea for an escape, it was objected that the plaintiff could not under the first count of the declaration, which was for a voluntary escape, give evidence of a negligent escape; but the objection was overruled. So here, although the declaration alleges that the hoarding was kept up an unreasonable time, if the defendants had merely pleaded not guilty, the plaintiff must have recovered if he could have shown an obstruction of the footway. In an ordinary case of trespass and false imprisonment, the declaration charges an imprisonment without reasonable
*751] cause; but it is no part of the plaintiff's case to prove that *there was no reasonable cause for his imprisonment. As these pleadings stand, the only question is, whether the license of the lord mayor is good. [TINDAL, C. J. The plaintiff does not appear to charge the original erection of the hoard as a grievance, but the keeping of it up an unreasonable time.] *Tebbutt* v. *Selby*, 6 A. & E. 786, 1 N. & P. 710, shows that the allegation that the act is *wrongful*, is quite immaterial. The true test is what evidence would the defendants be at liberty to give to rebut the charge

(a) Since printed, 3 Rot. Parl. 160.

in the declaration. The charge itself, without the word "wrongfully," *primâ facie* imputes wrong until the defendant justifies the act; and in so doing, although he professes to answer the whole charge, he does not admit that he exercised the right he might have in a wrongful manner. In an action for a malicious prosecution, to which the plea is, not guilty, it is necessary for the plaintiff to prove the act to have been done without reasonable cause, because that is the gist of the action; but it is otherwise in trespass. In *Frankum* v. *The Earl of Falmouth*, 2 A. & E. 452, 4 N. & M. 330, the plaintiff declared that he was possessed of a mill, and by reason thereof was entitled to the use of a certain stream for the mill, and that the water ought to run and flow to the mill, and that the defendant "wrongfully and injuriously diverted the same;" and it was held that on a plea of not guilty, the only matter in issue was the fact of the diversion, and that the right to the use of the stream as claimed was admitted. The arbitrator had no authority to raise the point, whether, although the custom was good, the plea was bad *non obstante veredicto*.

The next point is, whether, supposing the plea to be good, it was proved in point of fact. It is submitted that it was proved by the licenses. The question is, whether there is any distinction between the *words "hoard," "hoards," and "hoardings." [Tindal, C. J. The arbitrator has made none.] The arbitrator has found in the words of the plea, except as to identifying the trespasses, and it is admitted by the replication that the grievances mentioned in the declaration and the plea are the same. The license of the surveyor (who has chosen to call the hoard "four hoards," because four houses were enclosed,) is clearly to be considered as a license to erect one or more hoards of the dimensions mentioned in the license of the lord mayor. [*752

With respect to the damages, assuming the plea to be bad, the plaintiff is not entitled to more than the 100*l.* Supposing, however, the plea to be good, and to have been proved, he clearly ought not to have the 50*l.* With regard to the 50*l.* the award is bad for uncertainty; for the arbitrator has not said that the plaintiff is to have that sum, but has merely assessed the damages at that amount, and the court cannot give him the sum unless the arbitrator has given the court power to do so. [Tindal, C. J. I think that the arbitrator means in substance to say, that if the court think the plaintiff should have the 50*l.*, the verdict is to be so entered up.]

Channell, Serjt., and *Addison*, in support of the plaintiff's rule. If the declaration had complained of the original erection of the hoards, the cases cited might have been applicable; but it charges that the defendants wrongfully continued the obstruction for an unreasonable time. This case is in some respects not unlike *Wilkes* v. *The Hungerford Market Company*, 2 New Cases, 281, 2 Scott, 446. There the plaintiff, a bookseller, having a shop by the side of a public thoroughfare, suffered loss in his business in consequence of passengers having been diverted from *the thoroughfare by the defendants continuing an authorized obstruction across it for an unreasonable time. Here, the plaintiff, in his declaration, assumes that there may have been a right to erect the hoard for a certain period, but complains of the unreasonable time it was kept up. [*753

With respect to the custom alleged, it is submitted that it is bad in point of law. Under it, as laid, the lord mayor is authorized to enclose any part of a public way, and not merely the part near to the houses to be erected or pulled down. It makes the lord mayor the exclusive judge of

the time and manner of erecting the hoard, without any restriction as to the period during which it is to be continued; neither is the custom confined to cases of actual necessity. Such a custom might be exceedingly prejudicial to an individual; for there is no opportunity of his being heard before the lord mayor, and no appeal from the decision of the latter. *Morley* v. *The Goldsmiths' Company*(a) is no authority upon this point; for there the jury found that the hoard was not erected for an unreasonable time. Allowing that the corporation are the owners of the soil, they can only be so subject to the rights of the public. A qualified dedication to the public no doubt may exist, but here the right claimed is set up as a custom.

According to the argument on the other side, no custom would be too unreasonable to be supported, for in every case there must be an owner of the soil. In Com. Digest, tit. Prerogative (D. 4), it is laid down thus:—"A dispensation makes an act otherwise prohibited lawful to him to whom the dispensation is granted; for *dat jus*, *Vaugh*. 333. And this prerogative belongs to the king by the common law *in case of necessity*, Hard. 446,
*754] 448. But dispensations are odious in the law, *2 Roll. 179, l. 25." So (D 7,) "The king cannot dispense with a thing *malum in se*. Hard. 448. Nor with a thing which would be a *nuisance*, Hard. 444, 445. So the king cannot dispense with any thing in which the subject has an interest, Hard. 449." Here, the Crown could not have authorized any party to shut up the public way except for a reasonable cause and for a reasonable time, and the lord mayor cannot have a larger authority than the Crown would have possessed in such a case. It is a condition in the license from the lord mayor, that the party is to obtain such a license as he is bound to do under the paving act, 57 G. 3, c. xxix. But it is neither alleged in the plea, nor was it proved before the arbitrator, that the license of the surveyor was granted for either of the purposes mentioned in the 57 G. 3, c. xxix. s. 75. The plea is therefore clearly bad.

The next question is, whether the plea was proved in point of fact. There are two allegations on the record. Supposing the defendants right in saying that the license of the lord mayor supports the first allegation, a license from the surveyor must be shown to establish the further averment. Looking at the lord mayor's license, it is to erect "a hoard containing in length in front of the said premises sixty-two feet, projecting from the same four feet," and it is to continue four *weeks*, provided the party shall also obtain a license from the surveyor under the paving act. The license of the surveyor, however, is in the following words: "I do hereby give leave and license, &c. to erect and continue *four hoards*, in manner and for the time above mentioned." No reference is made in the latter license to dimensions, and it is therefore either for four hoards of the dimensions given in the lord mayor's license, or else the averment as to the dimensions is not made out.

As to the damages which are assessed under the general issue, if the
*755] plea is bad in point of law, or is not *proved in point of fact, the plaintiff is entitled to the 100*l*. and the 50*l*. Supposing, however, the court should think the plea good and made out in evidence, the plaintiff is entitled to the 50*l*. For this is not the case of a single trespass, but of a continuance of a grievance for an unreasonable time. No new assignment was necessary; for the defendants justify under the licenses, and the license, to be an answer to the declaration, must be co-extensive with the grievances. *Cur. adv. vult.*

(a) A case tried before Tindal, C. J., not reported.

TINDAL, C. J., now delivered the judgment of the court. This case has been brought before the court upon two cross motions—one rule, obtained by the plaintiff, calling on the defendants to show cause why judgment should not be entered for the plaintiff on the matter stated in the declaration and proposed to be covered by the second plea, *non obstante veredicto*, with 150*l*. damages; or why the judgment should not be entered for the plaintiff on the general issue for the sum of 50*l*. awarded in respect of the continuance of the hoarding mentioned in the declaration—the other rule obtained by the defendants, and which calls on the plaintiff to show cause why the award made in this cause under an order of nisi prius, should not be set aside, upon various objections (twenty-six in number) which have been urged against the validity of the award; and we think it will be more convenient to consider, in the first instance, the validity of the award, and afterwards the plaintiff's rule for judgment *non obstante veredicto*.

With respect to the first objection taken to this award, that the arbitrator was bound to decide as to the amount of damages to be recovered, and to direct how the verdict should be entered up, it appears to us that the arbitrator, upon the proper construction of the order of *reference, was not bound to come to such decision, or to give such direction. He has, by his award, disposed of all the issues joined on the record, and has assessed damages separately in respect of each subject-matter of complaint stated in the declaration. By the order of nisi prius the arbitrator was bound, at the request of either party, to state on the face of his award any point of law for the opinion of this court; and each party called upon him to state certain points as to the right of the plaintiff to recover damages in respect of some of the grievances stated in the declaration as to the validity of the second plea founded on the custom, and as to the right of the plaintiff to judgment *non obstante veredicto*, if the issue taken on that plea should be found for the defendants. The arbitrator, therefore, could not make an award which should be final as to those several matters. The case of *Anderson* v. *Fuller*, 4 M. & W. 470, was cited to show that an arbitrator cannot, without special leave, state a case for the opinion of the court; but here, by the order of nisi prius, and by the parties themselves, he was required so to do. The first objection, therefore, fails, and the same answer may be given to the second and third, viz., that the arbitrator has fully discharged his duty by finding the issues, assessing the damages separately, and stating for the opinion of the court such points as the parties required, and that he could not make any final award upon these points. [*756

The fourth objection is, that the arbitrator has not determined as to the validity of the second plea, independently of the question of the validity or invalidity of the custom therein set forth, as he ought to have done; but has, without being requested so to do by either of the parties, raised as a question for the court the validity of that plea generally. But this objection does not appear to be founded in fact. The arbitrator was *requested by the plaintiff and the defendants to raise a question as to the validity of the custom, and by the former to raise a question as to the sufficiency of the evidence to prove *residuum causæ*, and he does not appear to have raised any other question respecting it. But even if it could be shown that he has, inasmuch as he has in the first instance found the issue on the plea generally for the defendants, the matter afterwards stated may be rejected as surplusage; *Barton* v. *Ranson*, 3 M. & W. 322; *In re Wright and The Cromford Canal Company*, 1 Q. B. 98. [*757

It is a sufficient answer to the fifth objection that the arbitrator has assessed the damages separately as required by the plaintiff, so that the court shall direct what shall be the effect of their decision as to the custom; and the same answer may be given to the sixth, seventh, and eighth objections.

The ninth objection is, that the arbitrator has not decided certain points therein mentioned; but he has by assessing the damages separately submitted all those points to the court, as the defendants themselves required him to do.

As to the tenth objection, it was conceded during the argument that the plaintiff could not recover any damages for the delay in pulling down the houses, independently of the fact of keeping up the hoarding; but the point was raised at the request of the parties, and the validity of the award is not affected by it.

The eleventh and twelfth objections are not founded in fact. The arbitrator has not raised the questions referred to in those objections.

The thirteenth objection was founded on the supposed resemblance of this case to that of *Chadwick* v. *Trower*, 6 New Ca. 1, 8 Scott 1; but upon
*758] examination it will be found to *be essentially different. The declaration in that case contained two counts, and general damages were given on both; and it was contended for the plaintiff in error that the second count could not be supported: it alleged that the plaintiffs were possessed of a vault with wine in it; that the defendant was about to pull down the adjoining vaults and walls, and that it was the duty of the defendant, in the event of his not shoring up the walls, to give notice to the plaintiffs of his intention to pull down; and also that it was his duty to use due care and skill, and to take due, reasonable, and proper precautions about the pulling down his vaults and walls, so that for want of such precaution the plaintiff's vault should not be injured, and then alleged that, as a breach of such duty, that the defendant pulled down his vaults and walls without giving the plaintiff notice, and without taking due care and precaution in pulling down, whereby the plaintiff's vault was injured. The court of Exchequer Chamber held that the count was bad on two grounds —first, that the defendant was not bound to give notice; secondly, as it was not alleged that the defendant knew of the existence of the plaintiff's vault, it could not be said that the law imposed upon the defendant the duty of taking the precaution against injuring it by pulling down his own walls. The declaration in this case is very different; it charges the defendants with conducting themselves so carelessly, negligently, and improperly in pulling down their house; and in neglecting to use proper precautions in that behalf, large quantities of bricks, mortar, &c., fell from the defendants' house into and upon the plaintiff's house, broke the windows, skylights, &c., and occasioned great consequential damage. The plaintiff, therefore, complains, not of some mere omission on the part of the defendants, but of their doing certain acts in so negligent a manner that by those
*759] very acts the plaintiff's house was *injured. The present case is, therefore, very like that of *Dodd* v. *Holme*, 1 A. & E. 493, 3 N. & M. 739, and the arbitrator was warranted in giving damages in respect of this part of the declaration.

The fourteenth objection is only a repetition of the fifth in a different form. The fifteenth is too general.

The sixteenth is founded upon a supposed inconsistency in the award. But there is not any such inconsistency: the semblance arises from the ar-

bitrator's compliance with the request of the parties, that he would submit to the judgment of the court the validity of the second plea and also the sufficiency of the evidence to maintain the issue taken upon it.

No attempt was made to support the seventeenth objection, which indeed appears to be wholly unfounded.

The eighteenth objection is, that the arbitrator ought to have determined whether the custom set up in the second plea was good or bad; but he could not do so, as the plaintiff required him to raise the question on the award if he thought it good, and the defendants if he thought it bad.

The nineteenth objection is, that the arbitrator did not raise on his award the third, fifth, and sixth points which the defendants desired to have raised. But the third would have been useless, as no damages are given in respect of the matter to which it refers; the fifth is, in fact, raised, and the sixth was determined in favour of the defendants by the arbitrator's finding that part of the plea of not guilty in their favour.

The twentieth objection is too general.

The twenty-first is also too general. If the defendants had reason to complain that some specific point which they wished to have had raised was not raised, they should have pointed it out.

The twenty-second objection is, "that the arbitrator *has not found or stated in or by his award how long the hoarding erected by the defendants in front of their houses preparatory to pulling down the same, remained before the same was removed, so as no longer to enclose any part of the said public footway, as mentioned in his award, or how long it remained in the state last mentioned before it was again removed and re-erected as in the award mentioned, or how long it enclosed a part of the said footway, or in part obstructed the same." But the arbitrator does not appear to have given any damages in respect of the re-erection of the hoarding; it was therefore unnecessary to raise this point. The twenty-second objection then complains that the arbitrator has not found or stated "whether the party-wall mentioned in the award belonged wholly to the plaintiff or to the defendants, or partly to one and partly to the others, or whether it belonged to them as tenants in common." Now, with respect to the party-wall, the defendants requested the arbitrator to raise for the opinion of the court the following question;—"Whether the defendants were bound to underpin more than their own half of the party-wall, and whether they are liable upon the present declaration for underpinning only their own side, provided they were not guilty of negligence in so doing?" The plaintiff, on the other hand, requested him to state, amongst other things, "whether or not the plaintiff's house was an ancient house, and whether it had always been supported at the east end thereof by the party-wall, and whether or not the sinking of the plaintiff's house was occasioned by the defective underpinning on the part of those employed by the defendants." As to this part of the case, the arbitrator has stated that "the carelessness, negligence, and unskilfulness of the defendants, their agents, and workmen in and about the underpinning of the said party-wall consisted in their underpinning the said party-wall *partially, and not underpinning the whole of the said wall, whereby the said plaintiff's house sunk and sustained damage." Both parties appear to have assumed before the arbitrator that the party wall belonged one half to the plaintiff and the other half to the defendant, and he was not required to state any question for the opinion of the court upon that point. He has, according to the request

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of the parties, raised a question as to the liability of the defendants in respect of injury arising from their underpinning only their own half of the party-wall, by stating that the carelessness, negligence, and unskilfulness for which he has given damages consisted in underpinning their own half of the party-wall only. Now there is not, amongst the numerous objections taken to this award, any one distinctly complaining of that assessment of damages. Assuming, however, that the point is raised for the consideration of the court, we are of opinion that the defendants had no right to underpin the party-wall, either partially or wholly, unless that could be done without injuring the plaintiff's house. It may, indeed, be doubtful whether the plaintiff had a several interest in that half of the wall which was next to his house, or whether he and the defendants were tenants in common of the whole; but, in either event, an action on the case was maintainable against the defendants in respect of the injury which resulted from the mode of their dealing with it. See Comyn's Dig. Estates (K. 8,); *Cubitt* v. *Porter*, 8 B. & C. 257, 2 M. & R. 267.

The twenty-third, twenty-fourth, and twenty-sixth objections are too general.

And the twenty-fifth cannot be sustained; for it has been already shown that the arbitrator was not bound to make a final award, but had authority and was bound to state a case for the opinion of the court.

*762] *The award therefore cannot be set aside, and the defendants' rule obtained for that purpose must be discharged.

The rule obtained by the plaintiff for judgment *non obstante veredicto* remains to be considered. Two grounds have been stated for that motion; first that the custom set out in the second plea is bad in law; secondly, that the licenses stated by the arbitrator to have been proved before him did not support the plea. It was urged that the custom was unreasonable, because the power alleged to be vested in the Lord Mayor is not merely to give a license to obstruct by a hoarding any part of a public way next adjoining or near to any house to which the party may be about to pull down or erect; but to license the obstruction of any part of any public way within the city of London. But, upon examination of the language of the plea, it will be found that the power is not quite so large: it runs thus, "that from time whereof the memory of man is not to the contrary, until and at the time of the committing of the grievances in the introductory part of the plea mentioned, there had been and was, and from thence hitherto hath been, and still is, within the city of London a certain ancient and laudable custom there used and approved of, that is to say, that if any person or persons, body corporate or politic, hath or have at any time or times during the time aforesaid, had occasion to erect or pull down any building or buildings within the said city, near to any public way within the said city, and hath or have had occasion for those or either of those purposes to erect, place, or continue any hoarding in such a manner as thereby to obstruct or enclose any part of any public way within the said city, and hath or have applied to the Lord Mayor of the said city for the time being for his permission, license, or authority to erect, place, and continue such hoarding in

*763] such manner *and for such purpose or purposes as aforesaid, such Lord Mayor for the time being of the said city hath, during all the time aforesaid, had full and free power and authority to authorize, license, and permit, and hath lawfully authorized, licensed, and permitted, and been used and accustomed to license, authorize, and permit such person or persons, body corporate or politic, to erect, place, and continue any such

hoarding for such purpose or purposes aforesaid, and of such dimensions, and in such manner, and for such time or times as he hath thought reasonable or proper for such purpose or purposes; and the person or persons, body corporate or politic, so applying as aforesaid and having obtained such permission, license, or authority as aforesaid, hath and have during all the time aforesaid, lawfully and of right erected, placed, and continued, and been used and accustomed of right to erect, place, and continue for such purpose or purposes in any such public way so to enclose or obstruct the same, such hoarding in such manner, and of such dimensions, and for such time or times as he or they have been so authorised, licensed, or permitted to do by the Lord Mayor for the time being of the said city as aforesaid, except so far as such custom, power, or authority hath been affected by the statute 57 G. 3, c. xxix."—the Metropolitan paving act. It is, therefore, confined to the erection of a hoarding which the party applying for the license has occasion to erect so as to obstruct part of a public way for the purpose of building or pulling down a house; and we do not discover any thing unreasonable in such a custom. It is convenient that a power to grant such licenses should be vested somewhere. It is often necessary for the safety of the public, as well as for the advantage of individuals, that houses should be taken down and rebuilt; and that cannot be done without exposing the public to much danger and annoyance *unless a hoarding be erected; and surely it is not unreasonable that a party [*764 about to undertake such a work should be enabled to ascertain beforehand what he may do with safety, instead of incurring the peril of a verdict against him in a criminal or civil proceeding, or perhaps in both. The statute 57 G. 3, c. xxix., s. 75, makes it requisite that a person about to erect a hoard should obtain a license from the surveyor of the pavements of the district. The legislature, therefore, appears to have considered it reasonable that the surveyor should be the judge of the propriety of granting such licenses; and this confirms the opinion that an immemorial custom giving the like authority to the Lord Mayor is not unreasonable, especially as the soil of the streets of the city of London is vested in the corporation, and it is possible that on the original dedication of the streets of the city to the public, the power in question may have been reserved to the chief magistrate.

It was further urged that the custom cannot warrant the Lord Mayor in granting a license to keep up a hoard for an unreasonable time; but if he may, by custom, have power to judge of the expediency of erecting it, we think he may also judge how long it ought to be continued.

Assuming, then, the custom to be good, we think that the licenses set out on the award were sufficient to justify the finding of the arbitrator in favour of the defendants on the issue taken on the second plea. The rule for entering judgment for the plaintiff *non obstante veredicto* must therefore be discharged; and as the plea is pleaded generally to the keeping and continuing of the hoarding erected as in the declaration mentioned, the plaintiff cannot have either the 100*l.* or the 50*l.* assessed as damages in respect of the maintenance of that hoarding; neither can he have the 100*l.* assessed for damages sustained in respect of the delaying and retarding of the *pulling down and rebuilding of the houses in the declaration mentioned, otherwise than by the keeping and continuing of the hoarding. [*765 We, therefore, think that the plaintiff's rule for entering judgment *non obstante veredicto* must also be discharged.

Rule discharged accordingly.

DOE dem. DOVASTON *v.* ROE.

A tenant absconded, leaving the key of the premises with his attorney, to whom he by letter referred the landlord. A copy of the declaration and notice was affixed to the door of the premises, and another copy was served on the attorney. *Held*, a sufficient service to entitle the plaintiff to judgment against the casual ejector.

Bompas, Serjt., moved for judgment against the casual ejector, on an affidavit which stated that the tenant had absconded, having left the key of the premises with his attorney; and that he had written to the lessor of the plaintiff, referring him to the attorney for the terms on which possession would be given up; that a copy of the declaration and notice had been affixed to the outer door of the premises, and a copy served on the attorney, who, on being so served, stated that he expected to see his client in a day or two, and that if no agreement was come to, he would, in all probability, receive instructions to defend.

Per curiam. There appears sufficient in the affidavit to entitle you to a rule. Rule absolute.

*766] *DOE dem. HINE *v.* ROE (LAWRENCE.)

A copy of the declaration and notice was served on the neice of the tenant upon the premises, on Saturday the 21st of May. On an application being made to her, she refused to make an affidavit, but stated that she gave the copy to the tenant on the Saturday, or on the following day, (Monday being the first day of the term): *Held*, insufficient.

Storks, Serjt., moved for judgment against the casual ejector. It appeared from the affidavit that the premises were in the possession of two tenants. The service on one of them was by delivering a copy of the declaration and notice, and reading over and explaining the same to his daughter (upon the premises) who promised to deliver the same to her father on the 23d of May (the first day of the term); the father acknowledged to the deponent that he had received the copy of the declaration and notice from his daughter on the preceding Saturday. With respect to the other tenant, it was stated that a copy of the declaration and notice was delivered, read, and explained to his niece (who was a member of his family) upon the premises; that she promised to deliver it to her uncle; and that *she* had subsequently admitted that she had delivered it to him.

The court said that the rule might go as to the first-mentioned tenant; but that as to the other, nothing had been shown to entitle the party even to a rule nisi. They, however, suggested that the niece should be applied to for an affidavit; and in the event of her declining to make one, the lessor of the plaintiff might possibly have a rule nisi, as he then would have done every thing in his power.

Storks now renewed his motion on an affidavit, from which it appeared that application had been made to the neice for an affidavit, who had refused to make it, but had told the deponent that she had delivered the

*767] *declaration and notice to her uncle on the day on which they were left with her (Saturday the 21st), *or on the following day,*—Monday, the 23d, being the first day of term.

Per curiam. It cannot be inferred from this statement that the declara-

tion and notice reached the hands of this tenant on the Saturday, and if he did not receive them until the Sunday, the service would be bad. Therefore, as to the premises occupied by this tenant, the rule must be refused.

Rule accordingly.

In re EVANS and HOWELL.

An application made on the last day but one of the term for leave to move, on the last day of the term, to set aside an award, on the ground that the affidavit on which the motion was to be founded, had not arrived from the country, was refused by the court.

In this case all matters in difference had been submitted to arbitration by bond, pursuant to the 9 & 10 W. 3, c. 15, and previous to the commencement of the present term an award had been made in favour of the plaintiff.

Bompas, Serjt., on behalf of the defendant, this day asked leave of the court to be allowed to move on Monday (the last day of the term) to set aside the award, the affidavit on which the motion was intended to be grounded not having arrived from the country.

Maule, J. It is enacted by the second section of the 9 & 10 W. 3, c. 15, that any arbitration or umpirage procured by corruption or undue means shall be judged and esteemed void and of none effect, and accordingly be set aside by any court of law or equity, so as complaint *of [*768] such corruption or under practice be made in the court where the rule is made for submission to such arbitration or umpirage before the last day of the next term after such arbitration or umpirage made and published to the parties." By the statute, therefore, a party in whose favour an award has been made is entitled to the benefit thereof, unless a motion be made to set it aside *before* the last day of the following term. To allow this application would be, in effect, to repeal the act. The motion, if made at all, must be made to-day.

Coltman, J., concurred. Motion refused.(a)

(a) The other judges had left the court.

In re JOHN WHYTEHEAD.

A rule to prohibit an attorney from practising in this court was granted, on reading a rule of the court of Queen's Bench to the like effect.

Channell, Serjt, moved for a rule to prohibit Mr. *Whytehead*, an attorney of this court, from practising herein, upon reading a rule of the Queen's Bench prohibiting him from practising in that court. The learned serjeant cited *Ex parte Yates*, 9 Bingh. 455, 2 Moo. & Sc. 618, where an attorney was struck off the roll of this court in accordance with a rule of the court of King's Bench for striking him off the roll of that court, and he was afterwards re-admitted in this court, without any inquiry as to the circumstances, upon his being re-admitted in the court of King's Bench.

Per curiam. You may take your rule. Rule absolute.(a)

(a) See *Ex parte Hague*, 3 Brod. & B. 257, 7 B. Moore, 64, *where this court [*769] refused to strike an attorney off the roll upon an affidavit that he had been struck

off the roll of the court of King's Bench; the contents of the affidavits on which the court of King's Bench acted not having been stated, and there being no proof or allegation that the attorney had been struck off for a misdemeanor. See also *In re Richard Peter Smith*, 1 Brod. & B. 522, 4 B. Moore, 319.

M'KELLAR and Another *v.* REDDIE.

A writ issued on the 8th of January. A subsequent writ to continue the former was issued on the 7th of June. On the latter being tendered for entry of record, it was objected to as being out of time. The court granted a rule to enter it of record, *valeat quantum*.

Bompas, Serjt., applied for leave to enter of record a continuation of process under the 2 W. 4, c. 39, s. 10,(a) in order to prevent the operation of the statute of limitations. The date of the writ of summons
*770] *was the 15th of March, 1841, of the alias writ of summons the 12th of August, and of the pluries the 8th of January, 1842. A second pluries was issued to continue the preceding writ, dated the 7th of June; but on being tendered for entry of record, was objected to by the officer as being too late.

Tindal, C. J. Take your rule, *valeat quantum*.

The rest of the court concurring, Rule granted.

(a) By which it is enacted, "That no writ issued by authority of this act, shall be in force for more than four calendar months from the day of the date thereof, *including the day of such date*, but every writ of summons and capias may be continued by alias and pluries, as the case may require, if any defendant therein named may not have been arrested thereon or served therewith: provided always, that no first writ shall be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon or served therewith, or proceedings to or toward outlawry shall be had thereupon, or unless such writ and every writ (if any) issued in continuation of a preceding writ shall be returned *non est inventus*, and entered of record *within one calendar month* next after the expiration thereof, *including the day of such expiration*, and unless every writ, issued in a continuation of a preceding writ, shall be issued within one such calendar month after the expiration of the preceding writ, and shall contain a memorandum endorsed thereon or subscribed thereto, specifying the day of the date of the first writ, and return to be made in bailable process by the sheriff or other officer to whom the writ shall be directed, or his successor in office, and, in process not bailable, by the plaintiff or his attorney suing out the same, as the case may be."

HOULDITCH *v.* The EARL of LICHFIELD.

A distringas may be issued to compel the appearance of a peer, who is known to be abroad.

Bompas, Serjt., having obtained a rule nisi to set aside a distringas, which had been issued to compel the appearance of the defendant, who was known to be abroad, on the ground that the 2 W. 4, c. 39, s. 3, did not warrant the proceeding.

Channell, Serjt., now showed cause. The distringas was properly issued. In *Davis* v. *The Earl of Lichfield*, 1 Dowl. N. S. 363, the court

of Exchequer allowed a distringas to issue against the same defendant and a similar application to the present was there made on the part of the defendant, but without success.

Bompas, Serjt., in support of his rule. A distringas can only be issued against a party shown to be abroad at the time, for the purpose of proceeding to outlawry. [TINDAL, C. J. In a case like the present it would be a *denial of justice to withhold a distringas.] The statute clearly did not contemplate such a case. [CRESSWELL, J. Ought you not to wait until an appearance is entered for you?] Leave to enter an appearance is granted as a matter of course, upon an ex parte statement. [*771

TINDAL, C. J. It seems to me that the words of the first part of the third section of the uniformity of process act are sufficiently comprehensive to warrant the issuing of a distringas in a case like the present. The effect will probably be that the sheriff will go to the defendant's house and make a seizure, of which his attorney will have notice, and may then appear for him. If so advised, you can make a stand at the next step.

MAULE, J. Should you come to the court to set aside the appearance, it would appear that the defendant has instructed counsel, and therefore is represented.(a) No doubt can be entertained that the writ is properly issued.

The rest of the court concurred. Rule discharged.(b)

(a) *Quære*, whether, supposing the objection to the process had been well founded, the court would not have been *bound* to hear any person, or at least any counsel, who, as *amicus curiæ*, pointed out error in the proceedings of the court, without moving to set it aside; and whether the party who conceives himself to be aggrieved by such proceedings, has not the right to instruct counsel to point out the error without making such counsel his representative, so as to dispense with the necessity of any process to bring such party into court. And see *Rex* v. *Hobby*, Ryan & M. 241; *Regina* v. *Featherstonhaugh*, 6 C. & P. 109.

(b) See *Taylor* v. *Lord Stuart de Rothesay*, antè, p. 388, and *Cassidy* v. *Stewart*, antè, vol. ii. p. 437.

*ALEXANDER v. TOWNLEY. [*772

Where a defendant had twice obtained time to plead, the court refused to compel the plaintiff to give security for costs,—although he had been four times a bankrupt, once discharged under the Lords' act, and thrice under the insolvent debtors' acts, upon none of which occasions had his estate paid 15s. in the pound,—except upon the terms of the defendant undertaking not to plead those matters.

Bompas, Serjt., on a former day in his term, obtained a rule, calling on the plaintiff to find security for costs, upon affidavits stating that the action was brought to recover 74*l.* 14*s.* 1*d.*, the balance due upon four bills of exchange respectively drawn by the plaintiff, payable to his own order, and accepted by the defendant, the consideration for which was goods sold and delivered; that between the years 1805 and 1837, the plaintiff had been four times a bankrupt, once discharged under the Lords' act, and thrice under insolvents debtors' acts; that neither of the estates of the plaintiff under the commissions, fiats, or insolvencies, produced sufficient to pay 15*s*. in the pound of the amount of the debts proved under any of

the said commissions, fiats, or insolvencies; and that the plaintiff was still an uncertificated bankrupt.

Channell, Serjt., showed cause upon an affidavit in which it was sworn, that in last Hilary term, the defendant obtained a rule nisi, that a judge's order under which he had been held to bail might be set aside, and also that the proceedings might be stayed, upon the same grounds as those relied on upon the present occasion; that such rule having been enlarged to show cause at Chambers, was heard before Maule, J. on the 2d of February last, when the former part of the rule was made absolute without costs, and the latter part of the rule was discharged; that on the 25th of May, the defendant obtained a week's time to plead upon the usual terms; that on
*773] the 28th of May the demand for security *for costs was made, and that on the 1st of June the defendant obtained a further order for time to plead.

The bankruptcy or insolvency of a plaintiff furnishes no ground for calling on him to give security for costs, unless it occurs after action brought, or the suit is for the benefit of assignees. Archb. Pract. 1014, 7th ed. Tidd, 536, 9th ed. Tidd's New Pract. 267, 268. In *Wray* v. *Brown*, 6 New Cases, 271, 8 Scott, 557, this court refused to order a plaintiff to give security for costs, on the ground that he had been three times an insolvent and once a bankrupt, and was only suing as a trustee for a third person. At any rate, if the court were to grant this application, it would only be on the terms that the defendant should undertake not to plead the bankruptcy or insolvency. *Minchin* v. *Hart*, 1 Chitt. Rep. 215, *Manley* v. *Mayne*, 3 M. & R. 381.

Bompas, Serjt., in support of the rule. In *Webb* v. *Ward*, 7 T. R. 296, Lord Kenyon says, "It cannot be laid down as a general rule, that an uncertificated bankrupt must, in all cases, give security for costs where an action is brought by him; that would be going much too far. Each case must depend on its own circumstances. But it is fair to say, that if the action be really brought for the benefit of the assignees, they should be responsible for the costs. What weighs with me to grant the present application is, that this action *must* be brought for the benefit of the assignees; for an uncertificated bankrupt cannot have any property of his own. This is not an action for the fruits of his personal labour since his bankruptcy, but for goods, which if they belong to him at all, must by law be vested in his assignees." Here, if the plaintiff recovers the assignees are entitled to
*774] claim the fruits of the verdict. [Tindal, C. J. The *assignees have not interposed.] Although that may be so, this action must necessarily enure for the benefit of the assignees under the second commission, as the plaintiff has been four times a bankrupt, and his estate has never produced 15*s*. in the pound. In *Young* v. *Rishworth*, 8 A. & E. 470, 3 N. & P. 585, a plea that the plaintiff became bankrupt and obtained his certificate in 1822, that a second commission issued against him on the 20th of May, 1825, under which his effects were assigned in July, 1825, and he obtained his certificate in 1826, but did not pay 15*s*. in the pound, whereby and by force of the statute, the debt demanded in the declaration had vested in the assignees, was held to be a good plea, under the 6 G. 4, c. 16, s. 127, and it was decided that where the estate of a bankrupt after certificate is vested in his assignees by the statute, he cannot sue for an after-accruing debt, although the assignees do not interpose.

Tindal, C. J. Looking at the circumstances of this case, and especially

at the fact that the defendant has twice obtained leave to plead in order to set up the bankruptcy and insolvency of the plaintiff, it seems to me that the defendant must elect either to abandon that defence, or to have his rule discharged.

The rest of the court concurring,

Bompas elected to have the rule Discharged.

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*PADDOCK v. FORRESTER and Others. [*775

In an action of trespass for breaking and entering lands, and getting coals, earth, soil, and other minerals, the defendants pleaded, secondly, a plea, that the coals, earth, soil, and other minerals, were not the property of the plaintiff, and other pleas which set up an unqualified right to enter the plaintiff's land and take the minerals. The defendants obtained a verdict in respect of the coals mentioned in the second plea and the plaintiff upon the issues raised by the other pleas.

Held, that the defendants were entitled to the costs of witnesses brought, though not examined, to prove title to the minerals, but that such costs were to be estimated as contradistinguished from those occasioned by the claim of the right set up by the subsequent pleas, of entering the plaintiff's land for the purpose of getting and carrying away the coals.

TRESPASS for breaking and entering lands, subverting the soil, making and sinking mines, pits, shafts, and holes, and raising and getting, and seizing, taking, carrying away, and converting coals, culm, earth, soil, stones, ore, and other minerals.

Pleas: first, not guilty; secondly, that the coals, earth, soil, and other minerals, were not the property of the plaintiff; the third, fifth and seventh pleas, set up a justification, under a right of mining, in the lessee of the Crown upon an immemorial right, a user for forty years, and for twenty years; the fourth, sixth, and eighth pleas alleged similar rights, subject to making compensation for surface damage; in the ninth and tenth pleas, the defendants justified as servants of his late Majesty, and of her present Majesty; eleventh plea, the statute of limitations; and twelfth plea, not possessed. Replication, issue on the first, second, eleventh, and twelfth pleas; to the third, fifth, and seventh pleas, a traverse of the alleged rights; to the fourth, sixth, and eighth pleas, a claim of compensation and refusal.

The fourth, sixth, and eighth issues were found for the defendants; on the ninth and tenth issues the jury were discharged. Upon motion, the verdict on the issues on the third, fifth, and seventh, and on the second, eleventh, and twelfth issues was also entered for the plaintiff; and that on the first issue was entered *distributively, viz. for the defendants as [*776 to carrying away the earth, soil, and stone; and for the paintiff upon the residue of the declaration.(a) On the taxation the master's opinion was, that the defendants were entitled to the general costs of the cause, having obtained a verdict upon the fourth, sixth, and eighth issues; and he disallowed the plaintiff all the costs of opposing the rights set up in the third, fifth, and seventh pleas, and allowed the defendants the costs of witnesses, by whose testimony they sought to prove the right of the Crown to enter and take the minerals.

(a) In Vol. III., p. 923, it is stated by mistake, that the verdict upon the first issue was for the plaintiff as to the earth, soil, and stones, and for the defendants as to the residue.

Talfourd, Serjt., early in this term, obtained a rule nisi for reviewing the master's taxation.

The master appears to have considered the right to enter the plaintiff's land, and the right to take the minerals, as the same; whereas the right to the land may be in one party, and to the minerals in another. As the plaintiff has succeeded on the issues raised by the pleas alleging an unqualified right, he is clearly entitled to his costs.

Sir *T. Wilde* and *Bompas*, Serjts., now showed cause. The master's taxation is right; the defendants being entitled to judgment on the whole record, and to the general costs of the suit. At the trial, the right of the Crown to enter and take the minerals, was admitted; and the defendants, having succeeded on the pleas alleging the right to enter, paying compensation, and the jury having found that the compensation tendered was sufficient, the plaintiff was left without any cause of action. One of the pleas denied that the plaintiff was possessed of the minerals, and it was shown

*777] that they belonged *to the Duchy. The plaintiff, however, did not attempt to make out any case upon the issue thereby raised, and the witnesses were not called. It is objected, however, that the evidence of those witnesses if called would have applied to the issues found for the plaintiff, and therefore that their expenses ought not to have been allowed. There is no foundation for this objection; for where a party is entitled to the general costs, he is entitled to the costs of witnesses brought to establish an issue on which he has succeeded, although their evidence may be also applicable to another issue found for his opponent.

Talfourd and *Channell*, Serjts., in support of the rule. The second issue does not go to the whole cause of action. Two questions only arise on the pleadings; first, whether the defendants had an unqualified right to enter the plaintiff's lands; and, secondly, whether they had a right to enter—paying compensation; and if so, whether the compensation tendered was sufficient. At the trial the plaintiff took his stand upon the sufficiency of the compensation. [TINDAL, C. J. Must not each plea be taken singly on taxation?] At any rate the master should be required to review his taxation with respect to the costs of the second issue, as contradistinguished from those of the third, fifth, and seventh; for it is clear that he has allowed costs to the defendants on the second issue which would only be properly allowed on the third, which was found for the plaintiff.

TINDAL, C. J. It does not appear to me to be so difficult to define the manner in which these costs should be taxed, as to apply the rule to the different issues. The application of the rule must, in a great measure, be left to the discretion of the master. The costs of the second issue should

*778] be taxed as if there was no other *issue on the record; and looking at the case as if the second plea had stood alone, the question is what witnesses should be allowed to prove the property of the minerals in the defendants. The plaintiff had a *primâ facie* title; he was in possession: and it was necessary for the defendants to make out a title to the coals to show that they were not wrongdoers. Now it seems to me, that the defendants are not to be so strictly limited, as that when they have established their claim under the lord of the manor, they may not give some other evidence to prove what their title is. They should not, however, be allowed for evidence of winning and taking away coals, for that is the subject matter of a distinct issue. It is desirable to ascertain whether the master attended to this distinction. The case may therefore be referred

back to him to see if he has limited himself to giving to the defendants a fair and reasonable allowance for witnesses, brought to prove their property in the coals, as contradistinguished from the right to enter and take them away. I do not see that the defendants lose their right to the costs of witnesses upon one issue, because they may have been called to prove another issue.

The rest of the court concurred. Rule absolute accordingly.

END OF TRINITY TERM.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Michaelmas Term,

IN THE

SIXTH YEAR OF THE REIGN OF VICTORIA.

The judges who usually sat in banc during this term were,

Tindal, C. J. Erskine, J.
Coltman, J. Maule, J.

BARKER *v.* BIRCH.

By the forty-sixth section of the tithe commutation act, any person dissatisfied with a decision of the commissioners, may bring an action (in the form of a feigned issue) "within three months next after such decision shall have been notified in writing."

Where a writ of summons was issued within three months after the notification of such a decision, but was not served till some time after the expiration of that period, though within four months of the date of the writ, the court refused to set aside the writ, or the service thereof.

Talfourd, Serjt., (with whom was *Manning*, Serjt.,) moved, on behalf of the defendant, to set aside the writ of summons issued in this case, with costs. It appeared from the affidavit upon which the motion was made,
*780] that on the 12th of March, 1842, a decision against *the interests of the plaintiff, and in favour of the defendant, was made by one of the assistant tithe commissioners, acting under the tithe commutation act, 6 & 7 W. 4, c. 71, and that such decision was notified in writing to the plaintiff and defendant on the 15th of the same month. The deponent stated his belief that the action had been brought for the purpose of appealing against such decision. It further appeared, that the writ of summons was issued on the 9th of June, 1842; and that a copy thereof was served upon the defendant on the 2d of September; that the defendant on the 5th of September took out a summons before a judge to set aside the writ of summons, on the ground that the action had not been brought and prosecuted within the time limited by the tithe commutation act; that the summons had been heard before Cresswell, J., who refused to make any order, upon the ground that as the summons involved the question of the construction of the act, the application ought to be made to the court.

The learned serjeant argued, that by the forty-sixth section of the tithe commutation act,(*a*) the party *who is dissatisfied with the decision [*781
of the commissioners, may bring an action in the form of a feigned

(*a*) Which enacts, "that any person claiming to be interested in any lands, or in the tithes thereof, who shall be dissatisfied with any such decision of the commissioners or assistant com-

issue but the time within which he may do so is limited to three months after notification of the decision. Here, the writ, though actually issued just within the three months, was not served till long afterwards, and after one assizes had in fact passed. The time here is of the very essence of the right of action; it is not like the limitation of an action within a certain period, where the right has already vested. [TINDAL, C. J. In what respect is the issuing of the writ of summons bad? The writ was properly issued within the three months. It appears to me that the present application is made too soon, and that it will be time enough to apply when the plaintiff declares.] It might then be too late. But to obviate that objection, the present motion may be shaped to set aside the *service* of the writ of summons. The writ was spent and abandoned, by not having been acted upon within the three months limited by the act. [TINDAL, C. J. But the issuing of the writ was regular. The words of the statute are, that "any person dissatisfied with any decision of the commissioners, *may cause an action to be brought* against the person in whose favour such decision shall have been made, *within three months* next after such decision shall have been notified in writing." Now the plaintiff has done that. Then the act goes on to say, "in which action the plaintiff shall deliver a feigned issue, and proceed to a trial at law of such issue *at the sittings after the term*, or *at the assizes then next*, *or next but one*, *after such action shall have been commenced*." If the plaintiff cannot *comply with that requisition, he cannot proceed.] It is submitted that the action being the [*782 creature of the act, the time of the service of the writ is material. [ERSKINE, J. It will be material, if the service has been too late to enable the plaintiff to go to trial within the period limited by the act.] The action is in the nature of an appeal from the decision of the commissioners, and their hands are therefore tied up for several months. [TINDAL, C. J. The writ in this case has all the attributes of an ordinary writ of summons; it was issued in time under the act, and was in force for four calendar months after its date. I cannot see that either the issuing or the service was irregular. I think you must take your stand when the feigned issue is delivered, if that is out of time.]

Per curiam: Rule refused.(a)

missioner, may, (under sect. 45,) if the yearly value of the payment to be made or withholden according to such decision shall exceed the sum of 20*l*., cause an action to be brought in any of His Majesty's courts of law at Westminster against the person in whose favour such decision shall have been made, within three calendar months next after such decision shall have been notified in writing, in such manner as the commissioners or assistant commissioner shall direct, to the parties interested therein, or to their known agents, in which action the plaintiff shall deliver a feigned issue, whereby such disputed right may be tried; and shall proceed to a trial at law of such issue at the sittings after the term, or at the assizes then next, or next but one, after such action shall have been commenced, to be holden for the county within which such lands, or the greater part thereof, are situated; with liberty, nevertheless, for the court in which the same shall have been commenced, or any judge of His Majesty's courts of law at Westminster, to extend the time for going to trial therein, or to direct the trial to be in another county, if it shall seem fit to such court or judge so to do; and every defendant in any such action shall enter an appearance thereto, and accept such issue," &c.

(a) See further as to this case, post, vol. v.

*DARLINGTON v. MARTHA PRITCHARD and FRANCIS WOOD PRITCHARD. [*783

To trespass *quare domum fregit* by A. against B. and C., the defendants pleaded not guilty, and a justification by C. as owner, and B as his servant. A. entered a *nolle prosequi* as to C., and as to B. replied an estoppel by reason of a demise by B. to A. from year to year

The premises had been let to A. by a verbal demise from year to year, by D., the tenancy commencing at Michaelmas; D. devised them to his son C. (then a minor), charged with an annuity to B. (his widow.) After the death of D., A. paid rent to B., both before and after C. attained his majority. A written agreement was afterwards (in March, 1836) entered into between A. and B., embodying the terms of the original letting. In March, 1840, A. was served with a notice to quit at the following Michaelmas, signed by B. and C. A. having refused to quit, was served with a further notice signed in like manner, that application would be made to the justices for a warrant to turn him out of possession, under the 1 & 2 Vict. c. 74., and a "complaint" was consequently laid before justices by C., "on behalf of himself and B.," whereupon the warrant was executed, the plaintiff was ejected, and the key of the house was delivered to B.

***Held*, that these facts were sufficient to connect B. with the trespass;**

***Held* also, that *trespass* was the proper form of action against B., under the statute, sects. 3 and 6; and**

***Held* also, that the allegation in the plea that C. was owner, and B. acted as his servant, though not denied by the replication, was not admitted, to the extent of entitling B. to arrest the judgment on the ground of a right of possession confessed to be in C.**

TRESPASS, for breaking and entering the plaintiff's dwelling-house, &c., and seizing his household furniture, and casting it into the street, and ejecting and expelling the plaintiff and his family.

Pleas: first, not guilty. Secondly, that the said dwelling-house, &c., were, and at the time of the committing of the alleged trespasses, &c., were, and from time immemorial had been, within and parcel of the manor of Prees, in the county of Salop, and a customary tenement of that manor, demised and demisable by copy of the court rolls of the said manor, by the lord of the said manor, or by his steward of the court of the said manor for the time being, to any person or persons willing to take the same, in fee *784] simple or otherwise at *the will of the lord of the said manor, according to the custom of the said manor; that, before the time when, &c., to wit, on the 14th of October, 1834, Sir Rowland Hill, Bart., then being the lord of the said manor, at his court baron(*a*) then holden in and for the said manor, before, &c., then being his steward of the court of his said manor, by copy of the court rolls of the said manor, granted to the defendant, Francis Wood Pritchard, the said dwelling-house, &c., in which, &c., to hold to the defendant, F. W. P., his heirs, &c., for ever, by copy of the court roll of the said manor, at the will of the lord of the said manor, according to the custom of the said manor; by virtue of which grant the defendant, F. W. P. afterwards, and at the time of the committing of the first of the alleged trespasses, to wit, on the said 30th of September, 1840, entered into the said dwelling-house, &c., and became and was seised thereof in demesne as of fee, at the will of the lord of the said manor, according to the custom of the said manor: that before the time of the said entry so made by the defendant, F. W. P., as aforesaid, the plaintiff, claiming title to the said dwelling-house, &c., under colour of a certain charter of demise pretended to be thereof made to him, before the committing of the said alleged trespasses, by one John Pritchard, for the term of his natural life, whereas nothing of or in the said dwelling-house, &c., or any part thereof, ever passed by virtue of that charter, entered the said dwelling-house, &c., and was in possession thereof at the time of the said entry by the defendant, F. W. P., as aforesaid; and thereupon the defendant, F. W. P., in his own right, and the other defendant, Martha Pritchard, as his servant and by his command, at *785] the *several times when, &c., broke and entered the said dwelling-house, &c., and committed the alleged trespasses therein and thereto, as in the said declaration mentioned; and because the said house-

(*a*) That is, at his *customary court*, of which the lord or the steward is the judge, held at same time with the court baron, of which the free-holding suitors are the judges

hold furniture, &c., of the plaintiff, in the declaration mentioned, before and at the said time were wrongfully in and upon the said dwelling-house, &c., incumbering the same, and doing damage to the defendant, F. W. P., he, the said last-mentioned defendant, in his own right, and the said other defendant, M. P., as his servant and by his command, seized the said household furniture, &c., in the said dwelling-house, &c., so incumbering the same as aforesaid, and removed and carried away the same to a small and convenient distance, and there left the same for the use of the plaintiff, whereof the plaintiff then had notice, doing no unnecessary damage to the said household furniture, &c., on the occasion aforesaid, and then quietly ejected and expelled the plaintiff and his family from the possession of the said dwelling-house, &c., and kept and continued them so ejected and expelled from thence hitherto, as they lawfully might for the cause aforesaid; which were the same alleged trespasses, &c. Verification.

The plaintiff entered a *nolle prosequi* as to the defendant, F. W. P. The plaintiff joined issue upon the first plea, so far as the same related to and was pleaded by the said M. P.; and replied as to the second plea, so far as the same, &c., that the said M. P. ought not to be admitted or received to plead the said plea by her above pleaded, as to so much thereof as alleged that the said F. W. P. at the several times when, &c., was seised of the said dwelling-house, &c., in which, &c., in manner and form as in the said plea was alleged, because the plaintiff said, that, before the committing of the several trespasses in the declaration mentioned, and before the said several times when, &c., or any or either of them, to wit, on the *24th of March, 1836, the said M. P. demised the said dwelling-house, &c., in which, &c., to the plaintiff; to have and to hold the same to the plaintiff for the term of one whole year thence next ensuing, and fully to be complete and ended, and so on from year to year, so long as the said M. P. and the plaintiff should respectively please, yielding the rent of 15*l.* payable half-yearly, to wit, on the 29th of September, and the 25th of March in every year, by even and equal portions; which said demise and tenancy from year to year continued in full force and undetermined until, at and after the said several times when, &c., by virtue of which the said demise, the plaintiff afterwards, and before the said several times when, &c., or any or either of them, entered into and upon, and became and was possessed of the said dwelling-house, &c., in which, &c., for the said term so to him thereof demised as aforesaid, and remained and continued so possessed thereof under and by virtue of the said demise from thenceforth until and at the said several times when, &c., in the declaration mentioned: that afterwards, and before the said several times when, &c., to wit on the 29th of September, in the year last aforesaid, the plaintiff paid to the said M. P., and she, the said M. P., then received from the plaintiff the sum of 8*l.* as and for the rent aforesaid, so reserved as aforesaid, for a certain time, to wit, for one half year ending on the day and year last aforesaid; and that afterwards, on each and every 25th of March, and 29th of September, which happened in every year from the time of the making of the said demise, until the said several times when, &c., the plaintiff, as tenant as aforesaid duly paid to the said M. P., and the said M. P. as the landlady of the plaintiff as aforesaid, received and accepted from the plaintiff, all and every part of the rent which respectively grew due to the said M. P. from the plaintiff under the demise and tenancy as aforesaid. *Verification; and prayer of judgment, if M. P. ought to be admitted or received against the said demise, and acceptance of rent as aforesaid, to plead the said plea by her [*786 above] [*787]

above pleaded as to so much thereof as alleged that the said F. W. P. at the several times when, &c., was seised of the said dwelling-house, &c., in manner and form, &c.

Rejoinder: that, by reason of any thing in the replication alleged, the defendant M. P. ought not to be barred from pleading the said plea by her pleaded, as to so much thereof as alleged that the said F. W. P., at the said several times when, &c., was seised of the said dwelling-house, &c., in which, &c., in manner and form, &c., because she says that the tenancy of the plaintiff of and in the said dwelling-house, &c., was not in full force and undetermined(a) at the said several times when, &c.: concluding to the country. Issue thereon.

At the trial before ERSKINE, J., at the last summer assizes for the county of Salop, the facts of the case appeared to be as follows. At Michaelmas, 1823, the plaintiff became tenant from year to year of the premises in question (being copyhold of the manor of Prees in Shropshire,) under a verbal agreement with one Robert Pritchard, the husband of the defendant Martha, and the father of the other defendant Francis Wood Pritchard, at the rent of 15*l.* a year, payable half yearly. R. P. died at Christmas, 1833, having devised the premises in question (with other property) to his son F. W. P., then a minor, charged with an annuity to his widow M. P. The defendant F. W. P. attained his majority in 1834, and in the month of October in that year he was duly admitted tenant of the premises. After the death of

*788] R. P., the plaintiff regularly paid *the rent to his widow, the defendant Martha, down to the year 1836, when a dispute having arisen between her and the plaintiff, an agreement in writing was in the month of March in that year entered into between them, as follows:—

"Mr. Darlington agrees to take from Mrs. Pritchard the house, garden and stable he now occupies, with the use of the pump in the yard, for the annual rent of 15*l.* to be paid half yearly." (These being in fact the terms of the original tenancy.)

The plaintiff continued to pay rent to the defendant Martha.

On the 23d of March, 1840, the following notice to quit was served on the plaintiff:—

"We, and each of us, do hereby give you notice to quit and deliver up to us upon the 29th day of September next, or at such other time as your holding may by legal notice be determined, the peaceable possession of the messuage, and all other the premises, which you now rent of or hold under us, *or one of us*, situate in the township of Prees, in the parish of Prees, in the county of Salop. Dated, the 23d day of March, 1840.

(Signed) "Martha Pritchard.
"F. W. Pritchard."

The plaintiff having refused to quit at Michaelmas, 1840, was in October in that year served with a notice in writing signed by both the defendants, that they or one of them would apply to the magistrates to recover possession of the premises under the stat. 1 & 2 Vict. c. 74.(b) The notice

(a) The rejoinder appears to be bad for not showing some matter by which the tenancy was determined.

(b) By sect. 1, after reciting that it is expedient to provide for the more speedy and effectual recovery of the possession of premises unlawfully held over after the determination of the tenancy, it is enacted, "that, when and so soon as the term or interest of the tenant of any house, land, or other corporeal hereditaments held by him at will, or for any term not exceeding seven years, either without being liable to the payment of any rent, or at a rent not exceeding the rate of 20*l.* a year, and upon which no fine shall have been reserved or made payable, shall have ended, or shall have been duly determined by a legal notice to quit or otherwise, and such tenant, or (if such tenant do not actually occupy the premises, or only occupy

was in the form set out in the *schedule to the act, No. I.(*a*) The "complaint" laid before the magistrates, was as follows:— [*789

"Shropshire, to wit. The complaint of Francis *Wood Pritchard, of Hodnet, in the county of Salop, shopkeeper, *on behalf of himself and Martha Pritchard* of Prees, in the said county, widow, made before us, two of her Majesty's justices of the peace acting in and for the district of the Whitechurch division of Bradford North, in the county of Salop, in petty sessions assembled; who saith, that Robert Pritchard of Prees aforesaid, tanner, deceased, did in his lifetime let to A. E. Darlington a tenement consisting of a messuage, with a building, garden, and appurtenances thereto belonging, situate in the parish of Prees aforesaid, in the said county of Salop, for the term of one year, under the rent of 15*l.*, and that the said tenancy was determined by notice to quit given by them the said Francis Wood Pritchard and Martha Pritchard (who are, or one of them is, *become entitled to the said tenement under the will of the said Robert Pritchard deceased,) on the 29th day of September last; and that, on the 3d day of October instant, they the said Francis Wood Pritchard and Martha Pritchard did serve on the said A. E. Dar- [*790] [*791]

a part thereof,) any person by whom the same or any part thereof shall be then actually occupied, shall neglect or refuse to quit and deliver up possession of the premises, or of such part thereof respectively, it shall be lawful for the landlord of the said premises, or his agent, to cause the person so neglecting or refusing to quit and deliver up possession, to be served (in the manner hereinafter mentioned) with a written notice, in the form set forth in the schedule to the act, signed by the said landlord or his agent, of his intention to proceed to recover possession under the authority and according to the mode prescribed in this act; and, if the tenant or occupier shall not thereupon appear at the time and place appointed, and show, to the satisfaction of the justices hereinafter mentioned, reasonable cause why possession should not be given under the provisions of this act, and shall still neglect or refuse to deliver up possession of the premises, or of such part thereof, of which he is then in possession, to the landlord or his agent, it shall be lawful for such landlord or agent to give to such justices proof of the holding and of the end or other determination of the tenancy, with the time or manner thereof, and, where the title of the landlord has accrued since the letting of the premises, the right by which he claims the possession; and, upon proof of the service of the notice, and of the neglect or refusal of the tenant or occupier, as the case may be, it shall be lawful for the justices acting for the district, division or place within which the said premises or any part thereof shall be situate, in petty sessions assembled, or any two of them, to issue a warrant under their hands and seals to the constables and peace officers of the district, division, or place within which the said premises, or any part thereof, shall be situate, commanding them, within a period to be therein named, not less than twenty-one, nor more than thirty, clear days from the date of such warrant, to enter (by force, if needful) into the premises, and give possession of the same to such landlord or agent: &c. Provided also, that nothing herein contained shall be deemed to protect any person, on whose application and to whom any such warrant shall be granted, from any action which may be brought against him by any such tenant or occupier, for, or in respect of such entry and taking possession, where such person had not, at the time of granting the same, lawful right to the possession of the same premises."

(*a*) "I, , [owner, *or* agent to , the owner, *as the case may be*,] do hereby give you notice, that unless peaceable possession of the tenement, [*shortly describing it*,] situate which was held of me, *or* of the said , [*as the case may be*,] under a tenancy from year to year, [*or as the case may be*,] which expired [*or* was determined] by notice to quit from the said , [*or otherwise as the case may be*,] on the day of , and which tenement is now held over and detained from the said , be given to [the owner *or* agent, on or before the expiration of seven clear days from the service of this notice. I, , shall on next, the day of , at of the clock of the same day, at , apply to Her Majesty's justices of the peace, acting for the district of , [*being the district, division, or place in which the said tenement, or any part thereof, is situate*,] in petty sessions assembled, to issue their warrant, directing the constables of the said district to enter and take possession of the said tenement, and to eject any person therefrom.

"Dated this .

"(Signed) .

"[Owner *or* Agent.]

"To Mr. ."

lington a notice in writing of their intention to apply to recover possession of the said tenement (a duplicate of which notice is hereunto annexed,) by giving such notice to, &c., at the dwelling-house of the said A. E. Darlington, and reading over and explaining the same, &c.; and that, notwithstanding the said notice, the said A. E. Darlington hath refused to deliver up possession of the said tenement, and still detains the same.

"F. W. Pritchard.

"Taken at Whitechurch, in the said county of Salop, the 16th day of October, 1840, before us,

"R. C. Hill.
"W. H. Poole."

The defendant Francis Wood Pritchard alone appeared before the magistrates in support of the complaint. The plaintiff attended with his attorney, and it was contended on his behalf, that a new tenancy was created by the agreement with Mrs. Pritchard in March, 1836, which would not expire until Ladyday, 1841. The magistrates, however, were of opinion that the tenancy had expired under the notice to quit at Michaelmas, 1840, and granted a warrant, (which had been since lost.) Under the warrant possession was taken on the 9th of November; and the plaintiff's goods were removed from the premises. The key of the house was taken to Mrs. Pritchard's by the officer, and laid down on a table in her presence. She was proved to have been frequently afterwards on the premises, which had been turned into a shop, with the names "Pritchard and Son" placed over the door.

*792] *It was insisted on the part of Mrs. Pritchard, that the plaintiff ought to be nonsuited, inasmuch as there was no evidence to connect her with the trespass: and that at any rate the action against her should have been in *case* and not *trespass*, as the other defendant, at the time of applying for the warrant, had a right to the possession of the premises, and she was justified as his servant; or, if the application to the magistrates was improperly made, then they had no jurisdiction to grant the warrant.(a) The judge overruled the objections; and the plaintiff recovered a verdict for 90*l*.

Channell, Serjt., (on Saturday, the 5th of November,) moved for a rule to enter a nonsuit or for a new trial, on the grounds taken at the trial; and also to arrest the judgment, upon the ground that the plea stated that the defendant, F. W. Pritchard, was the owner, and entitled to the possession of the premises, and that the defendant, Martha, had acted as his servant and by his command, and that this was admitted by the replication, wherein the plaintiff relied upon the estoppel only. *Cur. adv. vult.*

TINDAL, C. J., now said:—We have looked at the pleadings in this case, and at the notes of the evidence of my brother ERSKINE. The rule was moved for upon two grounds: first, to enter a nonsuit, (as to which no distinct leave was reserved,) or for a new trial; secondly, in arrest of judgment.

The action is in trespass, and is brought against two defendants, Martha and Francis Wood Pritchard. Besides a plea of not guilty by the defendant Martha alone, the two defendants pleaded jointly a justification that *793] Francis Wood Pritchard acted as owner, and Martha as his *servant and by his command. The plaintiff thereupon entered a *nolle prosequi* as to the defendant Francis Wood Pritchard; and, as to the other de-

(a) See 1 & 2 Vict. c. 74, s. 6, post, p. 794, in the judgment.

fendant, replied an estoppel by reason of a demise by her to the plaintiff, as tenant from year to year, which was still continuing. This demise is pleaded as an estoppel, because on the face of the pleadings no interest could pass under it, if the fee was in the other defendant, F. W. P. The jury having found a verdict for the plaintiff, the first question is, whether the evidence, as it appears on the notes of the learned judge, is sufficient to show that such verdict was proper. And upon a careful consideration of the evidence we see no reason to disturb the verdict. It appears that the defendant Martha had, jointly with her son, given the plaintiff notice to quit, and also a notice that they intended to apply to the magistrates under the statute 1 & 2 Vict. c. 74; and that her son afterwards signed a complaint, "on behalf of himself and Martha Pritchard," in order to procure the warrant from the magistrates under that statute. This, we think, was evidence of assent and of an authority on the part of the mother. There was also evidence to show that she was treated, and that she acted, as owner of the premises; as we find the key of the house was delivered to her. On the first point, therefore, we are of opinion that there was sufficient evidence to show that the defendant, Martha, had authorized and assented to the application by her son. But then it is said that the action is misconceived, and that it should have been in *case*, and not in *trespass*, inasmuch as the application to the magistrates being improper, they had no jurisdiction to grant the warrant. The third section of the act 1 & 2 Vict. c. 74, however, expressly declares, "that, in every case in which the person to whom any such warrant shall be granted had not, at the time of granting the same, lawful right to the possession of the premises, the obtaining of any such *warrant as aforesaid shall be deemed a *trespass*(a) by him against the tenant or occupier of the premises, although no entry shall be [*794 made by virtue of the warrant." And in sect. 6 a distinction is expressly taken between case and trespass: for it enacts "that, where the landlord at the time of applying for such warrant as aforesaid had lawful right to the possession of the premises, or of the part thereof so held over as aforesaid, neither the said landlord nor his agent, nor any other person acting in his behalf, shall be deemed to be a *trespasser* by reason merely of any irregularity or informality in the mode of proceeding for obtaining possession under the authority of this act; but the party aggrieved may, if he think fit, bring an action *on the case* for such irregularity or informality, in which the damage alleged to be sustained thereby shall be specially laid, and may recover full satisfaction for such special damage, with costs of suit." We therefore think the statute clearly intended that a party who even *obtains* a warrant improperly should be considered a trespasser; and still more so, where, as in this case, the warrant has been put into execution.

The only remaining point is as to the arrest of judgment. The argument in support of this is, that the second plea contains an allegation that the defendant, Francis Wood Pritchard, was the legal owner and entitled to the possession, and that the other defendant, Martha, as his servant and by his command, committed the trespasses complained of, and that this is not

(a) It can hardly have been intended to give to a party, upon whose house or land *no* entry has been made, a formed action of trespass. The word "trespass" appears to be used in this statute in the more extended sense of a tort or wrong, every tort being in strictness a trespass, whether it be punishable in an action *de transgressione in casu proviso*, or in an action *de transgressione in consimili casu*, or *super casum*. It may be observed that the statute is not very carefully worded, as in speaking of a tenancy from year to year, the term used is the popular expression, "a tenancy at will."

*795] denied by the replication. It is true, it is not denied; but the *replication sets up an estoppel as to Martha by reason of the demise made by her to the plaintiff; and the very notion of an estoppel is, that it admits the facts against the allegation of which the estoppel is pleaded, *quatenus*—but to a certain extent only. It amounts to saying—such is your plea, but you are estopped by law from setting it up. The estoppel, therefore, cannot be relied upon as an admission of facts, so as to be taken advantage of in the cause. We think, therefore, there ought to be no rule.

Rule refused.

NATHANIEL BRADFORD PIERPONT *v.* WILLIAM LEVESON GOWER, Esq.

By the stamp act (55 G. 3, c. 184,) sched. tit. Bond (referred to from tit. *Warrant of Attorney*,) an *ad valorem* duty is payable where the instrument is "given as a security for the payment of any definite and certain sum of money."

Held, that a warrant of attorney given to secure a principal sum, with interest commencing from a *previous* day, is only liable to the *ad valorem* duty on the principal sum.

Where a warrant of attorney had been given to procure a principal sum, upon which the *ad valorem* duty had been paid, and default had been made in payment, but judgment had not been signed, and a bill of sale reciting the warrant of attorney and the default, was given to secure the payment of the principal sum and such portion of the interest as remained unpaid:

Held, that the bill of sale fell within the exemption of the schedule of the act, tit. *Mortgage*, as "an additional security for a sum already secured by another instrument;" and, therefore, that such bill was only liable to a common deed stamp.

TROVER for chairs and other household furniture. Pleas; not guilty, and not possessed.

The action was brought against the late sheriff of Surrey, who had seized the goods in question under a writ of fi. fa.

At the trial, before TINDAL, C. J., at the sittings in London after last Easter term, it appeared that the plaintiff claimed the possession of the goods by virtue of a conditional bill of sale from his father, Thomas Pierpont, made under the following circumstances: On the 9th of November,

*796] 1840, the plaintiff having *advanced to his father the sum of 1000*l.*, took from him a warrant of attorney as a security, bearing date the same day, the condition of the defeasance being that T. P. should pay to the plaintiff 1000*l.*, with interest at 5 per cent. from the 1st day of July, 1840, on the 1st day of July, 1841, and in default, &c. This warrant of atttorney was stamped with a 5*l.* stamp, and was duly filed. (*a*) The father made default in the payment, but the plaintiff did not sign judgment; and on the 3d of November, 1841, the father executed a bill of sale (dated the 30th of October, 1841,) whereby, after reciting the advance of the 1000*l.*, that the warrant of the attorney had been given as a security, and that the sum secured still remained unpaid, he bargained, sold, assigned and transferred unto the plaintiff all and every the household goods, &c., habendum, to the plaintiff, his executors, &c., as his and their own property and effects, "provided nevertheless that in case the said T. P., his heirs, &c., shall well and truly pay or cause to be paid unto the said N. B. P. (the plaintiff,) his executors, &c., at &c., the sum of 1000*l.*, with interest for the same after the rate of 5 per cent. per annum from the 30th day of November, 1840,—being the day up to which the interest on the said sum so lent and advanced to him the said T. P. as aforesaid

(*a*) See 3 G. 4, c. 39.

has been paid, on the 30th day of November next, without any reduction or abatement whatsoever," then the bill of sale should be void. It further contained a covenant on the part of T. P. to pay the principal and interest on the day specified, with a power of sale in case of default. This deed was stamped with a common deed stamp of 1*l.* 15*s.* The plaintiff entered into posssesion on the same day (3d of November,) and the goods were seized by the defendant on the 6th.

No question was raised as to the bona fides of the *transaction; [*797 but it was contended on the part of the defendant, that the bill of sale did not fall within the exemption of the schedule to the stamp act, 55 G. 3, c. 184, tit. "*Mortgage*,"(*a*) as "an additional or further security for a sum already secured by any deed or other instrument;" and therefore that it ought to have borne the *ad valorem* duty on the 1000*l.*; or, assuming that the *ad valorem* duty on that sum had been already paid in the stamp on the warrant of attorney, yet as the interest *previously* due was secured by the bill of sale, it fell within the concluding words of the exemption in question—which provide that if any further sum shall be added to the principal already secured, the *ad valorem* duty shall be charged in respect of such further sum; and therefore that some *ad valorem* duty was payable upon the bill of sale. His lordship overruled the objection, but reserved leave to move to enter a nonsuit; and the plaintiff had a verdict for 45*l.*

Talfourd, Serjt., in last Trinity term (26th of May), obtained a rule nisi according to the leave reserved upon the ground taken at the trial, and also upon the ground that the *ad valorem* stamp upon the warrant of attorney was insufficient, as it was given to secure not only the *principal [*798 and future interest, but also interest that had already accrued. (*b*)

Bompas, Serjt., (with whom was H. Pearson,) now showed cause. No objection was taken at the trial that the stamp on the warrant of attorney was not sufficient. The sum advanced was 1000*l.*; the warrant of attorney was given as a security for the payment of that definite sum; and though it was also given to secure the payment of interest, that forms no part of the *principal* sum secured. The warrant of attorney was therefore properly stamped with a 5*l.* stamp, which is the *ad valorem* duty on 1000*l.* Then, the bill of sale being given as "an additional security for a sum already secured by an *instrument*," (namely, the warrant of attorney,) which *had* "paid the said *ad valorem* duty" of 5*l.*, it fell within the exemption under title *Mortgage*, although not exempted under the terms of the schedule "from any other duty to which the same may be liable," namely, the common deed stamp of 1*l.* 15*s.*, which was impressed upon it. In

(*a*) Under tit. *Mortgage*, an *ad valorem* duty is imposed. Under the "Exemption from the said *ad valorem* duty on mortgages, &c., but not from any other duty to which the same may be liable," is the following paragraph: "Any deed or other instrument, made *as an additional or further security* for any sum or sums of money, &c., already secured by any deed or instrument, which shall have paid the said *ad valorem* duty hereby charged, &c., to be exempt from the said *ad valorem* duty hereby charged, so far as regards such sum or sums of money, &c., before secured, in case such additional or further security shall be made by the same person or persons who made the original security; but if any further sum of money, &c., shall be added to the principal sum of money, &c., already secured, or shall be thereby secured to any other person, the said *ad valorem* duty shall be charged in respect of such further sum of money, &c."

(*b*) In the schedule under tit. *Warrant of Attorney*, "given as a security for the payment of money," &c., the same duty is payable as on a bond for the like purpose. Under tit. *Bond*, "given as a security for the payment of any definite and certain sum of money, exceeding 500*l.* and not exceeding 1000*l.*," the duty payable is 5*l.*

Robinson v. *Macdonnell*, 5 M. & S. 228, it was decided, that a deed endorsed in a former deed, as a further security for advances made under the first deed, was exempted by the 48 G. 3, c. 149, (the then existing stamp act) from an *ad valorem* duty, if the first deed were stamped with an *ad valorem* stamp. In *Barker* v. *Smark*, 7 M. & W. 590, it was held, that a bond conditioned to secure a principal sum, with interest at 5 per cent., commencing from a previous day, is only liable to stand duty on the principal sum. The only difference is that the bill *of sale in this case
*799] admits the payment of part of the interest. The whole of the language of the stamp act has reference to the principal sum due, and not to the interest. [MAULE, J. That the by-gone interest was not *treated* as principal as appears from the fact of there being no interest payable upon it.]

Talfourd, Serjt., in support of the rule. The bill of sale, which was put in to support the plaintiff's title, bore an insufficient stamp on the face of it. In order to show that it was sufficient, the plaintiff relied upon the *ad valorem* stamp on the warrant of attorney; the two points are therefore mixed up together. Undoubtedly no question was raised at the trial as to the inadmissibility of the warrant of attorney by reason of the insufficiency of the stamp; but as the plaintiff seeks to set up the stamp on the warrant of attorney in aid of the bill of sale, he is bound to show that the stamp on the former is sufficient. Now the warrant of attorney is given to secure interest antecedently due; the sum secured therefore is the principal and that portion of the interest which becomes of the nature of principal. *Barker* v. *Smark* was decided upon the case of a *bond*, which is distinguished by PARKE, B., from the case of a mortgage. [MAULE, J. The *ad valorem* stamp in question is imposed under the title, "warrant of attorney," and not "mortgage." What distinction can be drawn between a bond and a warrant of attorney?] A bond is clearly a security for the payment of money, within the meaning of the stamp act, and of the subsequent act of the 3 G. 4, c. 117, s. 3;(a) but it *may be doubted whether a warrant
*800] of attorney is such a security within these statutes, although it cannot be denied that in one sense it *is* a security for money. [TINDAL, C. J. Why should not a warrant of attorney be within the exemption as well as a bond, seeing that they are dealt with in the same way in respect to the imposition of the duty?] The plaintiff might have taken out execution on the 1st of July, 1841, for the principal and interest. It never could have been intended that a creditor in his situation, instead of availing himself of

(a) Which enacts, "that where any deed or other instrument already made, or hereafter to be made, as an additional or further security for any sum or sums of money, or any share or shares in any of the government or parliamentary stocks or funds, or in the bank of England or the bank of Ireland, already or previously secured by any bond on which the *ad valorem* duty on bonds, charged by the said recited acts of the fifty-fifth and fifty-sixth years of the reign of his said late majesty, and the schedules thereto respectively annexed, shall have been paid, such deed or other instrument shall be, and be deemed to be, and to have been, exempt from the several *ad valorem* duties charged by the said acts, and the said schedules respectively, on mortgages, and shall be charged and chargeable only with the ordinary duty payable on deeds in general, in Great Britain and Ireland respectively; but if any farther sum of money or stock shall be added to the principal money or stock already secured, the said *ad valorem* duties respectively shall be charged in respect of such further sum of money or stock; and if necessary, for the sake of evidence, the deeds and instruments hereby exempted from the said *ad valorem* duties shall be stamped with a particular stamp, for denoting or testifying the payment of the *ad valorem* duty upon all the deeds and instruments relating to the particular transaction, provided such deeds and instruments shall be produced at the stamp office in London or Dublin (as the case may require) and shall appear to be duly stamped with the duties to which they are liable."

that remedy, should hold the instrument as a security for unlimited accumulations of interest.

TINDAL, C. J. That argument would equally apply to the case of a mortgage after the expiration of the time appointed for the payment of the principal and interest. But I think, upon general principles, that before we can say that any instrument requires a double *stamp, the language of the legislature should be clear upon the subject. [*801

Per curiam:

Rule discharged.

AVELINE and Another v. WHISSON.

To a declaration in *covenant* upon an indenture of lease, by the lessor against the assignee of the lessee, a plea that the indenture was not *signed* by the plaintiff, or by any agent authorised in writing, is bad.

COVENANT. The declaration stated that, heretofore, to wit, on the 26th day of July, A. D. 1819, by an indenture made between certain parties since deceased and the plaintiffs, of the one part, and one Richard Martin of the other part, (profert of the counterpart of the indenture, sealed with the seal of the said R. M.,) the plaintiffs and the said other parties demised unto the said R. M., his executors, &c., a certain piece of ground with the messuage, &c., thereupon erected, &c. And the said R. M. did, in and by the said indenture, for himself and his heirs, &c., covenant with the said other parties and the plaintiffs, their executors, &c., (amongst other things,) that he, the said R. M., his executors, &c., should and would at all times, &c., well and sufficiently repair the premises by the said indenture demised, and yield them up in good and sufficient repair at the end of the term, &c. The declaration then stated that R. M. entered, and that afterwards, on the 1st of January, 1833, his estate and interest vested in the defendant by assignment; that the defendant entered and continued possessed thereof, until the 29th of September, 1841, when the said demise ended and determined. Breach: that the defendant did not well and sufficiently repair *the premises during the term, or yield them up in repair at the said end and expiration thereof. [*802

Third plea: that the indenture in the declaration mentioned was not signed by the said parties deceased and the plaintiffs, or by any agent or agents of the said parties deceased and the plaintiffs, thereunto lawfully authorised by writing; nor was any lease of the said premises so by the said indenture alleged to have been granted, demised, &c., put in writing and signed by the said parties deceased and the plaintiffs, or any agent or agents of the said parties deceased and the plaintiffs, thereunto lawfully authorised by writing. Verification.

Demurrer: assigning for causes that the defendant had not, by his said third plea, either confessed and avoided, or traversed any matter of fact alleged in the declaration, and had not attempted to put in issue any matter of fact alleged by the plaintiffs, but had introduced and attempted to put in issue matters of fact not alleged, or necessary to be alleged. And that the said plea was no answer to the declaration, but was evasive and argumentative; and also that the defendant by his said plea, denied and attempted to put in issue the signing of the indenture in the declaration mentioned by the said parties deceased and the said plaintiffs, or by any agent duly authorised by the said parties, but did not put in issue, or attempt to put in issue, the due execution of the said indenture by the said parties, by sealing

and delivering the same; and that the issue attempted to be raised by the said plea was utterly immaterial and incompetent to decide the question between the plaintiffs and the defendant; and also that the defendant, by his said plea, had attempted argumentatively and vaguely to put in issue the consideration for the execution by the said R. M., of the counterpart of the said indenture in the declaration mentioned; and also that the said third
*803] plea concludes with a verification, *whereas, if it amounts to any thing, it amounts to a traverse, and ought to have concluded to the country; &c. Joinder in demurrer.(a)

Talfourd, Serjt., in support of the demurrer. The plea attempts to set up a defence under the statute of frauds; but that statute does not apply to this case, the lease being under seal. The plea is bad in form and substance. In form, it is a mere argumentative traverse of the demise. In substance it is bad, as the defendant by admitting that the counterpart was under the seal of his assignor, is estopped from denying the execution of the original deed.(b) [MAULE, J. Should not the estoppel be pleaded?] That is not necessary where the estopped appears upon the pleadings.(c) An assignee of a lease by indenture is estopped by the deed which estops his assignor; *Taylor* v. *Needham*, 1 Wms. Saund. 325, a, (c); and here
*804] *the assignor Martin would have been clearly estopped. [MAULE, J. Can the other side contend that a deed requires signature? This is not like a lease by parol.]

Channell, Serjt., who was to have supported the plea, after referring to 1 Wms. Saund. 291, n, (1), admitted that an allegation of a demise being by *indenture*, imports that the demise is by an instrument in writing and under seal.

Per curiam; Judgment for the plaintiff.(a)

(a) The following points were marked for argument on the part of the plaintiff:—

"First, that it is no defence to an action on a counterpart lease against a lessee or his assigns, that the indenture was not executed by the lessor.

"Secondly, that even supposing it to be a defence during the continuance of the demise, it ceases to be so when the term has expired, and the full benefit of it has been enjoyed by the lessee or his assigns.

"Thirdly, that if the defence were substantially good, it is badly and inartificially pleaded, for the reasons stated in the demurrer."

On the part of the defendant it was said, that "in addition to arguing that the plea was good in form, on the authority of *Maggs* v. *Ames*, 1 Moo. & P. 294, and, in substance, on the authority of *Cardwell* v. *Lucas*, 2 M. & W. 111. and other cases, (See *Berkely* v. *Hardy*, 5 B. & C. 355,) it will also be contended:—

"First, that the declaration stating no term, an estate for life must be presumed, which would not pass, except by feoffment or conveyance under the statute of uses.

"Secondly, that no term within the statute of 32 Hen. 8, c. 34, is shown to have been granted, and therefore no cause of action is disclosed against the defendant as assignee of a term either under that act, or at common law."

(b) As to the popular distinction between an original deed and a counterpart, vide *Hall* v. *Ball*, antè, vol. iii. p. 242.

(c) See *Sunderson* v. *Coltman*, antè, p. 209.

(a) See *Cooch* v. *Goodman*, 2 Q. B. 580, 2 G. & D. 159.

J. MERCER *v.* J. K. CHEESE and Eleven Others.

To assumpsit for work and materials, &c., the defendants pleaded that the promises were made jointly with T. M., and that before action brought, the plaintiff *for and on account* of the sum due, and of the promises of the defendant and T. M., drew a bill on T. M. which he accepted and delivered to the plaintiff, who received the same *for and on account* of the said sum and of the said promises. *Held*, that the plea was good, as raising a *primâ facie* defence; and that it lay on the plaintiff to show that the bill was overdue and unpaid, or had seen negotiated.

ASSUMPSIT. The declaration was for work and materials, goods sold and delivered, and upon an account stated.

Plea, by the defendants J. K. Cheese and six others, as to the sum of 150*l.* parcel, &c., that the said alleged promises in the declaration mentioned, as to the said sum of 150*l.* parcel, &c., were made by the defendants jointly with one Thomas Morris, to wit on the day and year in the declaration mentioned; and further that after the making of the said promises by the defendants, and the said T. M. as aforesaid, and before the commencement of this suit, to wit on the 24th of December, 1840, the *plaintiff, for and on account of the said sum of 150*l.* parcel, &c., and of the said promises of the said defendants and the said T. M. [*805 in respect thereof, made and drew his certain bill of exchange in writing, bearing date, to wit, on the day and year last aforesaid, and directed the same to the said T. M., and thereby required the said T. M. three months after the date thereof, to pay to the plaintiff's order the sum of 150*l.*; and the said T. M., for and on account of the said sum of 150*l.* parcel, &c., and the said promises of him the said T. M., and the defendants in respect thereof, then accepted the said bill so drawn by the plaintiff as aforesaid, and then delivered the same to the plaintiff who then took and received the same, of and from the said T. M., for and on account of the said sum of 150*l.* parcel, &c.; and the said promises of the defendants and the said T. M. in respect thereof. Verification.

There was a similar plea as to the further sum of 150*l.* other parcel, &c., with regard to another bill of exchange drawn by the plaintiff upon and accepted by T. M. on the 27th of March, 1841, at two months' date.

Special demurrer, stating for causes, that it is not alleged in, nor does it appear from, either of the said last-mentioned pleas, that the bills of exchange therein mentioned were not, nor was either of them, due before and at the time of the commencement of this suit; and that on the contrary thereof it appears, from the lapse of time since the making of the said bills and the dates thereof respectively, that the same were, and each of them was, overdue at the time of the commencement of this suit, and it is not alleged in nor does it appear from, either of the said pleas, that the plaintiff ever endorsed or transferred the said bills of exchange therein mentioned, or either of them, to any other person or persons, nor but that each of the said last-mentioned bills was, at the time of the commencement of this suit, and *still is, in the possession of the plaintiff as the holder thereof, and then and still wholly unpaid; and also for that it is not [*806 alleged in either of the said pleas, that the said T. M. delivered the bills of exchange therein mentioned, or either of them, to the plaintiff, for and on account of the said sum of money and promises, as to which such plea is pleaded; and also for that the alleged taking by the plaintiff from the said T. M. of such bills of exchange, or either of them, does not affect, suspend, alter or take away the remedy of the plaintiff against the defendants in the present action, for the debt due from the defendants, there being no agreement of the plaintiff to such affect alleged, either with the said T. M. and the defendants, or with either of them, nor any consideration for such agreement.

Channell, Serjt., in support of the demurrer. The pleas in question are in the nature of pleas in confession and avoidance; but although they confess the cause of action, they do not sufficiently avoid it. It is not stated whether the bills were overdue, or whether they were still running; but it appears from the dates mentioned in the pleas that they were in fact over-

due. It was necessary that the pleas should show, either that the bills were due and had been paid, in which case the defendants would have been satisfied—or that they had been endorsed to a third party; and that thereby the liability of the defendants to the plaintiff was discharged. But as the pleas are framed they contain no answer to the action. The plaintiff having a just demand against the defendant, is not barred of his remedy by taking a bill which is neither honoured when due, or negotiated by him. The other side will rely on *Kearslake* v. *Morgan*, 5 T. R. 513, where it
*807] was held that a plea to an action of *assumpsit, that the defendant was the payee of a promissory note, made by one Pierce, and endorsed it to the plaintiff "for and on account of" the debt, was a good plea; but in that case, Pierce, the maker of the note, was an entire stranger to the cause of action between the plaintiff and defendant, and the defendant gave Pierce's security for the debt; but in this case the defendants show that Morris, the acceptor of the bills, is a joint contractor with them, and they do not therefore give the security of a third party. In *Sard* v. *Rhodes*, 1 M. & W. 153, Tyrwh. & Gr. 298, which was an action by the endorsee against the acceptor of a bill, the defendant pleaded that after the bill became due, one G. P., the drawer of the bill, made his promissory note and delivered the same to the plaintiff in full satisfaction and discharge of the bill; the plaintiff replied that although he accepted the note in full satisfaction and discharge of the bill, yet that the note was not paid when due, and still remained unpaid; and it was held that the replication was bad, and that the plaintiff having accepted the note *in full satisfaction and discharge of the bill*, could not sue upon the latter; and in giving judgment, PARKE, B., observed: "The note is in the plaintiff's hands overdue and unpaid, and he may sue for it. It is averred to have been accepted in full satisfaction and discharge of the bill. The plaintiff, therefore, takes it for better or worse. This is not like the case of *Kearslake* v. *Morgan*, where it was admitted that the nonpayment of the note when due,—there being no laches on the part of the plaintiff,—would revive the remedy on the original debt; for there it was averred that the endorsement was 'for and on account' of the original debt. If it had been averred here that the promissory note was given for and on account of the bill, it might have been
*808] different." In the present *case the averment is, not that the bills were given *in full satisfaction and discharge*; but as in *Kearslake* v. *Morgan*, that they were given *for and on account* of the original debt; and it appearing upon the face of the plea that the bills were overdue and not paid, the remedy on the original debt would revive, it not being shown that the bills were in the hands of a third party. In *Lewis* v. *Lyster*, 2 C. M. & R. 704, Tyrwh. & Gr. 185, also, the plea contained an allegation that the second bill was accepted *in full discharge and satisfaction* of the former bill. There are no circumstances in this case to show that the defendant's situation is rendered at all worse by the fact of the bills having been given. The plaintiff's remedy may have been suspended while the bills were running; but it revived upon their becoming due. [COLTMAN, J. The dates in the plea are all laid under a *videlicet*.] That is so, but as far as they go, they show that the bills were overdue. [TINDAL, C. J. But can you rely upon the dates for any purpose?] The plea admits the original liability of the defendants, but shows no sufficient discharge thereof. In *Simon* v. *Lloyd*, 3 Dowl. 813, 2 C. M. & R. 187, 5 Tyrwh. 701, in assumpsit for goods sold, &c., the defendant pleaded as to 9*l*., part of the debt, that he, at the plaintiff's request, put his name as

acceptor to a stamped instrument, purporting to be a bill of exchange for 20*l.*, (there being no drawer's name to it,) partly for the debt, and partly for his accommodation, and delivered the same to the plaintiff, who accepted it in payment of the debt; and that the bill had not become due at the time the action was commenced. The plaintiff replied that the instrument then remained in his hands unnegotiated and unpaid, and without any drawer's name to it; and it was held, that this replication was no answer to the plea, and that the plea was good.

**Talfourd*, Serjt., contrà. The real question is, whether sufficient is stated in the plea to show a *primâ facie* defence, so as to throw on the plaintiff the onus of replying matter in answer. [*809 *Kearslake* v. *Morgan* is in favour of the affirmative of that proposition. How should the defendants know where the bills are at present? That is a circumstance that lies particularly in the knowledge of the plaintiff. If they have not been endorsed, it was his duty to state that circumstance by way of replication. Assuming that the bills are overdue, still the plaintiff, on the authority of *Kearslake* v. *Morgan*, is bound to show that they are unpaid and remain in his hands.

Channell, Serjt., in reply. It is admitted, on the other side, that the fact of the plaintiff having taken the bills in question would not operate as an extinguishment of his debt; and that the plea is only good as showing that the remedy was suspended. The question is, whether the defendants having admitted their primary liability, and set up the suspension of the remedy on the bills, are not bound to go further and show the continuance of such suspension. [MAULE, J. Whether the bills are due or not, Morris is liable to be sued upon them, either by the plaintiff, or by the person in whose hands they are. TINDAL, C. J. It appears from the plea that the plaintiff consented to take a security from Morris, which he, the plaintiff, is enabled to assign over. The plaintiff can tell whether he has assigned it over; but the defendants cannot.]

Channell, Serjt., then prayed leave to amend, by withdrawing the demurrer and replying; which was

Granted.

*DOE dem. WOODROFFE v. ROE. [*810

The court granted a rule for judgment against the casual ejector, where the declaration was by mistake entitled of T. T. 6 Vict., instead of T. T. 5 Vict., and there was no date to the notice.

Channell, Serjt., moved for judgment against the casual ejector. The declaration was entitled, by mistake, "Trinity term 6 Victoria," instead of "5 Victoria." In *Doe dem. Crooks* v. *Roe*, 6 Dowl. P. C. 184, where a similar mistake was made in entitling the declaration of "Trinity term 1 Vict.," that being a term which had not arrived, this court nevertheless granted the rule. In that case undoubtedly the notice attached to the declaration was regular as to the time of appearance;(*a*) here, the notice had no date.

(*a*) See *Goodtitle dem. Ranger* v. *Roe*, 2 Chitt. Rep. 172, Anon. Ib. 173 (two cases;) *Doe dem. Gore* v. *Roe*, 3 Dowl. P. C. 5; *Doe dem. Smithers* v. *Roe*, 4 Dowl. P. C. 374; *Doe dem. Wills* v. *Roe*, 5 Dowl. P. C. 380; *Doe dem. Phillips* v. *Roe*, 4 Scott, 359, acc. In all those cases the date in the notice corrected the mistake in the title of the declaration. See also Adams on Ejectment, 181, 2d edit.; and *Doe dem. Bluxam* v. *Roe*, 3 M. & W. 187; 6 Dowl. P. C. 388. In *Doe* v. *Greaves*, 2 Chitt. Rep. 172, the notice to appear was

*811] *[TINDAL, C. J., referred to *Doe dem. Greene* v. *Roe*, 8 Scott, 385, as being in point.]

Per curiam: Rule granted.

wrong, and nothing is said in the report about the title of the declaration; Holroyd, J., held the mistake immaterial, and granted the rule. And see *Doe* v. *Roe*, 1 Tyrwh. 80, 1 C. & J. 330, acc. In *Doe dem. Gowland* v. *Roe*, 5 Dowl. P. C. 273, there was a mistake in the *title of the declaration*, and nothing is said about the *notice;* and Littledale, J., held it an irregularity, and refused the rule. In *Doe dem. Symes* v. *Roe*, 5 Dowl. P. C. 667, there was a mistake in the notice, which was explained to the tenant at the time of service, and a rule nisi was granted. In *Doe dem. Watts* v. *Roe*, 5 Dowl. P. C. 149, there was also a mistake in the notice, which does not appear to have been explained, and a rule nisi was granted. In *Doe dem. Wilson* v. *Roe*, Willmore, Woll. & Dav. 606, there was an error in the title of the declaration, and the notice to appear "in the next Michaelmas term," had no date, but it was served in October; and the case having been referred by Littledale, J., in the bail court, to the full court, it was held sufficient. In *Doe dem. Vincent* v. *Roe*, 9 Dowl. P. C. 43, under exactly similar circumstances, this court refused the rule. In *Doe dem. Giles* v. *Roe*, 7 Dowl. P. C. 579, there was an error in the declaration, and no date to the notice (as in the principal case,) and Littledale, J., refused the rule. See also *Doe dem. May* v. *Roe*, ib., 580 n, 8 Scott, 385. In Doe dem. *Greene* v. *Roe*, 8 Scott, 385, (upon the authority of which the principal case was decided,) this court under similar circumstances, granted the rule.

CRESWICK and Others *v.* WOODHEAD.

It is no answer to an action by several executors, that one of them had *renounced* the executorship and had never taken upon himself the administration of the estate.

DEBT by Thomas Creswick, Nathaniel Creswick and William Younge, executors of the last will and testament of William Lowrie, deceased. The first count of the declaration set out an indenture of mortgage, whereby the defendant covenanted to pay a certain sum to the said W. L., his executors, &c. There were two other counts on similar indentures; and the declaration concluded with the usual profert by the plaintiffs of the letters testamentary of the said W. L.

Plea: that the said W. Y. never was executor of the last will and testament of the said W. L., deceased; and that, although he was named and appointed such executor in the last will and testament of the said W. L., deceased, yet he afterwards, and before acting as such executor, or taking upon himself the administration of the estate and effects of the said W. L., *deceased, and before the commencement of this suit, to wit, on, &c., duly renounced such executorship, and he never has in any [*812 way revoked such renunciation, nor since taken upon himself the administration of the estate and effects of the said W. L., deceased, or any part thereof. Verification.

Replication—that the said W. Y. was executor to the last will and testament of the said W. L., deceased, in manner and form as the plaintiffs had in their declaration above alleged; concluding to the country.

Special demurrer—assigning for causes, that the traverse taken in and by the replication was improper in this, that it took issue on the fact that the said W. Y. was at some time executor, which was admitted by the plea; but the plaintiffs ought to have traversed that the said W. Y. was and is executor, so as to traverse that he was still executor at the commencement of the suit; and the traverse taken by the said replication was wholly immaterial; and that the material allegation in the plea was, that the said W. Y. renounced his executorship before the commencement of the suit and ought not, therefore, to have joined in the action, and was not executor at the commencement of the suit; that the plaintiffs by not traversing

the last-mentioned allegation, had admitted the same, and that the said W. Y. had ceased to be executor before the commencement of the suit; that the traverse taken by the plaintiffs in their replication amounted, at most, to an argumentative traverse that the said W. Y. had renounced his executorship, as in the plea was alleged, and that such traverse was therefore improper; that the plaintiffs, instead of traversing some material averment in the plea, had merely reiterated the statement in the introductory part of their declaration, which was an argumentative, and therefore an improper way of traversing the defendant's *plea; and that the replication was in other respects informal and insufficient. Joinder.(a) [*813

Channell, Serjt., in support of the plea. As a general rule, undoubtedly, a party who is named executor, although he has *not proved* the will, may and ought to join in a suit, it being the will, and not the probate, that makes a party executor; but the non-joinder of such executor can only be taken advantage of by plea in abatement. Here, the plea admits that Younge was executor under the will, but states that he afterwards *renounced*, which is sufficient upon general demurrer. [*Talfourd*, Serjt., who was to have supported the replication, observed that the authorities are collected in 1 Wms. Saund. 291, i, k, n, (h). TINDAL, C. J., Hensloe's *case*, 9 Co. Rep. 37 a, which is there cited, seems decisive.] It was there resolved that where many are named executors and some of them *refuse*, and others prove the will, those who refuse may afterwards at their pleasure administer, notwithstanding their *refusal before the ordinary*. But, in that case, no direct *renunciation* was set up, as here. The renunciation here must, on general demurrer, be assumed to have been a renunciation *by deed* of all Younge's estate and interest. In a case of mere *refusal*, the interest of the executor might be kept alive; but where there is a *renunciation*, his interest would be *destroyed. An executor who had renounced by deed could hardly release. [TINDAL, C. J. In *Robinson* v. *Pett*(b) the Lord Chancellor said that the defendant's having *renounced*(c) the executorship did not put him in a different situation from the other executors as to receiving an allowance for his trouble; "because," his lordship said, "he is still at liberty, whenever he pleases, to accept of the executorship." *Talfourd*, Serjt., referred to *Wankford* v. *Wankford*, 1 Salk. 299, 307. [*814

Per curiam; Judgment for the plaintiffs.(d)

(a) The following points were marked for argument on the part of the plaintiffs:—

"That the defendant's plea is insufficient in law, inasmuch as it admits the said William Younge to have been appointed executor to the will. The plaintiffs will also contend that the replication, in averring that William Younge was executor of the last will and testament of the said William Lowrie, deceased, in manner and form as the plaintiffs had in their declaration alleged, sufficiently alleged him to have been executor at the commencement of this suit; and that it was unnecessary, and would have been improper to allege that he was executor at the time of the replication."

(b) 3 P. Wms. 249.

(c) There appears to be no method of *renouncing* but by refusal by means of some act recorded in the spiritual court. See 1 Wms. Exors., Part 1, B. 3, ch. 6, s. 1, p. 205, 3d ed.

(d) As to the effect of renunciation, see 1 Wms. Exors., Part 1, B. 3, ch. 6, s. 2, p. 206, 3d ed.

YONGE v. FISHER.

Semble, that a notice of trial "for the sittings after term," in London, is irregular as a notice of trial for the adjournment day. But where, after such notice, a cause was inserted in the list for the adjournment day, and the defendant's attorney obtained a judge's summons for

an order to strike the cause out of the list, which, upon hearing the parties, the judge refused to make: *Held*, that the irregularity, if any, was thereby waived.

Shee, Serjt., on a former day in this term, obtained a rule calling upon the plaintiff to show cause why the trial of this action, the verdict found thereon and all subsequent proceedings in the cause should not be set aside for irregularity; and why a bond given by the defendant in pursuance of an order of ERSKINE, J., dated the 8th of July, 1842, should not be cancelled, and why an order of COLERIDGE, J., dated the 16th of August,
*815] 1842, should not be rescinded; and why the *plaintiff should not pay the costs of trial and the subsequent proceedings, and also the costs incurred in the cause since the 15th of June last, and the costs of the present application.

The affidavits upon which the rule was obtained disclosed the following facts:—On the 4th of June last the defendant's attorney received the issue in the cause endorsed with a notice of trial "*for the sittings* after this present Trinity term, to be holden at the Guildhall of the city of London." The day appointed for the sittings after term was the 15th of June. The cause was not set down for trial pursuant to the notice, and, in consequence thereof, on the 20th of June, the defendant's attorney dispensed with the attendance of a material witness for the defence. On the 24th of June the defendant's attorney (having frequently searched the marshal's list of causes previously) first discovered that the cause had been set down in the list of new causes *for the adjournment day*. On the following day he took out a summons before a judge to strike the cause out of the list for the adjourned sittings. On the 27th the summons was attended by both parties before CRESSWELL, J.; but his lordship declined to interfere with the cause list, and endorsed upon the summons "No order." On the 29th the cause was tried as undefended, and an order was given for speedy execution. On the 2d of July the defendant's attorney took out a summons before a judge to stay the judgment and execution till the ninth day of the present term. On the 8th of July both parties attended before ERSKINE, J., when his lordship made an order that, upon the defendant bringing the amount of the verdict into court, or giving security for the same within one week to the satisfaction of one of the masters, all proceedings in the cause should be stayed till the ninth day of this term. The time for giving security was afterwards en-
*816] larged, and, after *various negotiations and attendances before a judge at chambers, a bond was ultimately executed by the defendant and two sureties on the 8th of August. The plaintiff afterwards took out a summons to tax his costs of the execution and levy and other incidental costs subsequent to the judgment, and for payment thereof by the defendant;(*a*) and COLERIDGE, J., made an order that the said costs should be costs in the cause. Merits were also sworn to.

The learned serjeant contended that notice for the sittings was not a notice for the adjournment day, under the rule of this court H. 3 G. 3;(*b*)

(*a*) The affidavits did not state when the execution was levied; but it was stated that the defendant's attorney opposed the granting of the order before Coleridge, J., upon the ground that the plaintiff, having signed his judgment and executed the writ of fi. fa. subsequently to the order of Erskine, J., which gave time to the defendant to find security for the amount of the verdict, with a stay of proceedings, which time had afterwards been enlarged, had executed the writ in his own wrong.

(*b*) "In every notice of trial to be given for the sittings after any term, to be holden at the Guildhall of the city of London, it shall be specified whether the cause is intended to be tried at the first day of such sittings, or at the adjournment day."

There is a similar rule in Q. B., T. T. 51 G. 3 and in the Exch. H. T. 1 W. 4. See 1 Lush's Prac. 438.

and that the plaintiff should have set down the cause for the day of the sittings, and have made it a remanet.

Channell, Serjt., now showed cause upon an affidavit, which stated that it was well known, from a notice in the sittings paper, issued by authority of the court, that no cause would be tried on the day appointed for the sittings, but that the court would meet only to adjourn until a future day; that the cause was entered on the 21st of June, seven days before the adjournment day; that on the 18th, three days after the nominal sittings day, the plaintiff gave the defendant's attorney notice *of his intention to produce certain documents at the trial, and that on the 20th the defendant's attorney attended at the plaintiff's office to examine them; that the plaintiff then told the defendant's attorney that he should enter the cause the next day, for the 27th, the adjournment day. [*817

The learned serjeant contended that there had been no irregularity, or if there had, that it had been waived by the subsequent steps taken by the defendant. [MAULE, J. Though the notice might have been irregular as a notice of trial for the adjourned sittings, what else could the defendant have understood by it? TINDAL, C. J. When the rule of H. 3 G. 3, was made, causes were tried on the sitting day; but now there is public notice that no causes will be tried on that day, but that the court will adjourn to some future day. The notice must be construed with a reasonable intendment. The defendant could not have been misled by it.]

Shee, Serjt., was then called upon to support the rule. The notice being expressly for the day of the sittings, cannot be intended to be for the adjournment day. The trial, therefore, on or after that day was irregular. If the notice *was* intended for the adjournment day, it was irregular on the face of it. The defendant has been injured by his cause being taken as undefended. [ERSKINE, J. The cause was not taken out of its turn.] It was taken in a hurry. [TINDAL, C. J. The hurry cannot hurt the defendant. If there has been an irregularity, and it has not been waived, the defendant may set aside the proceedings.] The defendant was not bound to return an irregular notice: the retaining of it therefore was no waiver of the irregularity; *Dignam* v. *Mostyn*, 6 Dowl. P. C. 547; S. C. per nom. *Dignam* v. *Ibbotson*, 3 M. & W. 431.

*TINDAL, C. J. Whether there has been an irregularity or not in this case it is not necessary to determine. Perhaps it would be better to adhere to the old rule, as it has not been abolished. But if there has been an irregularity, it is one *in extremos apices juris*. I cannot help thinking that the notice must have been understood to mean that the cause would be tried on the first practicable day. But even if there were an irregularity, I think it has been waived. On the 20th of June, five days after the day appointed for the sittings, there was a meeting between the plaintiff and the defendant's attorney, when the former gave verbal notice to the latter that the cause would be entered for the 27th, which the defendant's attorney must have known was intended for the adjournment day. Afterwards a summons was obtained to strike the cause out of the list, and both parties attended and were heard before my brother CRESSWELL on the 27th. That was clearly a waiver of any irregularity in the notice. But, notwithstanding such waiver, as there is an affidavit of merits, I think there should be a new trial, upon the security of the verdict already given, which must still stand and be extended to the costs; the costs of the present application being considered as costs in the cause. [*818

COLTMAN, J. I think the fact of the parties having referred the matter to my brother CRESSWELL puts an end to the question.

ERSKINE and MAULE, JJ., concurred.

Rule absolute accordingly.(a)

(a) The rule was drawn up in the following terms:—

"It is ordered, that the verdict found for the plaintiff on the trial of this cause, at the sittings in London after last term, be set aside, and a new trial be had, on the defendant's giving, within ten days, such security as shall be approved of by one of the masters of the *819] court (in case the parties differ *about the same) for payment to the plaintiff or his attorney of the costs of this action, also for the costs of and occasioned by this application to the court; provided that, by the result of such trial, the plaintiff shall be entitled to such costs. And it is further ordered, that the bond executed by the plaintiff and his sureties in the said rule mentioned, do stand as a security for the damages to be received in this action; and that the order of Mr. Justice Coleridge, in the said rule mentioned, do also stand."

PETTITT v. MITCHELL.

Certain woollen and mercery goods were put up to sale by auction. Each lot was described in the catalogue as containing a certain number of yards. The goods were open to public inspection for two days before the sale. By the printed conditions of sale, the purchaser of any lot was to pay down a deposit; the lots were to be taken away with all faults, imperfections, or errors of description, on a day specified; and the remainder of the purchase money was to be paid before the *delivery*. There was also a memorandum, that all small remnants were to be cleared at the measure stated in the catalogue. The biddings at the sale were to be at so much per yard;

Held, that in such a sale no condition is implied, that a purchaser may inspect and measure the lots, before paying the remainder of the purchase money.

Held also, that such a condition would be at variance with the printed conditions.

Held, by Coltman, J., that the condition that the lots were to be taken away with all *faults*, &c., referred to quantity as well as to quality.

In assumpsit upon a contract of sale, subject to certain conditions, the defendant pleaded another condition qualifying those mentioned in the declaration; but there was no written proof of the existence of any such condition as that set up by the plea. It appeared that the conditions mentioned in the declaration were in writing;

Semble, that evidence of usage, to establish such condition, is inadmissible.

SPECIAL assumpsit. First count, that whereas the plaintiff heretofore, to wit, on Thursday and Friday the 3d and 4th days of June, A. D., 1841, put up and exposed to sale by public auction in lots, (amongst other things) a large quantity of woollen and mercery and other goods and chattels, then lying and being at and in a certain dwelling house and premises situate, &c., and which said goods were particularly mentioned and described in a *820] certain catalogue thereof, under and subject *to the following amongst other conditions of sale, that is to say, that the highest bidder should be the purchaser, and that if any dispute arose between two or more bidders, the lot in dispute should be immediately put up again: that no person should advance less than one ½d. per yard on biddings under 1s.; on biddings from 1s. to 5s., 2d.; from 5s. to 10s. 3d.; on 10s. and upwards, 6d. per yard; that the purchasers should pay down immediately a deposit of 5s. in the pound in part payment for each lot; that each deposit should be applicable to any lot purchased; and that the purchasers should give in their names and places of abode if required; in default of which the lot or lots so purchased should be immediately put up again and resold. That the lots should be taken away with all faults, imperfections, or errors of description at the purchasers' expense, on Saturday the 5th then instant, that is to say, on Saturday the 5th day of June in the year aforesaid, after the sale; and that the remainder of the purchase money should be paid

before the delivery; that, the warehouse room and expenses of removal would be charged on all lots left uncleared after the time specified until such lots were taken away or resold; that, upon failure of complying with any of the said conditions, the deposit money should be forfeited, the lots uncleared within the time aforesaid should be resold by public or private sale, and the deficiency, if any, by such second sale, together with all charges attending the same should be made good by the defaulter or defaulters at that present sale. Averment, that by a certain memorandum printed at the head of the said catalogue, and which said memorandum and catalogue were affixed and annexed to the said conditions, he the plaintiff then announced that the stock comprised in the said catalogue had been measured to the yard's end, and would be delivered with *all [*821 faults and errors of description: that the purchasers were to pay, in addition to the amount of each lot, 1*s.*; and that all the small remnants must be cleared at the measure stated in the catalogue; as by the said conditions of sale and memorandum, reference being thereunto had, would more fully appear: of all which premises the defendant, before and at the time when the said goods were so put up and exposed to sale as aforesaid, to wit, on the said 3d and 4th days of June in the year aforesaid, respectively had notice. Averment, that on the said exposure to sale, on the said 3d day of June in the year aforesaid, the defendant was the highest bidder for, and then became and was in due manner declared to be the purchaser of, a certain lot of goods called "lot 19," parcel of the said goods so put up and exposed for sale under and subject to the said conditions and memorandums, consisting of, to wit, one piece of white drill which then measured divers, to wit, thirty-five yards and a half, at and for a certain price or sum of money, to wit, the price or sum of 4*l.* 5*s.* 9½*d.* being at and after the rate of 2*s.* 5*d.* per yard, then bid by the defendant for the same. And thereupon afterwards, to wit, on the day and year aforesaid, in consideration thereof, and that the plaintiff at the request of the defendant, had then promised the defendant to perform and fulfill all things in the said conditions of sale and memorandum contained, on the part of the vendor to be performed and fulfilled, he the defendant then promised the plaintiff to perform and fulfil all things in the said conditions of sale and memorandum on his the defendant's part, as such purchaser as aforesaid, to be performed and fulfilled. And although the defendant, in pursuance of the said conditions of sale and memorandum, ought to have cleared and taken away, and paid for, the said lot or parcel of goods, on Saturday the said 5th day of June in the year aforesaid, yet the *defendant (although often requested so to do,) did not, nor would at [*822 any time, on or before or after the said Saturday the said 5th day of June in the year aforesaid, clear or take away, or pay for, the said lot of goods or any part thereof, according to the said conditions of sale and memorandum, and his said promise; but on the contrary thereof, he the defendant suffered and permitted the said lot of goods to remain uncleared, and without taking away or paying for the same, on and after the said Saturday the said 5th day of June in the year aforesaid, being the day so appointed for taking away and paying for the same as aforesaid, and thereupon afterwards, and after the said Saturday the said 5th day of June in the year aforesaid, and whilst the said lot of goods remained uncleared and unpaid for as aforesaid, to wit, on the 28th day of September in the year aforesaid, he the plaintiff according to the said conditions of sale, and in pursuance thereof, did resell the said lot of goods so remaining uncleared and unpaid

for as aforesaid, that is to say, by public sale, at and for a certain price or sum of money, being a much less sum of money, to wit, the sum of 14*s.* 9½*d.* less than the amount of the sum of money so as aforesaid bid by the defendant for the same, and thereby there was a deficiency upon such second sale to a large amount, to wit, to the amount of the sum of 14*s.* 9½*d.*, over and besides the charges attending such second sale. Averment, that the plaintiff otherwise reasonably deserved to have of the defendant another sum of money, to wit, 1*s.* for the warehouse room of the said last mentioned lot, for and during the interval between the said 5th day of June, and the said second sale thereof; and also the sum of 1*s.* for such lot money in respect of the said lot as in the said memorandum mentioned; and that the reasonable and necessary charges attending such second sale
823*] of the said lot amounted to another sum of money, *to wit, 10*s.* 6*d.*, which said last mentioned several monies make together the sum of 1*l.* 7*s.* 3½*d.*, of all which said several premises the defendant afterwards, to wit, on the day and year last aforesaid, had notice, and was then requested by the plaintiff to pay him the said sum of 1*l.* 7*s.* 3½*d.*, and which he the defendant ought to have paid to the plaintiff according to the said conditions of sale and memorandum, and of the said promise of the defendant.

The declaration contained twenty-one similar counts in respect of twenty-one other lots.

Pleas: first, non assumpsit. Secondly, that the defendant did not become the purchaser of the said lots, or any, &c., *modo et formâ.* Upon both of which pleas issue was joined.

Thirdly, as to the causes of action in the declaration mentioned, so far as the same relate to the defendant's not clearing or taking away or paying for the said several lots of goods so purchased by him as in the declaration mentioned, that the said goods and chattels and lots were put up and exposed for sale as aforesaid, under and subject to a certain other condition of sale besides the said conditions in the said declaration mentioned, that is to say, that the purchaser of each lot, purchased by him, should be entitled to *inspect and examine* the lot purchased by him, for the purpose of ascertaining whether the same was of the proper quantity, quality and description according to the contract of sale thereof, before he should take away or pay for the same according to the said conditions, and that he should not be bound to take away or pay for the same without being allowed a reasonable time and opportunity for such inspection and examination. And the defendant became and was the purchaser of the said several lots as in the declaration mentioned, upon and subject to the condition in this plea
*824] mentioned, besides *the said conditions in the declaration mentioned. And further, that after the defendant became such purchaser, and before the said supposed breaches of his said promise, in respect of his not clearing or taking away or paying for the said several lots, or any or either of them, in the said declaration mentioned, to wit, on the said 5th day of June, A. D. 1841, being at a reasonable and proper time in that behalf, the defendant requested of the plaintiff to suffer and permit him, the defendant, to inspect and examine the said several lots so purchased by him as aforesaid, for the purpose of ascertaining whether the same respectively were of the proper quantity, quality and description, according to the said contract of sale, before he should take away or pay for the same respectively, according to the said conditions. Yet the plaintiff then, and from thence until the expiration of the said 5th day of June, A. D. 1841, and afterwards

from thence hitherto, refused to suffer or permit the defendant to inspect or examine, and hindered and prevented him from inspecting and examining, the said lots so purchased by him as aforesaid, or any or either of them, for the purpose for which the defendant requested such inspection and examination as aforesaid. And the plaintiff then and from thence hitherto wholly refused to suffer or permit the defendant to have, and hindered and prevented him from having, a reasonable time and opportunity for such inspection and examination of the said lots, or any or either of them; wherefore the defendant did not nor would clear or take away or pay for the said several lots of goods so purchased by him as aforesaid, or any of them, or any part thereof. And the defendant suffered and permitted the said several lots to remain uncleared, and without taking away or paying for the same, on and after the said 5th day of June, A. D. 1841, as he lawfully might for the cause aforesaid. Which are the said supposed breaches of promise in the *introductory part of this plea, and in the declaration mentioned. Verification. [*825

Fourth, a plea similar to the third, but stating the condition to be, that the purchaser should be entitled to *measure* the lots purchased by him, for the purpose of ascertaining whether the same were of the proper quantity according to the contract of sale thereof, before he should take away or pay for the same.

Replication to the third plea, that the said goods and chattels and lots were not, nor were any nor was either of them, put up or exposed to sale as aforesaid, under or subject to such other condition of sale, as in the said third plea is in that behalf mentioned, besides the said conditions in the said declaration mentioned, *modo et formâ*; concluding to the country. A similar replication was pleaded to the fourth plea.

Upon both of these replications issue was joined.

At the trial before ERSKINE, J., at the sittings for Middlesex after last Trinity term, the following facts appeared in evidence.

The plaintiff, who was an auctioneer, had put up to sale by auction, on Thursday and Friday, the 3d and 4th of June, 1841, a large quantity of mercery and woolen goods, subject to the following, among other, conditions, which were printed at the commencement of the catalogue of articles to be sold.

"3d. The purchasers are to pay down immediately a deposit of 5s. in the pound in part of payment for each lot—each deposit to be applicable to any lot purchased—and to give in their names and places of abode, if required; in default of which the lot or lots so purchased to be immediately put up again and resold.

"4th. The lots must be taken away with all faults, imperfections or errors of description, at the purchaser's expense, on Saturday, the 5th instant, after the sale, and the remainder of the purchase-money to be paid before the delivery.

*"5th. The warehouse room and expenses of removal will be charged on all lots left uncleared after the time specified, until such lots are taken away or resold. [*826

"Lastly, upon failure of complying with any of the above conditions, the deposit money shall be forfeited; the lots uncleared within the time aforesaid shall be resold by public or private sale, and the deficiency, if any, by such second sale, together with all charges attending the same, shall be made good by the defaulter or defaulters at this present sale."

At the head of the catalogue was the following annoucement:—

"Mr. Pettitt begs to announce that the stock comprised in this catalogue has been measured to the yard's end,) and will be delivered with all faults and errors of description; the purchaser to pay in addition to the amount of each lot, one shilling. All the small remnants must be cleared at the measure stated in the catalogue."

There were 485 lots in the catalogue: and the number of yards in each lot was stated. The goods were open to public inspection for two days preceding the sale. The biddings at the sale were at so much per yard. The defendant, who was present, was the highest bidder for the various lots in respect of which the action was brought. On the morning of Saturday, the 5th of June, the day on which, according to the conditions of sale, the goods were to be taken away, the defendant attended at the premises where the sale had taken place, and produced the money for the amount of his purchases, 175*l.*, but claimed a right to inspect and measure the goods before he paid over the money. The plaintiff's son, who acted as his clerk, refused to allow the defendant to do so; who thereupon declined to pay for the goods; and they were ultimately resold by the plaintiff at a loss of 31*l.* *827] 10*s.* It was *insisted at the trial, on the part of the defendant, that the conditions stated in the third and fourth pleas were implied by law, and that upon the evidence, as it then stood, the defendant was entitled to a verdict. His lordship was not of that opinion, but reserved leave to the defendant's counsel to move to enter a verdict for him upon that objection. Evidence was then proposed to be given on the part of the defendant, of the existence of a custom in the trade to the effect of the conditions stated in the third and fourth pleas. This was objected to by the plaintiff's counsel, upon the ground that parol evidence, to vary the printed conditions of sale, was inadmissible. The objection was overruled, and several witnesses were called for the defence, who were in the habit of making similar purchases by auction to a great extent, and who stated that they had always been accustomed to inspect and measure such goods before paying over the purchase-money, and that in no instance had permission to do so been refused. The conditions, however, under which the sales in question had taken place, were not produced; and it further appeared that the parties had frequently been permitted to take the goods to their own premises and there measure them, before payment.

In order to meet this evidence, several auctioneers were called on the part of the plaintiff, who denied the existence of any such custom or right as that set up by the defendant. They stated the usual course of business to be, (except in the case of customers who were known to them, and who were often permitted to take away goods they had purchased before payment, and even without making any deposit,) that when the purchase-money was paid over, a delivery order was given to the purchaser by the auctioneer or his clerk; that, upon the production of this order, the porter, *828] who had the custody of the goods, delivered them to the party *producing it; and that, after the purchaser had thus obtained possession of the goods, it was customary to allow him, if he thought fit, to measure them upon the premises, within the period allowed for clearing away; and if any deficiency was then discovered, to return a corresponding portion of the purchase-money. The printed conditions of another sale of goods by the piece were also produced, one of which conditions was, that if the quantity of any particular lot was not marked in the catalogue, the lot must be measured before the deposit was paid, in order to ascertain the amount of such deposit.

The learned judge left it to the jury to say whether any such custom of the trade existed as set up by the defendant; and if they should be of opinion that there was no such custom, he then directed them to find a verdict for the plaintiff. The jury, by their verdict, negatived the existence of the custom, and found for the plaintiff on all the issues, with 31*l.* 10*s.* damages.

Bompas, Serjt., on a former day in this term (November 3d) obtained a rule nisi, pursuant to the leave reserved at the trial, to enter a verdict for the defendant on the issues raised by the third and fourth pleas; or, in the alternative, for a new trial, upon the ground that the verdict, negativing the existence of the custom, was against the evidence.

Talfourd, Serjt., (with whom were *Crompton* and *Wordsworth*,) now (November 14th) showed cause. There are two questions in this case. The first, which is independent of the evidence, except as regards the conditions of sale, is, whether the third and fourth pleas are supported by the existence of any implied conditions in law, such as are set up by the defendant, to be superadded to the printed *conditions; as to this point, the affirmative rests upon the defendant. The second question may be considered as branching into two—whether the parol evidence, as to the alleged usage in the trade, should have been admitted; and whether such evidence, having been admitted, the verdict was against the evidence. [*829

First. No such conditions are implied by law in the present case as those which are set up in the third and fourth pleas. It is important to remember that the plaintiff is not the owner of the goods, but an auctioneer, employed to sell them, who stands in the relation of middle man between the two parties—the vendor and the purchaser. The goods are proved, after they had been lotted out, to have been on view before the sale. Each lot constitutes a single chattel, which is described as of a certain measurement. If, after a purchase, it turns out that any particular lot falls short of the alleged measurement, the purchaser may have his cross action. The deposit is paid on the estimate made of the contents of each lot. The purchaser, instead of paying the deposit, might pay the whole money and take away the goods at once; but, the sale taking place on a Thursday, he has a license to leave them on the premises till the following Saturday. That, however, is merely for his convenience, and cannot vary the original contract. Suppose this were an ordinary sale of so many yards of mercery, with liberty to the purchaser to leave the goods on the premises of the vendor for a day, could it be said that when he came to take them away he might insist on having a re-admeasurement of the articles? In that case no such condition would be implied by law; and the fact of the sale in this instance having been by auction makes no difference. In either case there would be an entire and complete contract, at a specific price. The plaintiff's clerk would be the agent of both *parties; *Bird* v. *Boulter*, 4 B. & Ad. 443, 1 Nev. & M. 313. It will be argued that it would be hard that a party should not have an opportunity of examining the goods to see that they correspond with the description of them; but the vendor must deliver the right quantity at his peril. In the case of the purchase of a quantity of plate, as of a specified weight, after the contract was complete all but the delivery, the purchaser would not be entitled to have the plate weighed at the time of its delivery. So in the case of the purchase of wine, it could not be contended that a purchaser would have a right to taste every bottle before he paid his money. In this case the pro- [*830

perty was, in fact, changed under the statute of frauds,(a) by the payment of the deposit. The fourth condition of sale is express, that "the lots must be taken away *with all faults, imperfections, or errors of description*, at the purchaser's expense, on Saturday the 5th instant after the sale, and *the remainder of the purchase-money to be paid before delivery*." There is also the memorandum, that "the stock had been measured, (to the yard's end,) and *will be delivered with all faults and errors of description*." The memorandum, it is true, also says that "all the *small remnants* must be cleared at the measure stated in the catalogue;" and it will probably be argued that the expression of the one excludes the other, and that therefore the other articles were to be subject to remeasurement; but the obvious meaning of this clause is, that the "small remnants" are to be cleared absolutely "at the measure stated"—without any return of a portion of the purchase-money, which would be made in case of a deficiency being discovered after the delivery of the other articles.

*831] *Secondly, as to the new trial. The terms of the contract being precise and unambiguous, parol evidence should not have been allowed, to explain or vary it. Lord Eldon, in *Anderson* v. *Pitcher*, 2 B. & P. 164, 168, expressed a regret that parol evidence had ever been admitted where the contract was in writing, and that parties had not been left to express their own meaning by the terms of the instrument. But the courts undoubtedly will admit a parol explanation of the understanding upon which parties have contracted; as, for instance, to show that the term "thousand," as applied to rabbits, meant in that part of the country where the contract was made, one hundred dozen; *Smith* v. *Wilson*, 3 B. & Ad. 728. [TINDAL, C. J. In the same way as evidence would be admissible to show that the term "a hundred-weight" means "one hundred and twelve pounds weight."(b)] It is, in fact, in such a case, as though the term used were in a foreign language, which required translation and explanation. But in the present case the object of the evidence was to import a new term into the conditions. The evidence was, however, admitted, subject, of course, to a discussion in this court as to its admissibility. But even upon that evidence, the verdict must stand for the plaintiff. The defendant called several parties who were purchasers—not a single auctioneer—who spoke generally as to the existence of the custom; but in no instance were the conditions of sale produced; and the privilege which the witnesses had exercised of measuring the goods before payment, looked more like a permission granted them as a favour than the exercise of a right. The plaintiff, on the other hand, called several auctioneers, who, in fact, disproved the custom. They proved that, in many cases where the customers were known, the goods were allowed to be taken away,
*832] even without any deposit being paid; and the defendant might *as well set up that, as a custom of the trade, in contravention of the express conditions of sale.

Bompas and *Channell*, Serjts., (with whom was Miller,) in support of the rule. The third and fourth pleas may be supported on the broad rule of law, or upon the terms of the particular contract. A reasonable condition will always be implied in law; as in *Haynes* v. *Holliday*, 7 Bingh. 587, 5 Moo. & P. 573, where the defendant had agreed to convey on board his ship a *boat* for the plaintiff of certain dimensions; the plaintiff

(a) No property is changed *under* or *by* the statute of frauds, though in some cases that statute prevents, and in others, it forbears to prevent, a change of property.

(b) Vide per Littledale, J., 3 B. & Ad. 732.

presented a *decked* boat, within the size agreed upon; and it was held that evidence was properly received of a practice to take off the decks of such boats, when they were stowed on board ships; and that the plaintiff having declined to permit his deck to be removed, could not sue the defendant for breach of agreement.(a) So, in the case of a bill of exchange, the pleadings always state that the bill became due at the time mentioned in the bill, without reference to the legal condition as to the three days of grace, which is imported into the contract.(b) If a man buys a bin of wine, he has a right to see that it *is* the bin he has bought. If he buys *woollen* goods, he has a right to see that the goods delivered are not *linen*. So, in the case proved at the trial, where the measurement of certain lots was not mentioned, the law would imply a condition that the lot should be measured before the party could be called on to pay. [Tindal, C. J. In that contract there would be nothing to exclude the implied condition; the question is, whether in this case there is not something.] In *Lorymer* v. *Smith*, 1 B. & C. 1, 2 D. & R. 23, it was decided that the buyer of a parcel of wheat, by sample has a right to inspect the *whole in bulk, at any proper and convenient time; and if the seller refuses to show it, the buyer may rescind the contract. [MAULE, J. It did not appear there that the wheat was bought by individual samples.] ABBOT, J., in giving his judgment in that case, says, "It appears that, by the usage of the place, the buyer had a right to inspect the wheat in bulk; which is so reasonable, that, without any such usage, the law would give him that right." It might have been argued there, as it has been in this case, that the seller took the risk that the wheat delivered was according to the sample. *Howe* v. *Palmer*, 3 B. & Ald. 321, was decided upon the same principle. The defendant may take his stand upon the fourth plea, by which his right to measure the goods is claimed, in order to ascertain the quantity, before payment. Now, it is admitted that where a party buys by measure, he has a right to measure at some time; the only question is at what time. [MAULE, J. It is only admitted as proved at the trial. *Talfourd*, Serjt. It is only admitted on the part of the plaintiff, that the defendant, in case of deficiency, would have a ground of cross action, not that he would have a right to make any deduction in the payment. MAULE, J. If a lot, purporting to consist of twenty yards were sold at a fixed price,(c) and it turned out that the lot contained only nineteen yards and a half, it does not seem to follow, as a matter of law, that the purchaser might deduct the value of the half yard.] The purchaser buys by the yard, and he has a right to see he has the quantity described. Then the statement in the memorandum that "all the small remnants must be cleared at the measure stated in the catalogue," obviously means that the measure stated in the catalogue was not to be taken as conclusive in other instances. *Expressio unius est exclusio alterius*. Suppose a sale by *private contract of so many yards of any article; and the contract, in terms, gave liberty to the purchaser to inspect the goods to ascertain their quality, but was silent as to measuring them; and an earnest was paid, and the goods were to be taken away at a later time; would it not be a good plea to an action for non-payment of the residue of the purchase money, that the defendant was ready and willing to pay such residue, if he had been allowed to

[*833] [*834]

(a) See *Bottomley* v. *Forbes*, 5 N. C. 121, 6 Sc. 866.

(b) In pleading a bill is stated to become due "according to its tenor and effect." Supposing a precise day to be mentioned, it would be the last day of grace.

(c) Not at a fixed *rate*, but at an entire price,—*per aversionem*.

measure and ascertain the quantity? [TINDAL, C. J. The contest is, whether the party has a right of inspection, before or after the delivery of the goods. The payment is to be before delivery.] The term *cleared* in the memorandum must refer to paying and taking away. Inspection is not the same as delivery. A party would have a right to inspect before bidding; that would not be a delivery. The term *delivery* in the fourth condition is synonymous with *taking away;* and that condition means that there must be payment before the goods are delivered to be taken away; but that does not exclude the previous right of inspection. There may be a delivery to inspect; quite distinct from a delivery to take away. In the former case no property would pass. If a man goes into a shop and asks to look at an article, and the shopkeeper *delivers* it to him to look at, and he runs off with it, that would be a felony. [TINDAL, C. J. There is no doubt of that.] Or if a party bids at an auction, without any intention to pay, and the thing he has bid for is delivered to him and he takes it away, it is submitted that also would be a felony. [TINDAL, C. J. Perhaps it would; but that does not appear to advance the argument.] It shows that the phrase "delivery" may be used in different senses. The general rule is, that upon the sale of a chattel, the property vests in the vendee; but he cannot take away the article purchased without payment, the vendor having a lien upon it. That rule does not apply where credit is given. In this
835*] *case the residue of the price is to be paid at a future day; but the words "the remainder to be paid before delivery" are introduced into the condition to preserve the vendor's lien; as it would otherwise be a case of credit. The argument on the other side would make the word "delivery" mean only a qualified delivery. The payment of the "*residue*" presupposes a computation of the quantity. If an application to inspect the goods were made at an unreasonable time or in an improper manner, it might be objectionable; but no such matter is set up. In the present case a vendee could not take away the goods before Saturday the 5th of June. The words of the condition are, that "the lots must be taken away on Saturday," not "on or before." A purchaser could not have sued for non-delivery before the Saturday.

With regard to the second point, as to the new trial, the verdict was certainly against the evidence. The auctioneers were, of course, anxious to cut down their own responsibility. They admitted that sometimes parties were allowed to measure; and no one instance of refusal was proved. A party is not to pay for more than is actually delivered to him; and there is nothing unreasonable in a custom of trade that a purchaser shall be entitled to ascertain before delivery what quantity is to be delivered to him, rather than that he shall be driven to his cross action.

TINDAL, C. J. This is a rule obtained by the defendant, calling on the plaintiff to show cause why a verdict should not be entered for him, the defendant, or why there should not be a new trial. It is the case of a sale of goods by auction; and the first part of the rule is grounded upon two conditions, which are set forth in the third and fourth pleas, and which, it is insisted on the part of the defendant, are implied by law, in addition to
*836] the printed conditions under which the *sale took place. It is said that in the case of a sale under such circumstances as the present, the law will imply a right on the part of the purchaser, before payment of the purchase money, to inspect and to measure the articles bought, in order to enable him to see whether they conform with the description of them given in the printed catalogue of sale.

The first question is, whether in a sale by auction circumstanced as this case is, the law will imply such conditions or either of them; and I think it will not. The stress of the case is, whether the purchaser has the right to inspect and measure the goods before payment of the money; for it is not denied that he may do so before he takes them away and, if the measurement should turn out to be short, that he would be entitled to a deduction from the purchase money. An argument has been raised on the part of the defendant, upon the cases of *Howe* v. *Palmer* and *Lorymer* v. *Smith*, that by law a purchaser may rescind the contract if he is not permitted to inspect the commodity he has purchased; but in both of those cases the purchase was by sample, and the commodity was in bulk, and therefore it was held, that the purchaser had a right to see that the bulk corresponded with the sample. But the present is not the case of the purchase of an uncertain quantity or of a certain quantity out of an uncertain bulk, but it is the purchase of a certain thing, which the purchaser has a right and power to inspect before the sale. There is also the circumstance of the measurement being made in the first instance, not by the seller himself, but by a third party, the auctioneer, who stands as a middle man between the parties; which constitutes a material difference between such a case as the present and that of a sale in a shop. If the law is called upon to impose a condition in such a case, it will look to the convenience of a rule sought to be introduced; and it will not impose a condition where the *preponderance of inconvenience would be against it. It appears [*837 that in this sale there were 488 lots sold; and it certainly would seem that the inconvenience would be greater if there were to be established a right on the part of each purchaser to measure any lot before payment of the purchase money. The purchasers may be unknown persons, and the stake is much greater on the part of the auctioneer who is a known person of responsibility; and it is not likely that any thing more than a small quantity will be in dispute between the parties. Upon principle, therefore, I am of opinion, that in a sale of this sort, no such conditions are to be imported as those set up by the defendant.

In this case too there are printed conditions of sale, and it appears to me that the conditions sought to be imported would materially vary those that are printed. By these it is stipulated that a deposit is to be made in the first instance, and that the remainder of the purchase money is to be paid "before the delivery" of the goods; that is, according to the evidence, before the delivery order is given and the goods are handed over to the purchaser. That the term "delivery" in the fourth condition does not mean the same as "taking away," clearly appears by the following paragraph of the same condition which stipulates that "warehouse room will be charged on all lots left uncleared after the time specified, until such lots are *taken away*, or resold." There are therefore three things to be done; the payment of the remainder of the price, the delivery of the article, and the clearing or taking it away—which are each distinct and separate; and I can readily understand that the auctioneer may have intended by this contract to avoid frivolous objections and the inconvenience that would ensue from a different course.

As to the motion for a new trial, it appears that there was evidence on both sides. The witnesses called for the *defendant state that on [*838 the occasion of different purchases at sales by auction, they have inspected the goods, they have bought, before payment of the price: but they do not produce the conditions of sale under which such purchases

were made; and it may have been a mere favour to them that they were permitted to make the inspection. Upon the whole therefore I am of opinion that this rule must be discharged.

COLTMAN, J. This is the case of a sale by an auctioneer, an intermediate person between the seller and the purchaser. The purchaser has the property vested in him by the sale; and looking at the fourth of the conditions under which this sale took place and the memorandum at the head of the catalogue, I understand that the purchaser must take the goods notwithstanding any "faults, imperfections or errors of description." Now the expression of "faults" may, I think, refer to the *quantity*, as well as to the *quality*, of the article purchased. At one time I entertained some doubt whether it would refer to quantity; but, coupled with the memorandum, I think it must be taken to refer to quantity as well as quality. And unless there is something amounting to fraud, I think the purchaser is bound by the terms of these conditions. It is stated in the fourth condition, that the remainder of the purchase money is to be paid before the delivery; and in the memorandum, that all small remnants must be cleared, that is, be taken away, at the measure stated in the catalogue. This does not show when the final adjustment is to take place; but the term "before delivery" does not mean the same as "on delivery." It would seem rather to point out that the payment is to be made before the commencement of the act by which the goods are to be handed over to the purchaser. I agree that the weight of convenience is in favour of this view.

*839] *Upon the other point it seems the evidence was fairly before the jury, whose disposition possibly would be rather adverse to the conditions than favourable to them; and, the sum recovered being so small, I concur that there should be no new trial.

ERSKINE, J. I am of the same opinion, and think the verdict ought not to be disturbed. The sale in this case was conducted as usual in auctions, by lots; each lot was numbered; and in the catalogue the measurement was stated. The defendant before or at the time of the sale, had an opportunity of inspecting the articles put up for sale, and of ascertaining what was contained in any particular lot for which he might intend to bid. He then purchased a number of lots at so much per yard, of a certain quantity, according to the statement in the catalogue. The plaintiff in his declaration sets out the conditions of the sale as they were printed in the catalogue, as forming the contract between him and the defendant; but the defendant says there was another implied condition on which the sale was conducted, namely, that a purchaser should have an opportunity of inspecting and measuring the lots he had purchased before the payment of the price; and we are asked to import this condition into the contract of sale, as being implied by law. Now certainly there would be nothing directly inconsistent with the contract of sale by auction, that a party should have an opportunity of inspecting and measuring the goods he had purchased before payment of the purchase money; but we must have something more than this, and must look at the printed conditions under which the contract took place. The fifth condition, I think, shows that "clearing" means taking away. The fourth seems studiously to avoid the use of the word "clearing." There are then, as observed by my lord, three acts, payment, delivery, and *840] clearing. The *plaintiff contends that the payment must precede the delivery, and that no inspection or measurement can take place before payment; although he admits, that there may be an inspection and measurement before the clearing. The defendant on the other hand insists

that the inspection and measurement are to take place before the payment. It is evident from the printed stipulation which comes after the conditions of sale, that the purchaser is not to be bound by the measure stated in the catalogue, inasmuch as that stipulation applies only to small remnants; but this brings us back again to the question, whether the purchaser has a right to have the quantity ascertained before the delivery; and I think he has no such right. The convenience of the respective parties would certainly seem to be that the measurement should take place after the delivery.

As to the other branch of the rule relating to a new trial, I agree as to the effect of the evidence.

MAULE, J. I also am of opinion that this rule should be discharged. This is the case of a sale by auction of certain articles numbered in a catalogue, and described as being of a certain kind and quantity. The bidding is of so much money for so many yards as described in the catalogue. The sale takes place under printed conditions; but it is said that there is a further condition implied, namely, that the purchaser has a right to see whether the article purchased corresponds with the description in the catalogue, in order that he may have the opportunity of raising an objection in case of any non-conformity. The defendant does not contend for a right to refuse the article, but merely for the right to measure it, in order to claim compensation in case of any deficiency in the specified length. Now the express contract is, that the goods are to be paid for before delivery; but even if that were not expressed *in the contract, I should think that, if a person buys an article at an ascertained price, the payment of the price and delivery of the article should be contemporaneous, and that the purchaser is not entitled to delivery without payment. According to the ordinary understanding of the English language, as soon as an article is put into the hands of a party, that is a delivery to him; the lien of the vendor is then parted with and the vendee is in possession: if the lien still continued, how could it be enforced? It must be either by forcibly taking the article from the vendee, or by imprisoning him with the article in his possession; either of which would be a very inconvenient course. The memorandum at the head of the catalogue clearly points out a difference between ordinary lots and small remnants. Now there can be no doubt that the putting of one of these remnants into the hands of a vendee would be a delivery; then ought it not to be so as to a whole piece? Can a party have a right to take away the one and not the other? I own this does not appear to me to be a question as to a right to measure the article after delivery—because then the purchaser has in fact a right to do any thing he pleases with it—he may cut it up or burn it, if he be so minded—it is his own property. The purchaser is under an obligation to clear the goods on a certain day; but he is admitted to object to there being short quantity after delivery and before clearing, so as to have a deduction allowed; but this is by the custom of the trade; if the deficiency is discovered after clearance, it would seem he is not entitled to the deduction. And, as an error in the measurement may be accidental, this appears to be a reasonable way of conducting the business. The inconvenience that has been pointed out would be a good reason for not importing a rule, which, though not absolutely inconsistent, is *certainly very little in accordance, with the condition as to payment taking place before delivery.

[*841] [*842]

With regard to that part of the motion which prays for a new trial, it rather seems that the result of the evidence is, that the auctioneer may

generally insist on having the money before the delivery of the goods. At any rate I cannot see that the verdict was contrary to the evidence.

Rule discharged.

DOE dem. JONES v. ROE.

A notice in ejectment, entitled in C. P. to appear in Q. B., is not sufficient.

Talfourd, Serjt., applied for a rule nisi for judgment against the casual ejector. The notice at the foot of the declaration was entitled in this court, but the notice was to appear in the court of Queen's Bench. The service was upon the daughter of the tenant, and she pointed out the mistake at the time. It appeared that the declaration had come to her father's possession.

Per curiam: Rule refused.

*943] ## *DOE dem. STORY v. ROE.

Service of a declaration or ejectment upon a person found upon the premises, but not shown to be resident there,—held to be insufficient.

Channell, Serjt., moved for judgment against the casual ejector. From the affidavits it appeared that the premises in question were held by one Benjamin Purser as tenant to the lessor of the plaintiff under an agreement, and the tenancy was put an end to by a notice given by the tenant to quit at Lady-day last. Purser went to reside in Ireland, and he informed the lessor of the plaintiff by letter, that he had left the keys with one of his men, with directions to take them to him to enable him to possess himself of the premises. On applying for possession at the expiration of the notice, the lessor of the plaintiff was referred by the tenants in possession to one William Fryer, who claimed to be the landlord of the premises. On the 1st of November instant a clerk to the attorney of the lessor of the plaintiff went to the houses for the purpose (as his affidavit stated) of serving the declarations in ejectment upon "the tenants in possession, whose names were, as the deponent was informed and verily believed, William Banks and Joseph Banks;" the affidavit further stated that the deponent found the outer doors fastened, and, on his knocking thereat, was answered by "two women" from the second floor windows of the said houses, who refused to open the doors, but referred the deponent to William Fryer; that the deponent called again, with the same result, and, after nailing a copy of the declaration and notice to each of the outer doors, and explaining the same and the reason of his so nailing them to the doors, in the presence and hearing of "the said two women" and other persons then and there as-
*844] sembled, the deponent proceeded to the residence of William *Fryer, to whom he delivered and explained another copy of the declaration and notice, and who threatened to have the deponent locked up if he annoyed his tenants.

TINDAL, C. J. The service may be good as against Fryer, but not as against the others, for the women are not shown to be part of the family. The affidavit is altogether very loose.

Per curiam:

Rule granted as against Fryer; refused as against the other parties.

TEBBS v. BARRON.

Writ of summons in assumpsit endorsed for 150*l.*; particulars for the same amount. Damages in declaration laid at 10*l.* only. Verdict for 150*l.* The court refused to amend the issue and the record by increasing the damages laid in the declaration to 150*l.*, but granted a new trial *on payment of costs*, with liberty to the plaintiff to amend.

Talfourd, Serjt., on a former day in this term (November 3d) obtained a rule nisi to amend the issue and the record by increasing the damages laid in the declaration from 10*l.* to 150*l.*, or for a new trial. The action was brought to recover a compensation for services; the writ was endorsed for 150*l.*, and the particulars claimed that sum, but, by a clerical error, the damages at the end of the declaration (which was in assumpsit) were laid at 10*l.* The plaintiff had recovered a verdict for 150*l.* The learned serjeant cited *Tomlinson* v. *Blacksmith*, 7 T. R. 132.

Bompas, Serjt., now showed cause. The amendment prayed for certainly cannot be granted in the present *stage of the proceedings. [*845 In *Clevely* v. *Morris*, 2 W. Bla. 1300, where a jury on a writ of inquiry had assessed more damages than were laid in the declaration, and the judgment was entered accordingly, the court of King's Bench would not allow the record to be amended by taking judgment for only the amount of damages in the declaration, or by suffering the plaintiff to enter a *remittitur* for the surplus.(*a*) But on the authority of *Tomlinson* v. *Blacksmith*, the rule for a new trial cannot be resisted, with power to the plaintiff to amend the declaration, but it must be upon payment of costs. In the report of that case nothing is said about costs; but upon a search at the rule office, it appears the rule was so drawn up.(*b*) In *Wright* v. *Lainson*, 2 M. & W. 739, where a wrong plea had been pleaded, the court would only grant a new trial with liberty to amend, on payment of costs. [MAULE, J., suggested that the damages might be reduced; but the learned serjeant said he would prefer having a new trial.]

Talfourd, Serjt., in support of the rule. *Tomlinson* v. *Blacksmith* was an action for unliquidated damages on a special contract. Here, by reason of the particulars of demand, the defendant could not have doubted what sum the plaintiff claimed.

TINDAL, C. J. The defendant on the other hand may have known he could not be called upon to pay more *than the 10*l.* We shall [*846 adopt the rule in *Tomlinson* v. *Blacksmith* as a precedent. The plaintiff may take a rule for a new trial, on payment of costs, with power to amend his declaration by enlarging the amount of damages.

Per curiam:

Rule absolute accordingly.

(*a*) The reporter states, as the reason why the court refused the motion, as follows:—"It being out of time, and the plaintiff having acted oppressively in suing out execution and taking the defendant's books (who was a gentleman at the bar) in a very insolent and invidious manner. The judgment was consequently reversed in error." As to entering a *remittitur* under such circumstances, see *Pickwood* v. *Wright*, 1 H. Bla. 643; *Usher* v. *Dansey*, 4 M. & S. 94. See also *Kloss* v. *Dodd*, 4 Dowl. P. C. 67.

(*b*) The learned serjeant produced an office copy of the rule, in the terms stated.

LAWRENCE PHILLIPS and Another v. AFLALO.

B. being indebted to A. in a large sum of money, signed a document in these terms: "I engage to ship for your account at M., in any vessel you may engage, &c., from forty to sixty tons Morocco produce, on the following terms, &c. And I also engage that the

above shall be shipped by my agent there, within thirty to fifty days from the time of the said vessel being ready to take in her cargo, &c. I do further engage to ship produce on similar terms to the above, to the amount of what I may remain indebted to you after the first shipment as above, within six months from the sailing of the first vessel." A. sent out a vessel, and received the goods first mentioned.

In an action to recover the residue of the debt, held that the agreement could not be set up as an answer, as it was optional on the part of A., whether he would send out a second vessel; and therefore that it did not support a plea, alleging an agreement on the part of A. to send out a second vessel, and receive the goods in liquidation of the debt.

ASSUMPSIT. The first count was upon a bill of exchange for 875*l* at six months, drawn by the plaintiffs upon and accepted by the defendants. The second count was upon a similar bill at nine months. The third upon a bill for 1250*l*. at fourteen months, between the same parties. There were also counts for goods sold and delivered, for money lent, money paid, interest, and upon an account stated.

Pleas: first, as to the first, second and third counts, and as to a certain sum to wit, the sum of 4010*l*. 7*s*. 4*d*. parcel of the monies in the fourth and subsequent counts of the declaration mentioned, *actionem non*, because
*847] that heretofore, and after the making and the acceptance by *him of the said several bills of exchange, and after the said sum of 4010*l*. 7*s*. 4*d*. parcel, &c., became due from him to the plaintiff, to wit on the 19th of May, 1837, it was proposed and agreed by and between the defendant and the plaintiffs, that the defendant should ship for the account of the plaintiffs in certain parts beyond the seas, to wit at Mogadore, in any vessel the plaintiffs might engage in part, or despatch for that purpose, as might best suit their convenience, from forty to sixty tons of Morocco produce which should be ready for shipment on the following terms free on board, *videlicet*, wool at $12½ (dollars) per quintal of 100 pounds, Mogadore weight, and sheep skins at $6½ (dollars) per dozen of twelve skins. And the defendant did then engage and agree to and with the plaintiffs, that the above mentioned articles should be shipped by his agent at Mogadore aforesaid, within from thirty to fifty days from the time of the said vessel being ready to take in her cargo; that the defendant's account with the plaintiffs should be credited with the amount of invoice on the date of the bill of lading, at the exchange of 4*s*. 3*d*. English per dollar; any other goods that might be shipped with the above mentioned, should be for the account and at the risk of the shippers; and it was also then further agreed by and between the plaintiffs and the defendant, that the defendant should ship, for the account of the plaintiffs, produce on similar terms to those above mentioned, to the amount of what the defendant might remain indebted to the plaintiffs, after the first shipment, as above, within six months from the sailing of the first vessel. And the plaintiffs then, in consideration of the said agreement on the part of the defendant to be by him performed and fulfilled, agreed with the defendant, that they, the plaintiffs, would accept, receive and take payment of the said three several bills of exchange, and the sums of money thereby secured and due and owing
*848] thereon to the plaintiffs, in *the said first, second and third counts, &c., and of the said sum of 4010*l*. 7*s*. 4*d*. parcel, &c., in the introductory part of this plea mentioned; and that the same might be liquidated and paid to them by the said shipments so agreed to be made by the defendant as aforesaid. Averment: that the defendant from the time of making the said agreement in manner and form aforesaid, and thence continually hitherto, hath been ready and willing to perform and fulfil the same in all things on his part and behalf to be performed and fulfilled; and to

ship such produce as aforesaid upon the terms and in the manner aforesaid. And that the defendant, confiding in the said agreement of the plaintiffs, afterwards, and within a reasonable and proper time and without delay, to wit on the said 19th day of May, did purchase and provide at Mogadore aforesaid, the said produce, that is to say, sixty tons of Morocco produce, ready for shipment, on the terms and conditions in the said agreement mentioned; and that pursuant to his said agreement, his agent there, to wit, at Mogadore, was at all times after the making of the said agreement, ready and willing to ship the said sixty tons of Morocco produce on board any vessel engaged by the plaintiffs, or despatched by them for that purpose, at Mogadore, within from thirty to fifty days, from the time of any vessel engaged or despatched by the plaintiffs for that purpose being ready to take in her cargo, according to his said agreement; and further that from the time of making the said agreement thence hitherto, he, the defendant, has been always ready and willing to ship produce on similar terms to the above to the amount of what the defendant remained indebted to the plaintiffs after the first shipment as above, within six months from the sailing of the first vessel: and that the defendant relying on the said agreement of the plaintiffs, did afterwards, to wit, on the said 19th day of May, and on divers days, &c., lay out and *expend divers large sums of money, to wit, 2000*l.*, and purchased and provided sixty tons of Morocco produce ready to be shipped for the account of the plaintiffs according to the said agreement, and divers, to wit, 5000 other tons of produce as aforesaid, on similar terms to the above, to liquidate and pay the amount or balance of what he was indebted to the plaintiffs, after shipment of the said sixty tons, to wit, 8000*l.*, and was ready and willing to ship the same, according to the said agreement and terms in that behalf mentioned and specified; which said produce of sixty tons, so provided by the defendant, as aforesaid, and the said other tons, to wit 5000 tons, of produce, were at the time they were so provided and are of greater value than the monies in which the defendant was indebted to the plaintiffs, at the time of the commencement of this suit, and of the sums in the introductory part of this plea mentioned, to wit of the value of 10,000*l.*, ready to be shipped to and for the plaintiffs, as aforesaid. And the defendant, according to his said agreement, had and provided the said divers, to wit, sixty tons and the said others, to wit, 5000 other tons, as aforesaid, ready to be delivered, according to the said agreement in that behalf made as aforesaid; of all which several premises the plaintiffs during all that time from the time of the making of the said agreement had notice; yet that, although the plaintiffs, in pursuance of the said contract and agreement, engaged and despatched a certain vessel called *The Ruth* to receive on board thereof, forty tons of Morocco produce aforesaid, of the value of a large sum of money, to wit, 1385*l.* 7*s.* 4*d.*, and although the defendant did then, that is to say on the 1st day of January in the year of our Lord 1838, put on board of the said ship or vessel, *The Ruth*, divers, to wit, forty tons of Mogadore produce aforesaid, to wit, wool and sheep skins, according to the said agreement, within thirty to fifty days from the time *of the said vessel being ready to take in her cargo, at Mogadore aforesaid, according to the said agreement, and the terms and conditions thereof, as agreed upon as aforesaid; and although the plaintiffs afterwards, to wit, on the day and year aforesaid, and before the commencement of this suit, had and received the forty tons of Morocco produce, so shipped as aforesaid, and upon the terms and conditions of the said agree-

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ment so entered into by the plaintiffs and defendant as aforesaid, nevertheless the plaintiffs did not, nor would, engage or despatch any vessel as aforesaid, for the residue of the said sixty tons or any of the said other produce, or any vessel whatever, for the residue of the said produce so provided as aforesaid; but have during all that time wholly neglected and refused, and still neglect and refuse so to do. Verification, and prayer of judgment.

Secondly, as to the residue of the moneys and causes of in the fourth action and subsequent counts, *non assumpsit.*

Thirdly, as to the sum of 647*l.* 6*s.* 11*d.* parcel of the money in the declaration mentioned, payment. Verification, and prayer of judgment.

Replication to the first plea; that it was not proposed and agreed by and between the defendant and the plaintiffs, that the defendant should ship for the account of the plaintiffs in certain parts beyond the seas in any vessel the plaintiffs might engage in part, or despatch, for that purpose, as might best suit their convenience, from forty to sixty tons of Morocco produce, which should be ready for shipment on the said terms in the plea mentioned; and the defendant did not then agree with the plaintiffs that the said articles should be shipped as in the said plea mentioned; and that the defendant's account with the plaintiffs should be credited with the amount of invoice on the date of the bill of lading, as in the said plea mentioned, and that any other goods which might be shipped should be for the accoun

*851] *and at the risk of the shippers; and it was not then further agreed by and between the plaintiffs and the defendant that the defendant should ship, for the account of the plaintiffs, produce on similar terms to those above mentioned to the amount of what the defendant might remain indebted to the plaintiffs, after the first shipment as above, within the said time in the said plea mentioned; and the plaintiffs did not agree to and with the defendant that they, the plaintiffs, would accept, receive and take payment of the said three several bills of exchange, and the sums of money thereby secured and due and owing thereon to the plaintiffs, in the said first, second and third counts of the declaration mentioned, and of the said sum of 4010*l.* 7*s.* 4*d.* parcel, &c., in the introductory part of the said first plea méntioned; and that the same should be liquidated and paid to them by the said shipments, *modo et formâ*; concluding to the country, upon which issue was joined. Issue was also joined upon the plea of non assumpsit as to the residue, and upon a replication traversing the plea of payment.

At the trial before TINDAL, C. J., and a full special jury, at the sittings for London after last term, the defendant began; and it appeared from the evidence, which was chiefly documentary, that the plaintiffs, who were merchants in London, had for a long period been engaged in extensive mercantile transactions with the defendant, who also resided in London, but had connections in Morocco. The result of these transactions was, that in the early part of 1837 the defendant was indebted to the plaintiffs to the amount of 7010*l.* 7*s.* 4*d.*; and on the 4th of that month, the defendant having been pressed by the plaintiffs for a settlement of their account, he sent them a letter, accompanying certain papers and accounts, wherein was the following passage:

*852] "Mr. Aflalo loses no time in writing on this subject, to *show how anxious he is to meet Messrs. Phillips' wishes, and after mature consideration, thinks it better to be indebted to his relations on the other side than to Messrs. Phillips; to effect which he is willing to put

from forty to sixty tons of wool or sheepskins, or saltpetre, at the present market price at Mogadore, free on board any vessel they may bargain for part of, from America, and which could remain there for that purpose from thirty to fifty days. On arranging accounts after the shipment, if any balance should remain due to Messrs. Phillips, Mr. Aflalo pledges himself to ship further to that amount on similar terms; but if, on consideration, they should think proper to make fresh arrangements, and to send two or three vessels to bring cargoes similar to the before mentioned, Mr. Aflalo will be happy to forward their views, and has no doubt that it would be to their mutual advantage."

A document in the form of a letter was subsequently drawn up by the defendant on the basis of the proposal contained in the letter of the 4th of May. This document was sent to the plaintiffs, one of whom made some verbal alterations in it, and it was then returned to the defendant, who made out a fresh copy, embodying the alterations, and signed and sent it to the plaintiffs. This document was as follows:—

"49 *Great Prescot Street.*

"Messrs. Jonas Phillips & Sons. 19th *May*, 1837.

"Gentlemen:

"I do hereby engage to ship to your account at Mogadore in any vessel you may engage in part, or despatch, for that purpose, as may best suit your convenience, from forty to sixty tons Morocco produce, which may be ready for shipment, on the following terms: free on board $12¾ per quintal of 100 pounds Mogadore weight, and sheepskins at $6¾ per dozen of twelve skins; and I also engage that the above shall be shipped by *my agent there within from thirty to fifty days from the time of the said vessel being ready to take in her cargo; my account with your house to be credited with the amount of invoice on the date of the bill of lading, at the exchange of 4*s*. 3*d*. English per dollar. Any other goods that may be shipped with the above to be for the account and risk of the shippers. [*853

"I do further engage to ship produce on similar terms to the above to the amount of what I may remain indebted to you after the first shipment as above, within six months from the sailing of the first vessel.

(Signed) "J. Aflalo."

This was enclosed in the following letter:

"Mr. Aflalo presents his compliments to Messrs. Jonas Phillips and Sons, and has the pleasure to enclose the contract agreed upon: the letter of introduction to Messrs. A. Courcoss and Co., of Mogadore shall be handed on Monday.

"49 *Great Prescot Street*, 19th *May*, 1837."

A considerable body of further correspondence was given in evidence; but as the only point in the case turned upon the construction of the first document, dated the 19th of May, it is not necessary to set out any other portions.

On the part of the plaintiffs it was contended, that the document of the 19th of May was only a proposal by the defendant, and that there was no evidence to affect the plaintiffs with the adoption of the whole of such proposal, or any thing to show a contract binding on them further than as regarded the cargo sent by the Ruth: and also, that the question turning upon the construction of a written document, it was one of law and not of fact for the jury. On the other hand it was argued that the contract was entire,

and having been adopted and partly acted upon, it could not now be repudiated.

*854] *The Lord Chief Justice told the jury that the question for them would be, whether the agreement of the 19th of May was, as the defendant alleged, to extend to, and cover, the whole of the demand which was then due from him; or whether, as the plaintiffs contended, it was only an agreement on their part that they would take the cargo to be brought from Mogadore by The Ruth; that that part of the stipulation was to be satisfied by the defendant, and they were to stand as before as to the residue of their demand. The jury interrupted his lordship in his summing up, and said that they would not trouble him, as they found for the full contract. His lordship, however, considered it expedient to read the agreement to them, and to offer some observations upon it; and having done so, the jury found a verdict for the defendant generally. Some discussion ensued; during which the counsel for the plaintiffs observed that the first plea was bad, and requested that the jury might be directed to find damages on the first issue, in order that judgment might be given for the plaintiffs *non obstante veredicto*. This was objected to on the part of the defendant; and his lordship said, he never knew any judge direct the jury to give conditional damages on such a suggestion. The verdict was ultimately entered for the defendant on the first issue, and for the plaintiffs on the other issues; leave being reserved to the plaintiffs to move to enter a verdict for themselves on the first issue; or if the plea should be held by the court to be bad, to enter a verdict for damages to the amount admitted by the pleas to be due.

Sir *T. Wilde*, Serjt., on a former day in this term (November 3d) obtained a rule nisi accordingly, and for judgment for the plaintiffs, *non obstante*
*855] *veredicto*; or for a new trial, *upon the ground that it ought not to have been taken as an admitted fact at the trial, that the defendant had provided any cargo, although that fact was alleged in the first plea, and not denied by the replication. Upon this point he cited *Bingham* v. *Stanley*, 1 Gale & Dav. 237; *Smith* v. *Martin*, 9 M. & W. 304.(a) He contended that the plea was bad, as amounting at the most to a plea of accord with *part* satisfaction; but that it was not even so pleaded. It was no more than one contract set up in satisfaction of the breach of another contract; no time even being fixed for the performance of the new contract.

Channell, Serjt., (with whom was *Hoggins*,) now showed cause. He argued that the fact of the contract having been partly performed by both parties, must be taken to be admitted on the record. (The argument upon this point is not reported, as the judgment of the court turned entirely upon the construction of the agreement.) Upon this latter point the argument was as follows:—

The first issue was expressly upon the fact, whether or not the agreement, as alleged in the first plea, was entered into between the parties. The jury had found the affirmative of that issue; and there was sufficient evidence to support that verdict. The plaintiffs' case was that they had assented to the first part of what they term the defendant's proposal, but not to the other part. But the whole was one proposal; and if it was accepted at all, it was accepted *in toto*, and amounted to one entire contract. [COLTMAN, J. There may be a contract binding on one party and not on the other; as in the case of a guarantee, which is of this nature: "if you will supply goods to a third person, I will see that you are paid."

(a) See also antè, vol. iii. p. 463, n.

In such case it is optional, whether the party will supply the goods. [MAULE, J. The question *is, whether the true construction of the letter of the 19th of May is not as follows: "I owe you money. I am willing to pay you in goods. If you will send out ships, I will send home goods to the amount of my debt." It would not, in that case, be binding on the creditor to send out any ship. The letter could not be considered a liquidation of the debt.] The whole case was before the jury, and they found that there was a contract, and that such contract was entire. [MAULE, J. The question is, whether it is not for the court to say whether or not there was a contract. If it was for the jury, they have certainly found for the defendant.] Even if this were a unilateral agreement, still if the situation of the defendant might be altered thereby, the rules of justice require that both parties should be bound. If the goods had risen in the market, and the defendant had tendered the money, the plaintiffs might have compelled the delivery of the goods. An agreement may be set up as amounting to accord and satisfaction, without showing that such agreement was executed. Where a new agreement is entered into, giving an additional remedy to the plaintiff, although it be not performed, the original right of action is gone; as where the situation of the defendant is altered, or the liability of a third party is introduced. The offer of the defendant, in this case, was accepted by the plaintiffs. [MAULE, J. That is, it was accepted in the terms of the offer. How does this case differ from that of *Wray* v. *Milestone*? 5 M. & W. 21. There the plaintiff and defendant, having been partners in certain transactions, settled a general account, which showed a balance against the defendant; and it was held to be no answer to an action founded on such account, that after the account was settled, the plaintiff had assented to a proposal of the defendant that he should *take out the balance in butcher's meat.(a)] There was no stipulation in that case, that the meat should be supplied on particular terms; but here, particular goods were to be shipped at a particular port, at certain specified prices, by which the defendant was bound. [*856] [*857]

TINDAL, C. J. The question in this case is, whether the contract set out in the plea was proved by the defendant. The alleged contract is contained in a letter of the 19th May, from the defendant to the plaintiffs; it is, therefore, for the court to say whether or not such contract is proved. The portion of the letter as to which the parties are at variance, is the latter part, and is in these words: "I do further engage to ship produce on similar terms to the above, to the amount of what I may remain indebted to you after the first shipment as above, within six months from the sailing of the first vessel." Now the question is, whether this is a contract on the part of the plaintiffs; whether they can demand payment on the original terms of the dealing between the parties, or whether the plaintiffs are bound to receive payment by taking goods. It appears to me that the letter amounts to nothing more than a declaration on the part of the defendant that he was willing, if the plaintiffs sent out ships, to ship goods by them, and that there was nothing compulsory on the plaintiffs to accept that mode of payment. I think, therefore, the verdict should be entered for the plaintiffs on the first issue.

COLTMAN, J. I am of the same opinion. This being the case of a written contract, it is for the court to say what construction it ought to bear It appears to me to be an engagement on the part of the defendant, entered

(a) And see *Collingbourne* v. *Mantell*, 5 M. & W. 289.

*858] into *with the consent of both parties, that if the plaintiffs would send a ship to Mogadore, the defendant would send certain goods in liquidation of his debt; and if any balance then remained due, then if another ship were sent, other goods should be sent to cover such balance. The only question is, whether the plaintiffs, having sent one ship, were bound to send another, and were prevented from exercising their option a second time in that respect. And I am of opinion they were not so bound; and that the plea was not proved.

ERSKINE, J. I am of the same opinion. (His lordship having read the first plea, continued.) Taking this plea in substance to allege a contract, that the debt should be liquidated in the particular way there mentioned and no other, the question is whether that plea is proved. It is said that, on the 19th of May, the contract was proposed by the defendant and accepted by the plaintiffs. Now there seems to be no doubt, that the terms of a contract were settled between the parties. They were reduced into writing, alterations were made by the plaintiffs, and the contract was copied out again, was signed by the defendant and remained in the plaintiffs' possession. And it may also be taken as clear, that there was nothing in the subsequent correspondence or conduct of the parties to vary the terms. Considering, therefore, the paper of the 19th of May as the contract between the parties, it is for the court to say what is its legal effect. And it appears clear to me, that it was not a positive contract on the part of the plaintiffs to take a shipment of goods in liquidation of the defendant's debt, and to relinquish all right to insist upon payment in the ordinary way, but that it was an engagement on the part of the defendant, that if the plaintiffs would send out a ship or ships, he would send goods to the
*859] amount of the debt. And the defendant *may have had good reasons for making such an arrangement, as thereby he put off the time of payment, and he may be supposed to have been better acquainted than the plaintiffs with the state of the Mogadore market. At any rate, it was optional with the plaintiffs whether they would enforce the bargain.

MAULE, J. I also think that the verdict should be entered for the plaintiffs upon the issue raised by the first plea, there being no evidence to support that issue. It is said, that plea is proved by the contract entered into between the parties on the 19th of May. That contract is in writing; and the general rule is, that the construction of a written contract is for the court, except where technical terms are introduced. I think the proper construction of the document in question is very clear. It is an engagement by the defendant, but not by the plaintiffs. It does not contain any limitation as to the time of the first shipment, but it does as to the second, which the defendant undertook should take place within six months after the first. I think this was an unilateral contract,—that if the plaintiffs would be at the trouble and expense of sending out a ship, the defendant would ship the goods. If the defendant's construction be correct, the plaintiffs would become the purchasers of the goods, and would part with their remedy upon the bills. If that had been so, the bills ought to have been given up. It appears to me that this case is very like that of a person who deals in certain goods, and being pressed by a creditor for payment of his account, says, "I have no money to spare, but I will give you goods in payment, at such a price, *if* you will send for them." Suppose the creditor sent for goods, to a certain amount, that would not release the debtor from the residue of the original debt. The probable reason why

the prices were mentioned in this case, is *to induce the plaintiffs not to insist upon immediate payment. Upon the whole, I think there was no evidence to support the first issue, and that the verdict must be entered thereon for the plaintiffs. *[860

Rule absolute to enter the verdict for the plaintiffs on the first issue; damages, 5,932*l.* 7*s.* 1*d.*

Channell, Serjt., afterwards submitted, that if the rule were made absolute in the above form, the defendant would have no means of going to a court of error.

MAULE, J. It is clear the defendant owes the amount, and the only question is how he shall pay it.

The learned serjeant therefore, Took nothing.

ARNOLD v. The Mayor, Aldermen, and Burgesses of the Borough of POOLE.

No municipal corporation (but that of London) can appoint an attorney except under the corporate seal.

Therefore, an attorney who has been appointed by the mayor and town council to conduct suits, but not under seal, cannot recover his costs against the corporation.

But if he has claims in respect of costs against a corporation, some of which he can enforce, and some of which he cannot, by reason of the want of a valid appointment, and money is paid to him generally on account, he may appropriate such payments to the latter claims.

DEBT. The first count of the declaration was for 3811*l.* 2*s.*, for work, labour, &c., by the plaintiff, done and performed as the attorney and solicitor of the defendants. The second was for 3000*l.*, for money paid. The third was for 100*l.* claimed to be due to the plaintiff as salary as town clerk, and for services as such town clerk performed by him upon the em*ployment and at the request of the defendants. The fourth was for 3811*l.* 2*s.*, upon an account stated. [*861

The defendants pleaded, first, as to all except 100*l.*, never indebted; secondly, no signed bill delivered before action brought; thirdly, as to all except 100*l.*, payment; fourthly, as to 500*l.*, parcel, &c., except the sum of 100*l.*, a set-off; fifthly, as to 100*l.*, payment into court.

The cause came on for trial before COLERIDGE, J., at the Dorchester summer assizes in 1840, when a verdict was entered for the plaintiff by consent, damages 500*l.*, debt 10,622*l.* 4*s.*, costs 40*s.*, subject to the award of a barrister, to whom the cause and all matters in difference comprised in the bills of costs were referred, and who was to direct whether the verdict so entered for the plaintiff should stand; and if to stand, for what amount of damages, or whether a verdict should be entered for the defendant, or a nonsuit be entered: and it was ordered that the said arbitrator, if he thought fit, was to state facts and make an interlocutory award or awards, at the request of either party, for the purpose of taking the opinion of the court on any point, and to have the same powers as a judge at nisi prius; the parties to the said cause thereby agreeing to be bound and concluded by such award as the arbitrator should make of and concerning the premises referred to him, &c.

On the 7th June, 1841, the arbitrator made an award, which, after reciting the order of nisi prius, (which had been made a rule of court,) proceeded as follows:—

"I do award and order, that the verdict found for the plaintiff be set aside, and instead thereof I do direct, as to the issue joined upon the plea

of the defendants by them first pleaded, that a verdict be entered upon that issue for the plaintiff, damages 1s., debt 718l. 9s. 7d., subject to the opinion of the court upon the points hereinafter reserved; the amount of debt, for which it *is so entered, to be increased or reduced by such [*862 sum or sums as are hereinafter specified: and, as to the issue joined upon the replication of the plaintiff to the plea of the defendants by them secondly pleaded, I do direct a verdict to be entered for the plaintiff: and, as to the issues severally joined upon the replication of the plaintiff to the pleas of the defendants by them thirdly and fourthly pleaded, I do direct a verdict to be entered for the plaintiff upon the same: and I hereby state the following facts to be submitted for the opinion of the court:—

"The action was brought by the plaintiff, an attorney, and town-clerk and clerk of the peace of the borough of Poole, to recover the amount of several bills. The action was commenced in June, 1840. The claim of the plaintiff consisted of charges and disbursements for business done by him as an attorney in divers suits and other matters, at various times, from the year 1836 until the year 1840, and also for business done by, and fees and salary due to, him as such town-clerk and clerk of the peace. The plaintiff was appointed town-clerk and clerk of the peace under the seal of the corporate body in January, 1836, at an annual salary of 100l. for his ordinary business; and was town-clerk of the borough during all the time when the business for which the action was brought was done.

"The borough of Poole is an ancient body corporate, and one of the boroughs regulated by and included in Schedule A. of the statute 5 & 6 W. 4, c. 76.

"The charges were contained in ten separate bills, and were for business done and disbursements made under the following circumstances:—

"The bill No. 1 was headed 'Bill of costs on opposing a bill in both houses of parliament for setting aside the municipal election of Poole, on the alleged grounds of frauds, and disbursements in relation thereto.' The
*863] *amount of this bill was 1591l. 1s. 4d.; and it contained no taxable items. No signed bill containing the particulars of this demand had been delivered to the defendants before the commencement of the action.

"In the year 1836 a select committee of the House of Commons was appointed, on the petition of certain inhabitants of Poole, to inquire into the circumstances relating to the then last municipal election of councillors and other corporate officers of the borough of Poole. And afterwards, on the report of the said committee, a bill was introduced into the House of Commons for the purpose of avoiding the said election on the ground of fraud and illegal practices. This bill passed the House of Commons, and was subsequently rejected in the House of Lords. The charges contained in No. 1 were for disbursements made and business done by the plaintiff, in opposing the motion for the appointment of the said select committee, and the bill so introduced into the House of Commons. The plaintiff had received no authority under the seal of the corporation to take any proceedings in the above matter. The propriety of such proceedings had not been proposed or considered at any regular meeting of the town-council, nor had any meeting of the town council been summoned for that purpose. There was no memorandum or resolution in the minute book of the town council authorising any of these proceedings. The plaintiff had received orders from the mayor for the time being, and from other members of the town council, to take all necessary steps to oppose the measures in parliament. Several meeting were held at the town-clerk's office, where the mayor and

the minority in number of the town council attended and instructed the plaintiff to oppose the said bill in parliament: but the members of the town council generally had not been summoned to *attend such meeting, nor did they attend. The members summoned were those only who were known to be favourable to an opposition to the bill. The charges were for business done between February and the 2d of August, 1836. [*864

"On the 3d of August, 1836, the following resolutions were passed at a quarterly meeting of the town council, and entered in the minute book:—

"'Resolved unanimously, that the thanks of this meeting be presented to the Right Hon. Lord Lyndhurst, Lord Redesdale, and the other noble peers, for their powerful efforts in rejecting the unconstitutional bill attempted to be passed for the destruction of this council.

"'Resolved unanimously, that the thanks of this meeting be presented to the Right Hon. C. W. Wynn, the Hon. Mr. Law, Mr. Serjeant Goulburn, Mr. Serjeant Jackson, Horace Twiss, Esq., W. Winthrop Praed, Esq., ——— Trevor, Esq., and the other members of the Honourable House of Commons, who so nobly opposed the unconstitutional bill, brought in and supported through the House of Commons by Mr. Poulter of Shaftesbury, for the destruction of this council.

"'Resolved unanimously, that the mayor be requested to forward a copy of the above resolutions to each of the noble lords and honourable members, under the seal of this council.'

"The bill No. 2 was headed 'Bill of costs incurred in opposing a rule for a mandamus as to the inspection of voting papers.' The amount of these charges was 141*l.* 11*s.* 10*d.*

"After the annual municipal election in 1835, the voting papers for that year were deposited with the plaintiff as town-clerk. A complaint was made as to the mode in which the town-clerk allowed the burgesses to inspect the voting papers, and a rule was obtained in the court of Queen's Bench, calling on the plaintiff to *show cause why a mandamus should not issue commanding him to permit certain burgesses to inspect the voting papers. The rule was subsequently discharged by arrangement.(*a*) The plaintiff had received no authority under the seal of the corporation to take any steps in the matter, nor was there any entry or resolution in the minute book of the town council directing the plaintiff to take any proceedings. He had received orders from the then mayor to oppose the rule, and the costs were incurred in opposing it. The business was done between January and May, 1836. [*865

"The following resolutions and orders were passed at meetings, and entered in the minute book, of the town council:—

"'29th March, 1837. Resolved unanimously, that a finance committee be appointed for the purpose of examining all accounts and claims upon the council, and reporting thereon.'

"'6th February, 1839. Resolved, that the report of the finance committee, as now read, be received and adopted.'

"'1st May, 1839. At a quarterly meeting of the council of this borough, it is ordered, that the bills of the town-clerk, amounting to 1000*l.* 13*s.* 5*d.*, be taxed.

"'It is ordered that the sum of 500*l.* be paid to the town-clerk by the treasurer on account of his bill delivered.'

"'7th August, 1839. Resolved, that the sum of 150*l.* on account of

(*a*) See *Rex* v. *Arnold*, 4 A. & E. 657, 6 N. & M. 152.

the cheque of 500*l.*, dated the 1st May last, be paid by the treasurer to the town-clerk.'

"The report of the finance committee, above referred to, was as follows:

"'28th January, 1839. The committee having examined the outstanding accounts due by the council for [*866] *the year ending 9th of November, 1838, finding the following orders on the treasurer outstanding, viz.

"'The clerk, for sundry law bills, 1000*l.* 13*s.* 5*d.*

"'The committee offer no observations on the bills delivered in by the town-clerk, and recommend the same to the consideration of the council.'

"The above bill of 141*l.* 11*s.* 10*d.* was included in the bills amounting to 1000*l.* 13*s.* 5*d.* mentioned in the above report, and had been duly delivered to the defendants, signed by the plaintiff as required by the statute, on or before the 28th of January, 1839. The other bills delivered, to which the above report refers, were bills Nos. 3, 4, 5, 6, and 7, herein after mentioned. An order for the payment of 500*l.*, on account of the bills so delivered, was given to the plaintiff; and at the time of the bringing of this action 350*l.* out of the 500*l.* so ordered had been paid to the plaintiff by the treasurer of the borough.

"The bill No. 3 was headed 'Costs and expenses incurred in the matter of the municipal charities in the borough of Poole.' A signed bill of these costs had been duly delivered to the defendants, on or before the 28th of January, 1839.

"An application had been made to the court of Chancery, on the petition of certain councillors of the borough of Poole, to appoint trustees of the corporation charity estates; and a counter-petition had been presented by three councillors of the borough, praying that they might be admitted to take part in the proceedings, which had been referred to a master. The whole amount of the bill of costs of the counter-petitioners was 184*l.* 6*s.* An order of the court of Chancery was made, whereby it was ordered that the costs of both of the petitioners and counter-petitioners should be taxed and paid out of the charity funds. The taxed costs of the counter-petitioners amounted to 101*l.* 18*s.* 11*d.*, of which [*867] *the plaintiff had received 55*l.* before the commencement of this action. The claim in this action was for 82*l.* 7*s.* 1*d.*, the residue of the above bill of costs. The business was done between September, 1836, and January, 1837.

There was no authority given to the plaintiff under the seal of the corporation: but the following resolution was passed at a meeting, and entered in the minute book, of the town council:—

"'7th September, 1836. Resolved unanimously, that Mr. Thomas Arnold, the town-clerk of this borough, be authorised to take such steps as may be advised by council with reference to a petition to the Lord Chancellor by George Lockyer Parrott and William Green, two of the members of this council, for the appointment of trustees of several of the charities in Poole, without previously conferring with this council thereon; and that the town-clerk be also authorised to take such other steps as may be advised for continuing the appointment of trustees of the said charities in the council of this borough, in conformity with the intention of the several donors thereof.

"'Resolved unanimously, that the petition now produced by the town-clerk, and read to this meeting, be adopted on the part of this council, and the common seal of the borough affixed thereto."

"The petition referred to in the above last-mentioned resolution, was the counter-petition to which the bill of costs refers.

"The bill No. 4, was a bill of costs incurred in a suit in Chancery between the attorney-general at the relation of the Honourable W. F. S. Ponsonby and others, and the mayor, aldermen, and burgesses of the borough of Poole, Robert Henning Parr, and Thomas Arnold.

"The object of the suit was to call in question the right of the said Robert Henning Parr to certain *compensation which had been granted him on his removal from certain borough offices, and to cancel a bond given by the corporation of Poole as a security for such compensation, on the ground that the compensation was illegal, and the bond fraudulent and void. A charge of fraud was made in the information filed in this suit against the corporation. The amount of the claim was 347*l.* 19*s.* 3*d.*, and was for business done between the 13th of November, 1837, and November, 1838. A signed bill of these costs had been duly delivered before the commencement of the action. [*868

"The bill No. 8, was a bill of costs in the last-mentioned suit for business done from November, 1838, to September, 1839. A signed bill of these costs had been duly delivered before the commencement of this action. The amount of this bill was 454*l.* 6*s.* 6*d.*

"The plaintiff had received no authority under the seal of the corporation to take the proceedings in this suit; but the following resolutions were passed at meetings, and entered in the minute book of the town council:—

"'17th November, 1837. The mayor and town-clerk having been served with a Chancery subpœna commanding them within eight days to appear to an information filed by Her Majesty's attorney-general at the relation of the Honorable W. F. S. Ponsonby and others,—Resolved unanimously, that the town-clerk be authorised to enter an appearance for the council and himself to such information, and to obtain an office-copy thereof; and he is also authorised to retain council, and take such steps as may be necessary in defence of this council and himself, and for answering such information.'

"'7th Frebruary, 1838. Resolved, that the instructions given by the mayor to the town-clerk on an appeal to the Lord Chancellor against the judgment of the Master of the Rolls in the case of the attorney-general *on the relation of the Hon. W. F. S. Ponsonby and others against the corporation of Poole, be confirmed.' [*869

"'24th November, 1838. Resolved, that the town-clerk do suspend proceedings in the cause of *The Attorney-General* v. *The Corporation of Poole*, till further instructed by the council: and that his bills in the above suit be made up to this date, and referred to the finance committee for their report at the next meeting of this council.'

"'6th February, 1839. Resolved, that the report of the finance committee, as now read, be received and adopted.

"'Resolved, that the town-clerk be authorised to prepare the necessary instructions for answering, by the corporation and himself, the information, as amended, filed against the corporation by the attorney-general on the relation of the Hon. W. F. S. Ponsonby and others.'

"'22d February, 1839. Resolved, that the town-clerk be directed to forward the several minutes and answers prepared this day to the several queries of the amended information filed by the attorney-general, on the relation of the Hon. W. F. S. Ponsonby against this corporation, with such other instructions and documents referred to as he shall consider to apply

to the effectually answering the said bill, for counsel to draw the answer in the usual way.

"'Resolved, that the sum of 100*l.* be voted to the town-clerk to enable him to meet the expenses to be incurred in preparing the above answer, and defending the said information.'

"'1st April, 1839. Resolved, that the draft answer of the corporation, as now read to the council, be approved and filed as the answer of the corporation to the original and amended information filed against them by the attorney-general, at the relation of the Hon. W. F. S. Ponsonby, and *870] others; and that the mayor be *authorised to affix the seal of the corporation of the said borough thereto on being engrossed.

"'10th September, 1839. The draft of the further answer, and of the answer to the supplemental bill of *The Attorney-General* v. *This Corporation*, was read and explained at this meeting, preparatory to the same being engrossed.

"'6th May, 1840. Resolved, that the report of the finance committee now read be received.'

"The report referred to was as follows:—

"'5th May, 1840. The committee also beg to report that the following bills have been delivered in by the town-clerk, amounting to the sum of 1547*l.* 5*s.* 6*d.*; and your committee, finding that they have been frequently laid before the council, recommend that some decisive steps be taken for disbursing the same.'

"Amongst the bills so referred to were the above-mentioned bills (No. 4) of 347*l.* 19*s.* 3*d.* and (No. 8) of 454*l.* 6*s.* 6*d.* The 100*l.* voted to the plaintiff by the above resolution was paid to him. The above information had been filed in the court of the Master of the Rolls; and an appeal was had from his judgment thereon to the Lord Chancellor. The suit is not determined, but is still pending, on appeal to the House of Lords. The plaintiff is still the solicitor in the suit. It was not proved that he had given any notice to the defendants of an intention not to go on with the suit.

"The bill No. 5 was a bill of costs in defending an action at law brought in December, 1837, by Robert Henning Parr against the corporation of Poole, to recover an instalment and interest due on a bond given by the corporation to the said Robert Henning Parr, to secure certain compensation granted to him on his removal from certain borough offices. The attorney on the record on behalf of the corporation was Mr. Weller, who *871] was the town agent of Mr. Arnold, the town-clerk. The *plaintiff had received no authority under the seal of the corporation to defend the action; but the following resolutions were passed at a meeting and entered in the minute book of the town council.

"'30th December, 1837. The mayor having been served with a writ issued out of Her Majesty's court of Common Pleas by R. H. Parr against the mayor, aldermen and burgesses of the borough, claiming the sum of 1350*l.*, being the first instalment due to the said R. H. Parr, on a bond executed by the council, dated the 29th November, 1836, for compensation, with interest thereon, and the town-clerk having entered an appearance for this council, at the request of the mayor—

"'Resolved that the same be hereby confirmed.'

"A signed bill of these costs was delivered in January, 1839, and was one of those included in the report of the finance committee of the 6th

February, 1839. The amount was 65*l.* 8*s.*, and was for business done between December, 1837, and March, 1838.

"The bills No. 6 and No. 9 were for business done at the sessions. The bills No. 7 and No. 10 were for general business as town-clerk. These bills, Nos. 6, 7, 9 and 10, had been signed and duly delivered before the commencement of this action. The plaintiff had frequently received orders from the town council, by means of resolutions, to act as their attorney in taking proceedings to recover all arrears of rent, to obtain possession of corporation property, and the like; and the finance committee had often called the attention of the town council to the bills delivered in by the town-clerk, and had reported that the town-clerk had made considerable advances on account of the council.

"As to the bill No. 1, I find, that upon the facts above stated, there was no sufficient evidence of a retainer of the plaintiff by the defendants, and of a right *of action, so as to enable the plaintiff to maintain this action in respect thereof against them. [*872

"And, as to the bills, Nos. 2, 3, 4, 5, and 8, I find that the above facts do not furnish evidence of a retainer of the plaintiff by the defendants, and of a right of action in respect of the matters contained in the last-mentioned bills, so as to enable the plaintiff to maintain this action in respect of the same, or either of them, against the defendants.

"And as to the bills, Nos. 6, 7, 9 and 10, I find that, after allowing all just deductions and payments, there is due and owing from the defendants to the plaintiff in respect thereof the sum of 718*l.* 9*s.* 7*d.*, which sum of 718*l.* 9*s.* 7*d.* is the debt for which I have directed the verdict to be entered as above-mentioned.

"And as to the sum of 350*l.* paid to the plaintiff in pursuance of the resolution of the 1st of May, 1839, on account of the bills, Nos. 2, 3, 4, 5, 6 and 7, I find that the plaintiff applied part of that sum in satisfaction of the bills, Nos. 2, 3 and 6, amounting in the whole to 203*l.* 6*s.* 10*d.*, and the residue of the said sum, amounting to 66*l.* 13*s.* 2*d.*, in part satisfaction of the bill No. 7: and I have, in estimating the debt, for which I have directed the verdict to be entered, so appropriated the said sum of 350*l.*

"And I do hereby submit the following questions for the opinion of the court.

"'First—whether the facts above stated furnish sufficient evidence of a retainer of the plaintiff to enable him to maintain this action in respect of the charges contained in the bill No. 1 against the defendants.

"'Secondly—whether in the absence of any authority under the seal of the corporation, the above facts furnish evidence of a valid contract or retainer binding the corporation, so as to enable the plaintiff to *maintain this action for the whole or either of the bills Nos. 2, 3, 4, 5 and 8, against the defendants. [*873

"'Thirdly—whether the charges in the bills, Nos. 1, 2, 3, 4, 5 and 8, were for matters concerning which the corporation could enter into a valid contract, or give a retainer binding the funds of the corporation, so as to enable the plaintiff to maintain this action in respect of such bills, or any of them, against the defendants.

"'Fourthly—whether the plaintiff had any right of action against the defendants to recover the charges contained in the bills, Nos. 4 and 8, the suit to which they refer being undetermined.

"'Fifthly—whether the plaintiff had a right to appropriate the payment

of two sums, *videlicet*, of 141*l.* 11*s.* 10*d.*, and of 82*l.* 7*s.* 1*d.*, part of the said sum of 350*l.*, to the bills No. 2 and No. 3 respectively.'

"If the court shall be of opinion, that the facts above stated furnish sufficient evidence of a retainer of the plaintiff, and of a right of action, so as to enable him to maintain this action in respect of the charges contained in the bill No. 1 against the defendants, and that the said bill was for matters concerning which the corporation could, by such retainer, bind the funds of the corporation, I direct the debt for which I have ordered the verdict to be entered to be increased by the amount of the said bill, No. 1.

"If the court shall be of opinion, that the facts above stated, in the absence of any authority, given to the plaintiff under the seal of the corporation, to do the work and business contained in the bills, Nos. 2 and 3, do not furnish evidence of a retainer, or valid contract, binding the corporation, in relation to the matters contained in the said bills, or either of them, so as to enable the plaintiff to maintain this action, in respect of such matters, against the defendants, and the plaintiff had *no right to appropriate the several sums of 141*l.* 11*s.* 10*d.* and of 82*l.* 7*s.* 1*d.* to the payment of the same, or either of them, then I do direct the said sums of 141*l.* 11*s.* 10*d.* and 82*l.* 7*s.* 1*d.*, or such of them as the court shall be of opinion the plaintiff had no right to appropriate, to be deducted from the debt for which I have directed the verdict to be entered.

*874]

"If the court shall be of opinion, that, in the absence of any authority given to the plaintiff under the seal of the corporation to do the work contained in the bill No. 5, the facts above stated furnish evidence of a retainer, or valid contract, binding the corporation, in relation to the matters contained in the said bill, and that the same was for matters concerning which the town council had power to make a valid contract, or to give a retainer binding the corporation, then I direct the debt for which I have ordered the verdict to be entered to be increased by the amount of the said last-mentioned bill.

"If the court shall be of opinion, that the facts above stated, in the absence of any authority given to the plaintiff, under the seal of the corporation, to do the work contained in the bills, Nos. 4 and 8, furnish evidence of a retainer, or valid contract, binding the corporation, in relation to the matters contained in the said last-mentioned bills, or either of them, and that the same were for matters concerning which the town council had power to make a valid contract, or give a retainer, binding the corporation, and also that the plaintiff had a right of action to recover the same, or either of them, notwithstanding the suit to which they refer had not been determined, then I direct the debt for which I have ordered the verdict to be entered to be increased by the amount of such bill or bills, deducting therefrom the sum of 100*l.* paid to the plaintiff in pursuance of *the resolution above-mentioned on account of the said bills."

*875]

The case was argued in last Easter term.

Bompas, Serjt., (with whom was Barstow) for the plaintiff. The principal question in this case is, whether or not a corporation can appoint an attorney to act for them otherwise than under their common seal. Secondly, it is a question, whether, under the circumstances disclosed in the award, there has not been substantially an appointment under seal. And, lastly, whether, supposing there was not a valid retainer of the plaintiff as to some of the services performed by him, he was at liberty to appropriate payments, that were made to him generally, to the costs of the proceedings in which he had not been properly retained.

With regard to the first question, it is to be observed, that no point can be made in favour of the defendants, grounded on any distinction between executory and executed contracts. The work has been *bonâ fide* done by the plaintiff; and in most of the instances he is shown to have been employed to do the particular work either by the mayor, as the head of the corporation, or by the body, pursuant to resolutions passed by them; and in all the cases the corporation recognised and sanctioned the employment. The question is, whether, under these circumstances, a narrow technical rule is to stand in the way of the plaintiff's right to recover for his services? The general rule undoubtedly is, that a corporation can only act by deed under their common seal, Bro. Abr. *Corporations et Capacities*, pl. 34. That rule however has been much broken in upon by modern authorities; and even in the older cases, at a time when the rule was more strictly adhered to, it was considered that a corporation might do certain acts [*876] *and make certain appointments, such as of a servant, cook, butler, &c., without deed; Bro. Abr. *Corporations et Capacities*, 47,(a) 49,(b) 50,(c) 56;(d) Com. Dig. **Franchises* (F. 13); Vin. Abr., *Corporations*, [*877] (K.); Bac. Abr. *Corporations*, (E.) 3. [TINDAL, C. J. The principle to be collected from the old cases appears to be, that an appointment under seal was not necessary in the case of officers or servants required to perform acts of trifling import or of immediate necessity. If cattle were damage feasant, and it were necessary to appoint a bailiff under the corporate seal in order to distrain them, the cattle might escape while the deed was preparing.] It is submitted that cannot be the only reason; for in such a case the appointment might, if it were necessary, have been made out after the act was done, so long as it was in existence at the time of pleading. There may be many cases where the presence of an attorney at the

(a) "Debt. Townsend, J. A dean and chapter may retain and assign a *bailiff, receiver*, or other *servant*, without writing. Brian, C. J. of C. P., contrà; and that he could not be a servant without writing, nor demand his salary without writing; but they may charge a man for his occupation without deed, as a guardian in socage, bailiff of the king, and receiver of his own head, and such like, and he was positive (precise) in this. 4 H. 7, 6."

(b) "Townsend, J. C. P. A corporation may have *ploughmen* and *servants of husbandry, butlers, cooks*, and such like, without retainer by deed; and a servant may justify by the command of a body politic without having a deed of command. Brian, C. J. C. P. contrà. And that they can do nothing without writing. Vavisour, K. S. In the time of Edw. 4, it was agreed that a corporation cannot assign auditors without writing. And Bryan was of opinion, that a bailiff (ought) to be charged as here, by reason of his occupation. 4. H. 7, 17."

(c) "Trespass. The defendant said, that it was the freehold of the president and scholars of C., and he, as servant to them, and by their command, entered &c. Keble, Serjt. He cannot be retained with the corporation without specialty; nor make a feoffment without specialty. Hussey, C. J. of K. B. (in the year book, '*Non, par Dieu*'). They cannot be disseisors without an agreement by deed, nor enter on the land without a command given by deed. Wood, K. S. As to small things, there is no need for a writing; as for lighting candles, making hay or fire, nor for putting cattle out of their land. Oxenbridge apprehended to the contrary: for these things belong to a servant to do without command; but entering and such like ought to be by deed. And Fairfax, J. K. B., agreed as to small things; but that a corporation could not have a servant but by deed. And Tremaile agreed with Wood as to small things. Nevertheless, in the same place, the last folio in the same year, it was agreed that a corporation could not vest in them, or divest out of them, any freehold by any person, without authority given by deed. Nevertheless, several *e contrà* as to the small things above mentioned, *by reason of the usage and of the great trouble that it would be to the contrary; but not by the law: ideo quære.* 7 H. 7, 9."

(d) "Debt upon arrears of account, by the mayor and commonalty of S. against the executors of T. P., their receiver: and they counted that auditors were assigned by the aforesaid mayor and commonalty." —— "and by Littleton, The opinion of all the justices of both benches is, that an assignment of *auditors* by a corporation is good without deed; and the same of a justification by their command; and the same of a command by a convent, in the time of vacation, to saw their trees and other necessaries. 12 E. 4, 9. 10."

time the act is done may be most important, and where there would be neither time nor opportunity to execute a deed for the purpose of retaining him. The only object for which a seal can be required is to testify the fact of the appointment—and in this case that has been done sufficiently by the resolutions of the body. A seal is by no means a protection against an improper appointment—for a seal may be affixed by some subordinate officer, without the assent of the body. In *Roe dem. The Dean and Chapter of Rochester* v. *Pierce*, 2 Campb. 96, a notice to quit, given by a person acting as steward of a corporation, was held sufficient, without evidence that he had an authority under seal from the corporation for that purpose. A corporation, it is true, can only appear by attorney; Case of Sutton's Hospital;(a) but in London an attorney for the *corporation is
*878] appointed every year in open court without seal. [Tindal, C. J. That is matter of record; Mayor of Thetford's case.(b)] It has been held that a stranger may receive a deed to the use of a corporation, without a letter of attorney from them to receive it; *Cooper* v. *Gooderich*, Cro. Eliz. 862. Formerly it was thought that a corporation could not be sued for a *tort;* but that doctrine has been overruled; *Yarborough* v. *The Bank of England*, 16 East, 6; and it has been decided that *tort* will lie against a corporation even for the act of their agent, though not appointed under seal; *Smith* v. *The Birmingham and Staffordshire Gas Light Company*, 1 A. & E. 526, 3 N. & M. 771.(c) It has also been held that a corporation aggregate, strictly partaking of the corporate character, may sue in assumpsit upon an *executed* consideration; *The Barber Surgeons* v. *Pelson*, 2 Lev. 252, or in debt for use and occupation; *The Dean and Chapter of Rochester* v. *Pierce*, 1 Campb. 466; *The Mayor and Burgesses of Stafford* v. *Till*, 4 Bingh. 75, 12 B. Moo. 260; and if such actions are maintainable, the remedy must be mutual.(d) In *The East London Waterworks Company* v. *Bailey*, 4 Bingh. 283, 12 B. Moo. 532, it was held that assumpsit would not lie by a corporation upon an *executory* contract not under seal. The applicability of that doctrine to a manufacturing or trading corporation was, however, questioned in *Dunstan* v. *The Imperial Gas Light Company*, 3 B. & Ad. 125; and it was at length established
*879] *that it did not apply in such cases; *Beverley* v. *The Lincoln Gas Light and Coke Company*, 6 A. & E. 829, 2 N. & P. 283; *Church* v. *The Imperial Gas Light and Coke Company*, 6 A. & E. 846, 3 N. & P. 35.

The Mayor of Ludlow v. *Charlton*, 6 M. & W. 815, will probably be relied upon by the other side, where it was held that a municipal corporation cannot enter into a contract to pay a sum of money out of the corporate funds for the making of improvements within the borough, except under the common seal. But the contract in that case was one relating to land, and involved a specific outlay of the corporation property. In *Steavenson* v. *The Corporation of Berwick*, 1 Q. B. Rep. 154, 4 P. & D. 546, which, like the present case, was an action for work and labour by an attorney against a corporation, the objection was not taken. Suppose an at-

(a) 10 Co. Rep. 22, 32, b. See also Bro. Abr. *Corporations et Capacities*, pl. 28, (citing 19 H. 6, 80,) Co. Litt. 66, b, Com. Dig. *Pleader*, 2 B. 2, and see infra, p. 897, n, (d).

(b) 1 Salk. 192, 3 Salk. 103, Holt, 171, S. C. per. nom. *Rex* v. *Chalice*, Mayor of Thetford, 2 Ld. Raym. 848, Vide infrà, p. 897, (d).

(c) And see *Maund* v. *The Monmouthshire Canal Company*, antè, p. 452, S. C. 5 Scott, N. R. 457, and cases there cited.

(d) See the judgment in *Beverley* v. *The Lincoln Gas Light and Coke Company*, 6 A. & E. 829, 841, 2 N. & P. 283, 291.

torney, not appointed by deed, had recovered judgment at the suit of the corporation, and had received the fruits of such judgment, would the fact of his not having been appointed by deed have protected him from liability to be sued for money had and received?

By sect. 76, of the municipal corporation act, 5 & 6 W. 4, c. 76, the town council are to appoint a certain number of their own body a watch-committee; and such committee are to appoint constables for the borough. It never could have been intended that such appointments were necessarily to be under the seal of the corporation. If an action were brought against such a constable for an act done by him in the execution of his duty, might not the corporation employ an attorney to defend him; and must the retainer in that case be under seal? [ERSKINE, J. The question would be, could the attorney maintain an action against the corporation unless he were appointed by deed; and that is very like the *present question. [*880 CRESSWELL, J. By sections 95, and 96, the council are empowered to renew and grant leases; it could hardly be contended that they could do so except under seal.] That would stand upon a very different footing. There are some instances in which perhaps it might be required that the council should contract under seal; as, for example, where they contract for committing prisoners to the gaol of another borough, which by sect. 115, they are empowered to do "in the name of the body corporate." By sect. 58, the council have power to appoint a town-clerk, treasurer, and other officers: the town-clerk may be, and probably would be, an attorney, but the act does not require the appointment to be under seal. [TINDAL, C. J. An attorney acting in any individual suit would hardly be considered as an officer of the corporation.] The town council would appear to have the right of making any appointments necessary to carry out the purposes of this act. [COLTMAN, J. Is there any part of the act by which a power is given to any person or persons to affix the corporate seal?] There is no clause to that effect

With regard to the particular bills in question. As to No. 1,(a) it must be admitted that there was no retainer by the corporation in respect of the business included therein, and no subsequent recognition by them of the employment of the plaintiff. [TINDAL, C. J. As to that bill, the plaintiff must look for payment to those who employed him.]

The bill No. 2,(b) relates to the costs of opposing a rule for a mandamus. It appears that a question had arisen as to the right of the burgesses to inspect the voting papers; the plaintiff, as town-clerk, had refused to allow the inspection; a rule nisi had been obtained for a mandamus directing the plaintiff to allow such *inspection, and this rule was opposed under [*881 the direction of the mayor, and the opposition was afterwards recognised by the town council: the argument on that case is reported in *Rex* v. *Arnold*, 4 A. & E. 657, 6 N. & M. 152. [COLTMAN, J. This bill is for business done in his office of town-clerk.]

No. 3(c) refers to costs incurred relating to the municipal charities of the borough. A petition having been presented to the Lord Chancellor, as to the appointment of trustees, under sect. 71 of the 5 & 6 W. 4, c. 76, a counter-petition was presented, the management of which was entrusted to the plaintiff by a resolution of the town council; and this counter-petition it appears was under seal. [COLTMAN, J. It does not expressly appear from the award that the counter-petition was under seal; but only that a resolution was passed that the common seal should be affixed thereto.] I'

(a) Suprà, p. 862. (b) Suprà, p. 864. (c) Suprà, p. 366.

may fairly be inferred that the seal *was* affixed, in pursuance of the resolution; and it is clear that it was presented and proceeded in by the authority of the corporation. This would amount, at any rate, to a recognition, by the town council, of the employment of the plaintiff. Besides, he would, in this instance, appear as their attorney on record; and the case would therefore fall within the principle of The Mayor of Thetford's case(*a*) before mentioned, where it was laid down that a mayor and corporation may do an act by record, though it be not under seal; and they may appoint an attorney in the same way; as the city of London does every year. It may
*882] be said, that is by custom; but it shows that *such a custom in a corporation is good. [TINDAL, C. J. I think you can hardly derive any argument from that. It is an isolated case. It has been done from the earliest times, and is a solemn proceeding in the courts at Westminster. The lord mayor comes to the bar of this court attended by the late lord mayor, several members of the corporation, and the recorder, as the mouthpiece of the corporation; the appointment of the attorney is read and is entered on record on the prayer of the recorder.(*b*) This proceeding has been sanctioned by ancient custom. It may rather be said—*Exceptio probat regulam.* CRESSWELL, J. Could any other corporation come to the court and ask them to do the same thing? COLTMAN, J. In The Mayor of Thetford's case the question was not with regard to the corporation of London, but to another corporation.] The case of London was there referred to as affording a good argument applicable to other corporations, that they might do certain acts by record. It may be that London is so high a corporation that they do formally every year what other corporations do only when necessary. The corporation of London appoints a common serjeant every year.(*c*) Other corporations also may surely em-
*883] ploy counsel, but is it necessary they should do so *under seal? [TINDAL, C. J. A counsel could not maintain an action against them.(*d*) ERSKINE, J. An attorney duly appointed under seal would have the power to retain counsel.] In the same way it may be said that the mayor, being appointed the head of the corporation, may retain either counsel or attorney. In *Hartwell* v. *The Thames Haven Dock and Railway Company*,(*e*) where the plaintiff, the proprietor of a weekly publication, brought an action against the company for advertisements inserted in the publication, an objection was raised that it was not shown the authority to insert them was under seal; but the learned judge overruled the objection. [TINDAL, C. J. That would come within the exception that a trading

(*a*) In that case the return to a mandamus directed to the corporation of Thetford, was objected to, as not being under their common seal, or under the hand of the mayor. Precedents having been searched for, many such returns were found, and the court held the return was sufficient, the act being on record. Vide post, pp. 896, 897, in the judgment of the court.

(*b*) "The lord mayor's warrant" is in the following form:—

"Michaelmas term, in the year of the reign of the Queen Victoria.

"London (to wit). The mayor, commonalty, and citizens of London, appoint Henry Belward Ray, Esq.* to challenge, prosecute, and defend all the liberties, privileges, and franchises of said city."

This warrant, engrossed on parchment, is handed to the recorder, who reads it aloud. It is then handed back to one of the masters, who also reads it aloud. The recorder then prays that the warrant may be entered of record; which the Lord Chief Justice orders to be done.

(*c*) *Serviens ad Legem*, 241.

(*d*) Counsel cannot maintain any action for fees, and they cannot sue a corporation for a salary, *pro consilio impendendo*, or for a retainer, unless the salary or retainer be granted by deed.

(*e*) Tried before Maule, J., at Guildhall, on Saturday, 30th of April, 1842.

* The senior master; formerly the senior prothonotary.

corporation may do things necessary for the trade, without giving an authority under seal.] That doctrine has grown up merely from the *inconvenience* of adhering to the established rule, and not from any *impossibility* of doing so in the particular cases. There can be no doubt that attorneys do usually act for corporations, without having any appointment under seal. In actions by or against corporations the court never requires it to be shown that the attorney on the record was appointed under seal.

The bills, Nos. 4 and 8,(a) arise out of the same proceeding, viz. the suit in chancery; *The Attorney-General* v. *The Corporation of Poole*, 2 Keen, 190; S. C. on appeal, 4 Mylne & Cr. 17. The question there was, as to the right of Mr. Parr, the plaintiff's predecessor in the office of town-clerk, to recover a compensation secured to him by a bond, which it was alleged was fraudulent. In this instance there was not only a thorough recognition by the town council of *the plaintiff's employment, but an express authority and direction to him in the fullest terms to appear in the suit for the corporation, embodied in a resolution of the council. And they afterwards voted him the sum of 100*l.* on account of his expenses in that suit. The resolution authorizing the mayor to affix the corporate seal to the answer, amounted to a recognition *in pais* of the plaintiff's employment. [*884

The bill No. 5,(a) was in respect of an action brought by Mr. Parr, on the same bond. The attorney on the record in that action was not the plaintiff, but his London agent. In this case the plaintiff had entered an appearance at the request of the mayor, and the act was confirmed by an express resolution of the council. These are the only bills in dispute.

The expenses in question were all such as the corporation were justified in incurring and in paying out of the corporation funds; *The Attorney-General* v. *The Mayor, &c. of Norwich*, 2 Mylne & Cr. 408; *Reg.* v. *the Mayor, &c. of Bridgewater*, 10 A. & E. 281; *Reg.* v. *Paramore*, Id. 286; *Holdsworth* v. *The Mayor, &c. of Dartmouth*, 11 A. & E. 490, 3 P. & D. 308.

Another question arises as to the bills, Nos. 4, and 8, namely, whether the plaintiff can now have a right to recover in respect of a suit which is not yet terminated. It was formerly considered to be the rule that when an attorney once appeared, or undertook to be attorney for another, he should not be permitted to withdraw himself; but that it was his duty to proceed in the suit, although his client neglected to bring him money; Tidd's Prac. 26, 9th edit. But the rule is now settled on the more equitable footing—that he may abandon the conduct of the suit, and recover his costs up to that time; **Rowson* v. *Earle*, Moo. & M. 538; *Van Sandau* v. *Browne*, 9 Bingh. 402, 2 Moo. & Sc. 543; *Lawrence* v. *Potts*, 6 C. & P. 428.(c) [885*

As to the question of appropriation. Money had been paid to the plaintiff on account generally; and the receiver has a right to appropriate a payment to any items of his demand which are due to him in equity and conscience, so long as such appropriation is not inconsistent with any directions given by the party making the payment; *Mills* v. *Fowkes*, 5 N. C. 455, 7 Scott, 444.(d)

Channell, Serjt., (with whom was *Bere*,) for the defendants. The plaintiff's claim arises out of ten different bills of costs. The arbitrator has

(a) Suprà, pp. 867, 868.
(b) Suprà, p. 879.
(c) See also antè. vol. iii. p. 484. and cases there cited.
(d) See also *Williams* v. *Griffith*, 5 M. & W. 300.

made his award in favour of the defendants, except as to Nos. 6, 7, 9, and 10. The plaintiff requires the court to come to a different conclusion as to those bills from that at which the arbitrator has arrived. The defendants on the other hand say, that the amount of the verdict ought to be reduced by appropriating the sums that have been paid—and which the plaintiff has improperly appropriated to Nos. 2, and 3—to the further reduction of the four first-mentioned bills. The arbitrator was empowered to make interlocutory awards; and the one under consideration is final only as to the cause of action, and not as to all matters in difference. Suppose, then, the court should be of opinion that the action cannot be maintained in respect of the charges in Nos. 4 and 8, by reason of there having been no notice of the plaintiff's intention to discontinue his conduct of the suit, he would still have it in his power to give such notice hereafter, and would not be concluded from recovering upon that ground.

*886] *The bill No. 1, has been abandoned. With regard to the others in dispute, the arbitrator has expressly found that there was no retainer of, or contract with, the plaintiff under the seal of the corporation. And the first question is, whether in the absence of such a retainer or contract, the plaintiff is entitled to recover.

It is not necessary to consider the old authorities, which are uniform in establishing the rule, that a corporation cannot contract except under seal. Upon that rule two exceptions have been grafted, within one or the other of which it is imperative upon the plaintiff to bring his case. The first exception — which appears to be almost coeval with the rule — is, that in some trifling matters a corporation may make certain appointments without deed. The exception is thus stated in Bac. Abr. *Corporations* (E.) 3. "But a corporation may employ one in ordinary services without deed, as a butler, cook," &c.; and then it is added, "but *not to appear for them in an assize, or any other act which concerns their interest or title*," (a) which latter sentence is an authority against the plaintiff in the present case. The second exception is the creation of modern times, and refers only to trading corporations, which have been brought into life, for the specific purpose of some particular trade. This exception was not thoroughly admitted in *The East London Water Works Company* v. *Bailey*, 4 Bingh. 283, 12 B. Moo. 532; but that case was distinctly overruled, and the exception in question firmly established, by the subsequent cases of *Beverly* v. *The Lincoln Gas Light and Coke Company*, 6 A. & E. 829, 2 N. & P. 283; *Church* v. *The Imperial Gas Light and Coke Company*, 6 A. & E. 846, 3 N. & P. 35; in which cases the distinction as to *executory* and *887] *executed** contracts, was overruled with respect to such trading companies. In all these modern cases the ancient rule is laid down, and the new principle adopted is clearly mentioned as an exception to that rule. It is quite an error, therefore, to suppose that the old rule has been abrogated. It was recognised and acted upon in this court in *Gibson* v. *The East India Company*, 5 N. C. 262, 7 Scott, 74; where it was held that the retiring pension of a military officer of the East India Company, granted by the company, but not by deed, did not upon his bankruptcy pass to his assigners, as it could not have been enforced by the officer against the company. The previous cases of *Beverley* v. *The Lincoln Gas Light and Coke Company*, and *Church* v. *The Imperial Gas Light and Coke Company*, were there brought under the review of the court; and

(a) Citing 1 Vent. 47; *Horn* v. *Ivy*, 1 Mod. 18, S. C. See also the case of *Assize of fresh Force brought in London, Panel* v. *Moor, &c.*, Plowd. 91.

the doctrine thereby established was upheld; but on the same ground, of its being an exception to the general rule. The rule was again recognised by the court of Exchequer in *Mayor &c. of Ludlow* v. *Charlton*, 6 M. & W. 815, which has been referred to by the other side. That case was not decided on the narrow ground that the contract related to land; but upon the general application of the old rule. In delivering the judgment of the court, ROLFE, B. says, "Before dismissing this case, we feel ourselves called upon to say, that the rule of law requiring contracts, entered into by corporations, to be generally entered into under seal, and not by parol, appears to us to be one by no means of a merely technical nature, or which it would be at all safe to relax, except in cases warranted by the principles to which we have already adverted. The seal is required, as authenticating the concurrence of the whole body corporate. If the legislature, in erecting a body corporate, invest any member of it, either expressly or impliedly, with authority to *bind the whole body by his mere signature, or otherwise, then, undoubtedly, the adding a [*888] seal would be matter purely of form, and not of substance. Every one becoming a member of such a corporation, knows that he is liable to be bound in his corporate character, by such an act; and persons dealing with the corporation, know, that by such an act, the body will be bound. But in other cases, the seal is the only authentic evidence of what the corporation has done, or agreed to do. The resolution of a meeting however numerously attended, is, after all, not the act of the whole body. Every member knows that he is bound by what is done under the corporate seal, and by nothing else. It is a great mistake, therefore, to speak of the necessity for a seal, as a relic of ignorant times. It is no such thing: either a seal, or some substitute for a seal, which by law shall be taken as conclusively evidencing the sense of the whole body corporate, is a necessity inherent in the very nature of a corporation; and the attempt to get rid of the old doctrine, by treating, as valid, contracts made with particular members, and which do not come within the exceptions to which we have adverted, might be productive of great inconvenience." The rule for the necessity of a seal has been carried so far, that in *Yarborough* v. *The Bank of England*, 16 East, 6, it was held, in an action of trover against a corporation, that the court would, after verdict for the plaintiffs, presume that an authority to do the wrongful act complained of had been given under seal.

The present case falls within neither of the exceptions mentioned. The municipal corporation of Poole is obviously not a trading corporation; and the appointment of an attorney cannot be considered as a trifling matter.

It is said that a corporation may appoint an attorney by matter of record, as in the instance of the city of *London. But that example, as has been observed by the court, does not advance the argument; [*889] for that is one of the particular privileges of that city, like that of certifying their customs by their recorder, a privilege which other corporations have not; *Day* v. *Savadge*, Hob. 85, (87). The recorder's certificate(*a*) is in the nature of a writ,(*b*) and if it be false, no action will lie against the recorder, as he is but the mouthpiece of the corporation, but the action must be brought against the mayor and aldermen; Bac. Abr. *Customs of London*.(*c*) [TINDAL, C. J. In the old forms of appearance by attorney it

(*a*) See *Crosby* v. *Hetherington*, post,
(*b*) Rather of a return.
(*c*) Citing Hobart, ut suprà.

was not stated that he was appointed by deed, even when the action was against a corporation.] The appearance is only recorded by the attorney for a particular purpose. If an attorney, without authority acts for another, he may be punishable, but the court do not require him to show his authority. But when he sues for costs, he is then bound to show a retainer. It is said to have been suggested by Lord TENTERDEN, that an attorney ought always to have a retainer in writing;(a) but at all events he is bound to show *some* retainer to entitle him to recover; and the question here is, whether there can be any retainer by a corporation, otherwise than by deed. And certainly if any one appointment more than another requires to be under the corporate seal, it would appear to be that of an attorney, who has of necessity so much authority delegated to him.

With regard to the bill No. 2, the arbitrator has found that there was no retainer, and that the plaintiff had no right of action in respect thereof; but the question is left for the court to decide, whether the town council could

*890] bind the corporation funds by the *resolutions that are set out in the award. Assuming the necessity of an appointment under seal, there was clearly no valid contract. There was not even a resolution by the council previously to the work being done in respect of which the charges are made. The resolutions are merely as to the payment of the plaintiff's bill. The sixty-ninth section of the 5 & 6 W. 4, c. 76, points out the manner in which meetings of the town council are to be summoned; and unless that course was followed, a resolution passed at a meeting would be of no avail. [TINDAL, C. J. Where the arbitrator says it was resolved *by the town council*, must we not take it that they were properly summoned?(b)] Admitting that to be so, still there is no resolution in this particular instance, authorising the employment of the plaintiff. There is only an order from the mayor in the first instance, and the subsequent resolution as to the payment, which is relied upon as a ratification. As town-clerk, the plaintiff had the custody of the voting papers, and it was his duty to permit any burgess to inspect them, on payment of 1*s.* for every search, under sect. 35, of the 5 & 6 W. 4, c. 76. A mandamus was moved for to compel the plaintiff to permit an inspection of these papers; the costs were incurred in opposing that rule; but the plaintiff was bound to defend himself and pay the costs out of his own pocket, especially as he had a salary allowed him as town-clerk. An overseer is in certain cases bound to produce the poor-rate;(c) and a mandamus would lie against him if he neglected his duty in doing so; but could he charge upon the poor-rate his expenses of opposing the rule? The plaintiff, therefore, having no legal claim to these costs, and the corporation being under no

*891] legal liability to pay them, the subsequent resolution to *pay him is of no value. [CRESSWELL, J. Does it not admit that if there could be a binding retainer there has been one?] It is submitted that such is not its effect. The plaintiff in fact was acting as his own client and his own attorney. The supposed ratification by the town council could not create a liability that did not exist previously.

As to the bill No. 3, the plaintiff has already received the costs as taxed between attorney and client; and there is nothing to show a contract to pay him any further costs.

As to Nos. 4 and 8, it may be admitted, that as far as the town council

(a) In *Owen* v. *Ord*, 3 C. & P. 349. See also 1 Lill. Prac. Reg. 134, 137.
(b) Or that all were present; in which case the summons would be immaterial.
(c) See *Wethered* v. *Calcutt*, antè, 566.

can, by their resolutions, bind the corporation, the corporation would be bound in respect of the charges in these two bills. But the question would still remain as to the right of the plaintiff to recover, the suit not being determined. There is no doubt that an attorney is not compelled, in all cases, to conduct a suit or action to its end, and that he may put himself in a position to recover his costs pending the suit. But the general contract arising out of his retainer is, to conduct the suit to the end; and he can only vary that contract by giving a regular notice of his intention not to continue to act as attorney. That principle is laid down in *Harris* v. *Osbourn*, 2 C. & M. 629, 4 Tyrwh. 445, and indeed in the cases cited upon this point on the other side.

In No. 5, there *was* a resolution of the town council previous to the employment of the plaintiff; but that, for the reasons before stated, it is submitted does not amount to a valid retainer.

As to the reduction of the verdict:—that turns on the right of the plaintiff to appropriate the money he has received to the payment of the bills Nos. 2 and 3. But if those bills are not recoverable, the plaintiff has no such right. A party can only appropriate a *payment where a legal [*892 liability to make the payment exists on the part of the debtor, or at least has at some time existed; *Wright* v. *Laing*, 3 B. & C. 165, 4 D. & R. 783.

Bompas, Serjt., in reply. The distinction between trading corporations and others does not appear to be well founded. *The Mayor of Stafford* v. *Till* was the case of a municipal corporation. There may be a good reason why an act relating to the *lands* of corporations should require the solemnity of a seal, as was the case in *The Mayor of Ludlow* v. *Charlton*. So as to what is said in Bac. Abr. *Corporations* (E) 3, as to authorising a party to appear for them *in an assize*. But it is nowhere said that they cannot, except under seal, appoint an attorney to appear for them in an action. It is stated in Tidd's Practice, P. 84, 6th edit., that attorneys were anciently appointed in court, when actually present; but that they are now usually appointed out of court by *warrant*,(a) which should regularly be in *writing*; but an authority by parol is sufficient to support a payment. *Gibson* v. *The East India Company* was decided upon the ground that the pension was in the nature of half pay. From the case of *Rex* v. *Arnold* it appears that it was the duty of the plaintiff to refuse the inspection of the papers; and surely he ought to be paid for resisting the mandamus, especially as the town council resolved that it should be resisted. As to the plaintiff's right to recover his expenses before the termination of the proceedings in Chancery, no injury can arise to the defendants from the demand; although the suit is going on, the bill has been called for by the defendants. In *Wadsworth* v. *Marshall*, 2 C. & J. 665, it was held that an attorney who has undertaken a cause is not bound to proceed without adequate *advances from time to time by his client, for expenses out of [*893 pocket; and therefore that the court would not compel an attorney, even after notice of trial, to carry the cause into court, unless the client supplied him with sufficient funds to pay the expenses out of pocket thereby incurred. [ERSKINE, J. The distinction made in that case seems to be, that an attorney may say he will not go on with a suit without funds to meet expenses out of pocket; not that he can demand payment for his services.] *Cur. adv. vult.*

(a) Vide infra, p. 897, n. (c).

TINDAL, C. J., now delivered the judgment of the court.

This was an action of debt brought by an attorney who was town clerk and clerk of the peace of the borough of Poole, to recover from the corporation of the mayor, aldermen, and burgesses of Poole, the amount of ten several bills of costs, numbered from 1 to 10.

By an order of nisi prius the cause was referred to an arbitrator, who found, as to all the bills, except those numbered 6, 7, 9 and 10, that the plaintiff had no retainer under the common seal of the corporation, and decided that he could not recover. As to the bills numbered 6, 7, 9 and 10, he found that the business therein mentioned was done by the plaintiff in his capacity of town-clerk and clerk of the peace, and directed that a verdict should be entered in his favour for the sum of 718*l.* 9*s.* 7*d.*, which he found to be due in respect of those bills. He also found, that, after all the bills had been delivered, money was paid on account, generally, by the corporation, and that the plaintiff had applied a portion of it to the bills numbered 2 and 3; and he stated specially the facts upon which his award proceeded, and submitted for the opinion of the court the following questions:—First, whether the facts
*894] *stated in the award, furnished sufficient evidence of a retainer of the plaintiff, so as to enable him to maintain this action in respect of the charges contained in the bill No. 1 against the defendants. Secondly, whether, in the absence of any authority under the seal of the corporation, the facts stated furnished evidence of a valid contract or retainer, binding the corporation, so as to enable the plaintiff to maintain this action for the whole, or any, of the bills Nos. 2, 3, 4, 5 and 8, against the defendants. Thirdly, whether the charges in the bills Nos. 1, 2, 3, 4, 5 and 8 were for matters concerning which the corporation could enter into a valid contract, or give a retainer binding the funds of the corporation, so as to enable the plaintiff to maintain this action in respect of such bills, or any of them, against the defendants. Fourthly, whether the plaintiff had any right of action against the defendants to recover the charges contained in the bills Nos. 4 and 8, the suit to which they refer being undetermined. Fifthly, whether the plaintiff had a right to appropriate the payment of two sums, viz. 141*l.* 11*s.* 10*d.* and 82*l.* 7*s.* 1*d.*, part of the said sum of 350*l.*, to the bills No. 2 and No. 3 respectively. Of these questions, however, it is only necessary to determine those relating to the sufficiency of the retainer, and the application of the money paid on account.

The case was elaborately argued in last Easter term, when it was conceded, and rightly conceded, that, in respect of the bill No. 1, amounting to 1591*l.* 1*s.* 4*d.*, the action was not maintainable, there being no sufficient evidence of a retainer of the plaintiff by the corporation. But, as to the residue of the bills disallowed by the arbitrator, it was contended, that the facts appearing on the face of the award were sufficient to prove a valid retainer, although not under the seal of the corporation; and several instances were pointed out in
*895] *which it has been held that corporations aggregate, having a head, may, by parol, appoint servants for the performance of certain acts in their behalf. But the acts which may be so done have always been considered as exceptions out of the general rule of law, and relate either to trivial matters of frequent occurrence, or such as from their nature do not admit of delay. Cases were also cited in which actions founded on simple contracts have been maintained by and against corporations aggregate. These instances are, for the most part, modern, and relate to corporations established for particular purposes, and where the

making of such contracts was essential for carrying those very purposes into execution. For some time it was considered that such actions could be maintained on executed contracts only; but, in *Church* v. *The Imperial Gas Light and Coke Company*, 6 A. & E. 846, 3 N. & P. 35, the same principle was extended to actions on executory contracts. These two classes of cases, viz. those relating to the appointment of servants by corporations aggregate, and those founded on simple contracts entered into by trading companies, and the principle upon which they may be supported, were lately considered by the court of Exchequer in *The Mayor*, *&c.*, *of Ludlow* v. *Charlton*, 6 M. & W. 815; and it was held by that court that a municipal corporation was not bound by a contract to pay money, although the consideration had been executed, such contract not being made under their common seal. That case appears to us to be direct authority in favour of the present defendants; for the appointment of an attorney to conduct important suits, affecting the rights and property of the corporation, cannot be considered a trifling matter; nor is it of such frequent occurrence, or of such immediate urgency, as to render it inconvenient to *postpone it until the seal of the corporation can be affixed to the retainer. [*896
Still less can it be said that the retainer of an attorney falls within the principle of the decisions relating to contracts made by corporations established for trading purposes.

But another class of cases was cited at the bar, in which corporations aggregate have been allowed to maintain actions on simple contracts not failling within either of the principles considered in *The Mayor*, *&c.*, *of Ludlow* v. *Charlton*; such as *The Barber Surgeons of London* v. *Pelson*, 2 Lev. 252, which was an action of assumpsit for money forfeited by a bylaw; and *The Dean and Chapter of Rochester* v. *Pierce*, 1 Campb. 466, which was assumpsit for use and occupation: and it was contended that all contracts to be binding must be mutual, and that, therefore, where corporations may sue upon simple contracts, it follows as a legal consequence they may also be sued. But we think the proposition as to the necessary mutuality of contracts was stated too broadly, and that it must be confined to those cases where the want of mutuality would leave one party without a valid or available consideration for his promise. The cases last cited do not therefore show that corporations may be sued on parol contracts.

It was argued for the plaintiff, that, if municipal corporations cannot make contracts in general, yet they may nevertheless make a valid appointment of an attorney, without seal; and the annual appointment of an attorney by the corporation of London was referred to. But that appointment is recorded; and in The Mayor of Thetford's case, 1 Salk. 192, 3 Salk. 103, 2 Lord Raym. 848, Lord Holt, 171, HOLT, C. J., explained the ground upon which such appointment is binding. He there said, and the rest of the court concurred with him, "that, though a corporation cannot do an act *in pais* *without their common seal, yet they may do an act *upon record:* and that is the case of the city of London every year, who appoint an attorney by warrant of attorney in this court, without either sealing or signing; and the reason is, because they are estopped by the record to say it is not their act," 1 Salk. 192. [*897

It appears to us, therefore, that none of the cases or arguments brought before us, are sufficient to establish a right of action in the plaintiff to recover the amount of the bills which the arbitrator disallowed, and that the law laid down by the court of Exchequer in *The Mayor*, *&c. of Ludlow* v. *Charlton* must govern this case.

With respect to the appropriation of a portion of the money received by the plaintiff to the discharge of the bills Nos. 2, and 3, it appears to us, that, although the plaintiff could not have maintained an action to recover the amount of those bills, yet, as the money was paid generally on account of all the bills after those two bills were delivered, the appropriation of the money made by him at the time cannot now be questioned. The claim of the plaintiff on these two bills was a just and equitable claim, although from the absence of a contract under seal, it could not be made the subject of an action in a court of law. The case, therefore, is not like that of *Wright* v. *Laing*, 3 B. & C. 165, 4 D. & R. 783, where there were two contracts, the one lawful, the other forbidden by law, and where no specific appropriation had been made at the time of payment.(a)

The result is, that the verdict must be entered according to the direction of the arbitrator. Rule accordingly.(b)

(a) A. does two acts of service for B., one at B.'s request, the other without any provable request. Quære, whether A. can appropriate a general payment made by B. to a claim set up by A. in respect of the latter act.

(b) In Com. Dig. Pleader, 2 B. 2, it is said, "the corporation must appear by an *attorney, appointed under their common seal;" citing Bro. Abr. *Corporations et Capacities*,
*898] 28. The placitum in Brooke, referred to by Comyns, does not bear out the latter statement; but in tit. *Garrantie d' Attorney*, 36, it is said "Per Choke, justice, a corporation cannot appear but by attorney by deed under their common seal, and otherwise the warrant (of attorney) is void; *quod non negatur: ideo quære* the usage thereof at this day;" citing 21, E. 4, 13. And again, in tit. *Corporations*, 63. "Choke, J. Warrant of attorney of a corporation shall be by their common seal, and otherwise it is void;" citing 21 E. 4, 7, 12, 27, 67. See also *Rex* v. *The City of Chester*, Skin. 154.

FITT and Another *v.* CASSANET.

A. agreed to purchase thirteen tons of palm oil scrapings from B. by sample, in the bulk, at 8*l.* per ton. A. paid a deposit of 22*l.*, and B. delivered part of the article. A. then gave notice that the quality of the oil delivered did not correspond with the sample, and required B. to fetch away what had been delivered, and to repay the 22*l.* B. resold the residue, but it was not shown at what time such re-sale took place.

Held, that A. could not recover the deposit as money had and received, unless there was fraud in the contract, or there had been an agreement between the parties to rescind such contract. *Quære*, whether he might have recovered if the re-sale by B. had been before the notice by A.

ASSUMPSIT, for money had and received. Plea: non assumpsit.

At the trial before Lord ABINGER, C. B., at the last assizes for Surrey, it appeared that the action was brought to recover the sum of 22*l.* which had been paid by the plaintiff's, who were oil and tallow merchants, to the defendant, as a deposit upon the purchase of thirteen tons of fat and palm oil scrapings, at 8*l.* per ton. Before the contract was entered into, a sample of the article had been sent to the plaintiff's. Wishing to see the bulk, they sent their foreman, who inspected and sampled it; and one of the plaintiff's afterwards did so himself. This was in the month of November. They then agreed to take it at the price above mentioned. They paid the 22*l.* on account, and five tons were delivered to them; one ton at one time, and the remaining four at another. After the second delivery the plaintiff's
*899] complained to the *defendant that the article delivered did not correspond with the samples; that there was a quantity of rubbish at the bottom of the casks; and on the 3d of December they gave the defendant notice to take away the casks that had been delivered, and to repay the 22*l.* Some evidence was given on the part of the plaintiff's in order to show that the defendant agreed to rescind the contract, and only required

time to pay back the money. It was proved that the defendant had sold the remaining casks to a third party at 8*l.* 10*s.* per ton; but it did not appear at what time this re-sale took place.

The Lord Chief Baron directed the jury, that if a contract was entered into it could not be rescinded, unless by consent of both the parties, except in a case of fraud; and he left it to them to say: first, whether there had been any fraud in the sale on the part of the defendant; and secondly, whether there had been an agreement to rescind the contract. The jury negatived both points and returned a verdict for the defendant.

Channell, Serjt., on a former day in this term obtained a rule nisi for a new trial, on the ground of misdirection. He submitted that the defendant, having by selling the residue of the article, put it out of his power to perform the contract, the plaintiffs were entitled to consider it as rescinded; and that they were not precluded from doing so by having received and retained a portion of the article, as they had given the defendant notice as soon as they discovered that it did not correspond with the sample. He cited *Grounsell* v. *Lamb*, 1 M. & W. 352.

Sir *Thomas Wilde*, Serjt., (with whom was *G. Taylor*,) now showed cause. The plaintiffs have already received 40*l.* worth of the oil; they have paid 22*l.*, and remain, *therefore, debtors to the defendant in the sum of 18*l.* on account of what they have actually received and retained. They have refused to receive the residue. What then was the defendant to do? He sells the residue—(for the fair inference is, that such sale was after the plaintiffs' notice that they would not receive the residue)—intending probably to charge the plaintiffs with the difference that might arise in the amount on such resale. But it turned out that the difference was in favour of the defendant: as upon the re-sale the oil fetched 10*s.* a ton more than it had been sold for to the plaintiffs. That fact negatives all fraud in the original contract. The re-sale, under such circumstances, does not amount to a rescinding of the contract by the defendant. If there has been a breach of contract on his part, the plaintiffs may sue on such breach, but clearly they cannot recover in the present form of action. [TINDAL, C. J. *Non constat* here that the plaintiffs have not used the oil they received.] The plaintiffs now wish to present their case as if *they* were desirous to complete the contract, but the defendant would not do so. [*900

If the goods had been re-sold for less than the original price, the defendant would undoubtedly have been entitled to sue the plaintiffs for damages on the contract; but no damage arose, as the goods sold for more than the plaintiffs agreed to take them for. [TINDAL, C. J. There are some cases in which the goods must be re-sold, as where they are perishable.] *Grounsell* v. *Lamb* is very distinguishable from the present case. That was an action to recover the price of a cutting machine manufactured by the plaintiff for the defendant, and it was held, that the defendant might show, under the general issue that the machine was sold under a condition, that if it did not answer its purpose, nothing should be paid for it, and that in fact it turned out to be useless: and under these circumstances it was *also held, that although the defendant was not proved to have returned the article, still the plaintiff was not entitled to damages on the *quantum valebat*, without showing some new contract to be implied from the defendant's dealing with the article. The present is the case of a sale of a commodity in bulk with a part delivery, and no such condition therefore can be implied. [*901

Channell, Serjt., (with whom was *Bovill*,) in support of the rule. In December the defendant had notice to take away the oil that had been delivered. The defendant sold the residue, and thereby showed that he considered the contract was rescinded. [TINDAL, C. J. There is no date to show whether the re-sale was before or after the plaintiffs' notice. If it was before, the plaintiffs are bound to show that.] If the contract was not rescinded, the plaintiffs might have brought an action for its non-completion. [TINDAL, C. J. Perhaps they would have found it difficult to prove that they were ready and willing "to pay the price of the goods." MAULE, J. You say that even though there was a dissent on the part of the plaintiffs, yet the defendant, by selling the goods to a third party, has entitled the plaintiffs to treat the contract as rescinded.] That is the argument. If the re-sale had been after action brought, it would have been wholly immaterial; it must, therefore, be taken to have been before. [MAULE, J. The plaintiffs could only have been in the right in giving notice to the defendant to take the goods back, on the ground that there had been fraud in the original contract; but fraud has been negatived. The plaintiffs therefore had no right to give that notice, and can derive no right by insisting on the defendant's doing that which he was not bound to do.] It was not necessary to give any notice, except for the purpose of showing non-acceptance of the goods. The plaintiffs are entitled to recover the money which has *902] *been paid as a deposit upon a contract which the defendants have not performed, and are not in a situation to perform. [COLTMAN, J. Might not the defendant sue upon the original contract, and allege, and prove, his readiness and willingness to fulfil the same, but that he had been discharged from so doing by the plaintiffs?] That would depend upon the period when he re-sold the goods. If he had done so before he received the plaintiffs' notice, he clearly would not have been in a situation to prove that allegation. *Grounsell* v. *Lamb* is an authority to show that the mere retention of goods by the vendee does entitle the vendor to sue, either on the original contract, or on an implied new contract, unless it appears that he has made use of the goods. [Sir *T. Wilde*, Serjt. In that case it was part of the contract that if the article sold was of no use to the vendee, it should not be paid for; and it turned out to be useless.] In *Shipton* v. *Casson*, 5 B. & C. 378, 8 D. & R. 130, A. contracted to sell and deliver to B. a large quantity of bark. He delivered a small part only, and failed to complete his contract. B. never returned the part delivered; and it was held that A. was entitled to set-off the value of that part against a demand which B. had against him. There the vendee elected to retain the part which had been delivered to him. The same principle was established in *Oxendale* v. *Wetherell*, 9 B. & C. 386, 4 M. & R. 429.(a) [COLTMAN, J. Is it not incumbent on the plaintiffs to show that no action could be maintained against them?]

TINDAL, C. J. I think that the verdict which has been found for the defendant in this case ought not to be disturbed. Two points were left by the Lord Chief Baron to the jury—first, whether there was any fraud *903] *on the part of the defendant in the original contract—and secondly, whether there was any subsequent agreement between the parties to rescind their contract. The jury have found in the negative on both those points: and the evidence appears to have been fully sufficient to warrant their finding. But there a third circumstance is alleged upon the part of the plaintiffs as entitling them to recover: namely, that the defend-

(a) See also *Richardson* v. *Dunn*. 2 Q. B. 218.

ant re-sold part of the palm oil scrapings—the subject matter of the original contract;—and it is argued, that as he has thereby incapacitated himself from performing the original contract, the law will not allow him to retain the money which was paid to him on account thereof. But assuming that to be so, it is necessary for the plaintiffs to show when the re-sale took place. If it was after the plaintiffs had signified that they would not receive the rest of the goods, it certainly was not necessary for the defendant to keep them for an unlimited time. When a contract is rescinded, both parties are to be put in the same condition they were in before the contract was entered into. The time of the re-sale, however, in this case is left a perfect blank. An inference is sought to be raised by my brother *Channell*, that the re-sale was before the plaintiffs' notice that they would not receive the residue. But there is no evidence of that fact; and it behoved the plaintiffs, who relied on it, to establish it. I own I should rather infer that the determination of the plaintiffs not to receive the residue was the first in order of time. Otherwise it is not easy to see why the defendant should subject himself to the liability of an action by the re-sale of the residue. The fair inference seems to me to be, that the plaintiffs were the first to repudiate the further performance of the contract, and then the conduct of the defendant would be consistent with what the law would allow. It is difficult to see how an action for money had and received could be *maintained by the plaintiffs unless they were in a situation to recover upon the original contract. [*904] The action for money had and received would be a compendious form of recovering back the deposit, but it would stand upon the same footing as the right to sue on the contract. But in order to recover upon that, the plaintiffs must have averred that they were ready and willing to perform their part of the contract, and in the proof of that allegation they must have failed.

COLTMAN, J. If it had been proved that the re-sale by the defendant took place before the notice by the plaintiffs in December, I should have thought there was some weight in the arguments which have been urged on their behalf; because the defendant would have been disabled from suing upon the contract, which was an entire one. And in that case the fact of part of the goods being in the possession of the plaintiffs, would not, according to the decisions, have operated to prevent their recovering in this form of action. But as there was no evidence of the time when the re-sale took place, I think there is no pretence to set aside the verdict, and that the rule must be discharged.

ERSKINE, J. I am of the same opinion. The plaintiffs say that the money which they seek to recover in this action was paid upon a contract, which has since been rescinded. They put their case on three grounds: first, that there was fraud in the original contract on the part of the defendant, which authorised the plaintiffs to rescind it; secondly, that there was an agreement between them and the defendant that it should be rescinded; and, thirdly, that the conduct of the defendant in having re-sold the residue of the goods, authorised the plaintiffs to consider the contract as rescinded. The verdict negatives the fraud and the agreement to *rescind. To entitle the plaintiffs to recover on the last ground, [*905] they should have shown that the re-sale by the defendant took place before the refusal on their part to complete the contract. But there was no evidence to that effect. I agree, therefore, that the rule must be discharged.

MAULE, J. I am of the same opinion. In order to entitle the plaintiffs

to maintain *any* action against the defendant, it is necessary that he should be in the wrong. It is incumbent on the plaintiffs to show that. Now it is quite consistent with the evidence in the case and the finding of the jury, that the oil delivered was of the quality which the plaintiffs were bound to receive; and that the defendant re-sold the residue after the plaintiffs had refused to receive it. If that is the state of the case the defendant has done nothing but what he had a right to do. Without considering whether a special action would not be necessary for the breach of contract, if the defendant were in the wrong, or whether an action for money had and received would be maintainable, I think the evidence does not show that the defendant has done any thing wrong, and therefore that *no* action will lie against him on the part of the plaintiffs, and consequently the present action for money had and received cannot be maintained.

Rule discharged.

*906] *ANONYMOUS.

The court will not, on the last day of term, grant a rule nisi for the plaintiff to bring in the record, in order to enter a suggestion to entitle the defendant to double costs.

Bompas, Serjt., moved for a rule calling upon the plaintiff to bring in the record in order that a suggestion might be entered, to entitle the defendant to double costs.

TINDAL, C. J. The rule would be a rule nisi, and this is the last day of term.

Per curiam; Rule refused.

BRISTOWE *v.* NEEDHAM.

The plaintiff having an unsatisfied judgment to a large amount against the defendant, the latter obtained a rule nisi for security for costs in a subsequent cause, upon the ground that the plaintiff lived out of the jurisdiction. The court discharged the rule upon the plaintiff's undertaking that the judgment should be set off against any cost to which the defendant might become entitled.

Channell, Serjt., on a former day in this term, had obtained a rule nisi calling upon the plaintiff to show cause why he should not find security for costs, on the ground that he was resident in Jersey out of the jurisdiction of the court.

Sir *Thomas Wilde*, Serjt., now showed cause, upon an affidavit which stated that the plaintiff had an unsatisfied judgment against the defendant for 22,000*l.*, which the learned serjeant submitted was a sufficient answer to the application.

*907] *TINDAL, C. J. The better course will be that the present rule should be discharged, upon the plaintiff undertaking to allow the judgment to be set off against any costs to which the defendant may become entitled.

Per curiam; Rule discharged accordingly.

CAUTY *v.* GYLL.

Where money paid into court is taken out in satisfaction of part only of the plaintiff's demand—there being other issues upon which the parties are proceeding to trial—the plaintiff is not entitled to tax his costs under R. T. T. 1 Vict.

DEBT. The declaration contained five counts, claiming 5,000*l.* in each;

and bringing two parties jointly into court, would not be the same as jointly suing them. [MAULE, J. Upon Breedon alone demanding a declaration, might not the plaintiff have declared against him alone?] Having joined all the defendants in the same writ, he could not proceed against one only. He might have declared against them all, notwithstanding the demand for a declaration was by one only. [TINDAL, C. J. The real difficulty appears to be this. One defendant out of seven has signed a general judgment of *non pros.* when the other six were not entitled to it. What authority had he to put the other defendants in a different position?] The argument is, that he was entitled to sign for all. [TINDAL, C. J. In the cases referred to it appears that all the defendants had the right. The right of one appears to be coupled with a condition—that the others are entitled.] If all the defendants have appeared they are all entitled. [MAULE, J. Suppose all have appeared, and one of them *wants to *non-pros.* the plaintiff, and the others want to go on with the action, could the one in that case sign for all?] It is submitted that he could. If one defendant sign *non pros.* in one week, and another in another, that would be bad. [MAULE, J. If there can be only *one* judgment of *non pros.* that would be so.] There is no difference in this respect between a nonsuit and a *non pros.* One defendant may have a nonsuit as to all. In *Allington* v. *Vavasor*, 2 Salk. 455, it was held that in trespass against four, there can be but one nonsuit for want of declaring. It is there called a nonsuit instead of a *non. pros.*(a) In *Murphy* v. *Donlan*, 5 B. & C. 178,(b) it was held, that after judgment by default against one of two defendants, the plaintiff upon the trial of an issue by the other defendant, might elect to be nonsuited. [MAULE, J. That is, as to the defendant who had pleaded. ABBOTT, C. J., there expressly says, "there is no inconsistency in allowing a plaintiff to be nonsuited, *as to the defendant who has pleaded*, although the other defendant may have suffered judgment by default." TINDAL, C. J. It is a nonsuit *quâ* the one who goes before the jury. If there can be a nonsuit as to one defendant, why should there not be a *non pros.* also? ERSKINE, J. *Murphy* v. *Donlan* was a case *ex contractu*. MAULE, J. There are cases in which an action lies against one only, *or* against several. There are others where the action *must* be brought againt several. In the former, if more than one defendant are joined in the action, why should there not be a nonsuit or *non pros.* as to one, and the case proceed as to the others?] [*912

In *Palmer* v. *Feistel*, 2 Dowl. P. C. 507, it was held, that in an action against several defendants, a judgment of *non pros.* cannot *be signed until all have appeared. A plaintiff cannot now include four persons in a writ of summons, and sue only two. [TINDAL, C. J. Is that so? COLTMAN, J. By the rule M. T. 3, W. 4, No. 1, it is ordered "that every writ of summons, &c., shall contain the names of all the defendants, if more than one, in the action, and shall not contain the name or names of any defendant or defendants in more actions than one." But it does not state that a plaintiff shall not declare against fewer than he has summoned. ERKSINE, J. Suppose a summons against three, and an appearance by all, and a declaration against two only, would be entitled to [913*

(a) *Non pros.* (*non prosecutus est breve.*) is the law Latin term, and *nonsuit* the law French term, to denote that the plaintiff has made default in prosecuting his action. The latter term is now used with reference merely to such an abandonment taking place at the trial; but this is a modern distinction.

(b) *Murphy* v. *Tomlan*, 7 D. & R. 619.

sign a judgment of *non pros.* as to all?] Probably he would. But the whole proceedings would be irregular. A discontinuance as to one would clearly be a discontinuance as to all. One defendant cannot demand a declaration and sign a judgment of *non pros.*, and then another defendant make a separate demand and separately *non. pros.* After the demand of declaration by one the plaintiff is bound to deliver the declaration against all. [TINDAL, C. J. The argument would be as strong if some of the defendants had not appeared.] There cannot be a *non pros.* until all have appeared. [TINDAL, C. J. The plaintiff need not declare till there has been a demand of declaration.] There has been a demand here by one defendant who is sued jointly with others. *Coldwell* v. *Blake*, 3 Dowl. P. C. 656, S. C. *per nom. Coldwell* v. *Blake*, 2 C. M. & R. 249, 3 Tyrwh. 618, may be relied upon on the other side. That case is not very intelligible. It is stated that a motion was made to set aside the declaration for irregularity, and that the only process against the defendant was against two, of whom the defendant was one.(*a*) It was contended that the *decla-
*914] ration ought to correspond with the writ, and the rule of M. T. 3 W. 4, (which has been cited by the court in this case,) was referred to. And Lord ABINGER, C. B., said: "Your objection at present is too early. You will be in time when the plaintiff has declared against the other."(*b*) [TINDAL, C. J. The learned judge meant that there was no irregularity at that time, and that the defendant should wait to see if the plaintiff declared against the other defendant in another action, and then there would have been an irregularity.(*b*) The learned serjeant also referred to *Knowles* v. *Johnson*, 2 Dowl. P. C. 653.

TINDAL, C. J. If any distinct authority or precedent had been shown that where one of the several defendants was in a condition to *non pros.* the plaintiff, and the rest were not, the one might sign judgment for all, we must have yielded to it. But no case or reason has been adduced to show that one defendant may put the others in a situation in which they could not place themselves. *Murphy* v. *Donlan* shows that a plaintiff may be non-suited with respect to one defendant only; and I am unable to see why a defendant who has alone demanded a declaration should not be allowed to sign judgment of *non pros.* as against himself only. I am of opinion, therefore, that the present judgment is irregular, and must be set aside.

COLTMAN, C. J. I am of the same opinion. If it could have been shown that, where there was a writ of summons against several defendants, the plaintiff could not declare against some of them only, I should have thought the argument on the part of the defendants in this case would have been entitled to great consideration. *But the cases, as well as the [915*
language of the rule which has been referred to, show that such is not the law. And I see no reason why a *non pros.* as to one of several defendants should enure so as to put the case out of court as to all the rest. I think, therefore, the judgment in this case was irregularly signed.

ERSKINE, J. Before the rule of M. T. 3 W. 4, a plaintiff might have issued a writ against four parties, and might have proceeded in one action against two of them, and in another against the other two; or he might have issued different writs against several defendants in the same action.

(*a*) "It appeared that the writ of summons was against two, whereas the declaration was against one only;" 2 C. M. & R. 249.
(*b*) See *Palmer* v. *Beale*, 9 Dowl. P. C. 529.
(*c*) See *Pepper* v. *Whalley*, 1 N. C. 71.

But this has been altered by the rule in question. That rule however does not say that the writ of summons must be against all the defendants *and no one else*. And that explains the expression of Lord ABINGER in *Coldwell* v. *Blake*. The practice in this respect is left as it was before the new rule, that a plaintiff may issue the writ against several, and may declare against some of them only. No authority has been cited to show that, where one defendant is in a condition to *non pros.* the plaintiff, and the others are not, the one may not sign judgment as regards himself. I think he may do so; but not as regards the other defendants.

MAULE, J. I also think this rule must be made absolute on the ground that one defendant is not entitled to sign a judgment of *non pros.* for all the other defendants, who are not themselves in a situation to *non pros.* the plaintiff. The plaintiff in this case is not bound, as the proceedings stand at present, to go on against all the defendants. One defendant has a just ground of complaint, inasmuch as having called upon the plaintiff to proceed against him, the plaintiff has not done so. That right of complaint is satisfied by his power to enter *a *non pros.* as regards himself. It [*916 is said the judgment must be as to all, even though the others are not in a situation to call for it. But there is no default on the part of the plaintiff except as against one, and he may take advantage of it. Suppose the others wished the cause to go on; it would be very strange that the plaintiff should be *non-prossed* as to those with respect to whom there had been no default.

Rule absolute.

JOHNSON and Another, Assignees of RIDGWAY, a Bankrupt *v.* SHAW.

A. consigned goods to B., a factor, who sold them to C.; B. having become bankrupt, his assignees sued C. for the price of the goods, which were also claimed by A. *Held*, that C. was entitled to the benefit of the inter-pleader act.

THIS was an action for goods sold and delivered by Ridgway before his bankruptcy. The goods were also claimed by one Renter, who had consigned them to Ridgway, as his factor.

Talfourd, Serjt., on behalf of the defendant, having obtained a rule under the first section of the inter-pleader act, (1 & 2 W. 4, c. 58,)

Sir *Thomas Wilde*, Serjt., now appeared for Renter, and contended that his client, as consignor of the goods to a factor, had a right to follow them; for never having been the property of the bankrupt, they would not pass to his assignees.

Channell, Serjt., for the plaintiffs, argued that it was doubtful, upon the authority of *James* v. *Pritchard*, 8 Dowl. P. C. 890, whether this case was within the inter-pleader act. The *plaintiff in that case having sold [*917 to the defendant a rick of hay belonging to a deceased person, and S. having afterwards taken out administration and claimed the price of the hay, it was held that the defendant could not be relieved under the act. Here, if the bankrupt had been the plaintiff and had sued the defendant, and Renter had put in his claim, the defendant would not have been entitled to an inter-pleader rule. [TINDAL, C. J. The whole question arises in consequence of the representative character of the plaintiffs.] In the case referred to the party claimed in a representative character. [ERSKINE, J. In that case the plaintiff was seeking to enforce a contract made with himself; here, the contract was made with another party.]

TINDAL, C. J. I think there should be an issue between the assignees

and Renter, to try whether at the time of the bankruptcy the latter was entitled to the goods or any part thereof.

Per curiam:

Rule accordingly.

*918] *WOOD *v.* HEATH.

A jailor has no right to apply for the discharge of a debtor in execution, under the stat. 48 G. 3, c. 123. Such an application can only be made on behalf of the debtor himself.

Channell, Serjt., on a former day in this term had obtained a rule calling upon the plaintiff to show cause why the defendant should not be discharged out of the custody of the marshal of the Queen's prison; the defendant having lain in prison twelve calendar months, next before the making the application, in execution on a judgment at the plaintiff's suit for a debt not exceeding 20*l*. The application was made under the statute 48 G. 3, c. 123, s. 1,(*a*) *on behalf of the marshal.*

*919] **Dowling*, Serjt., now showed cause. The application under the 48 G. 3, c. 123, can only be made on behalf of the prisoner. The words of the statute are express upon this point. There is no compulsory power either in that act or in the 1 & 2 Vict. c. 110, or in the act for consolidating prisons, 5 & 6 Vict. c. 22, by which a prisoner can be compelled to *seek* his discharge. The defendant is not even made a party to the present rule, which was served upon the plaintiff alone.

Channell, Serjt., in support of the rule. It must be admitted that in all

(*a*) "Whereas it might tend greatly to the relief of certain debtors in execution for small debts, and at the same time occasion no material prejudice to trade and public credit, if such debtors should, after a limited period of imprisonment, be allowed the benefit of a discharge therefrom, the creditors, at whose suit they were so in execution, being at the same time authorised to take out other writs of execution against the land and goods of such debtors, or to use other remedy for the satisfaction of their debts, as if the persons of such debtors had never been taken in execution; be it enacted, that from and after the passing of this act, all persons in execution upon any judgment, in whatsoever court the same may have been obtained, and whether such court be or be not a court of record for any debt or damages not exceeding the sum of 20*l*., exclusive of the costs recovered by such judgment, and who shall have lain in prison thereupon for the space of twelve successive calendar months next before the time of their application to be discharged, as hereinafter mentioned, *shall and may, upon his, her, or their application* for that purpose in term time, made to some one of His Majesty's superior courts of record at Westminster, to the satisfaction of such court, be forthwith discharged out of custody, as to such execution, by the rule or order of such court," &c. "Provided always, that for and notwithstanding the discharge of any debtor or debtors by virtue of this act, the judgment whereupon any such debtor or debtors was or were taken, or charged in execution, shall nevertheless continue and remain in full force to all intents and purposes, except as to the taking in execution the person or persons of such debtor or debtors thereupon, as is hereinafter provided; and that it shall and may be lawful for the creditor or creditors, at whose suit such debtor or debtors has been, was, or were so taken or charged in execution, to take out all such execution or executions on every such judgment against the lands, tenements, hereditaments, goods and chattels of any such debtor or debtors, (other than and except the necessary wearing apparel, &c.,) or to bring any such action or any such judgment against such debtor or debtors respectively, or to bring any such action, or use any such remedy for the recovery and satisfaction of his, her, or their demand, against any other person or persons liable to satisfy the same in such and the same manner, but in such and the same manner only, as such creditor or creditors otherwise could or might have done in case such debtor or debtors had never been taken or charged in execution upon such judgment: Provided always, that no debtor or debtors who shall be duly discharged in pursuance of this act, shall at any time afterwards be taken or charged in execution upon any judgment herein so as before declared, to continue and remain in full force, nor be arrested in any action to be brought on any such judgment; and that no proceeding whatsoever by *scire facias*, action, or otherwise, shall be maintained or had against the bail in any action upon the judgment, wherein the defendant or defendants shall have been charged in execution, and afterwards discharged by virtue of the provisions of this act."

former cases the application for a discharge under the 48 G. 3, c. 123, appears to have been made on behalf of the defendant. But there seems no reason why it should not be made by the jailor. The prisoner is receiving the prison allowance, and is a *charge upon the county; and it might give rise to a collusion between a prisoner and a plaintiff, if [*920] the former could not be discharged except upon his own application. The jail too might be inconveniently crowded. Although the preamble of the statute speaks of "the relief of debtors," that is not the only object of the act. The words of the enactment are, that persons in execution under the circumstance there stated "shall and may" be discharged. In *ex parte* Chusan, Chitt. Stat. 589, n, the court of King's Bench held that this clause was compulsory on the court, and that they had no power to compel the defendant to assign his property. *Langdon* v. *Rossiter*, 13 Price, 186, and *Wood* v. *Kelmerdine*, 2 Y. & J. 10, are to the same effect. [MAULE, J. If the defendant is discharged has the plaintiff any remedy?] If he is discharged under this act the plaintiff may have an execution against the lands and goods of the debtor. [MAULE, J. Possibly a defendant may choose to stay in prison rather than have his goods taken in execution.]

TINDAL, C. J. From the preamble of the statute it was obviously passed for the benefit and relief of debtors. And the enacting part says that persons in execution may be discharged "upon his, her, or their application;" which must mean upon *their own* application. If we were to hold that a party might be discharged upon the application of the marshal, we should in effect be giving him the power to change the plaintiff's remedy. A defendant in custody has the power to do so, but no one else. The words of the statute being so clear, the rule must be discharged with costs.

Per curiam:

Rule discharged with costs.

*ALDRIDGE v. HOWARD. [*921

Covenant against a lessee, upon a covenant whereby undertook to pay an additional rent of 100*l*. per acre for pasture land, which he should "ear, plough. break-up, dig, *use*, or convert to tillage or for brick earth, *or for any other purpose whatever*, the quarterly payment of such further rent to be made on the day, &c., which should first happen, next after such earing, ploughing, breaking-up, digging or using, or converting to any other use than for meadow or pasture land." The breach assigned was, that the defendant had used and converted the land to the uses and purposes of a race-course and ground for training horses.

***Quære*, whether using the land as a race-course was a breach of the covenant?**

The defendant having demurred generally to the declaration, the court advised him to amend, on the ground, that the question was rather one of fact for a jury than of law.

To a breach which alleged non-payment of the rents reserved, the defendant pleaded, "as to so much of the declaration as related to the sum of 150*l*. parcel of the alleged arrears of rent in the declaration first mentioned," that after the same became due, and before the commencement of the action, the plaintiff took and distrained certain goods of J. S., being upon the demised premises, and sold them for a sum greater than the amount of the arrears of rent, and thereby satisfied and discharged the last mentioned arrears: *Held*, no answer

COVENANT. The declaration stated that one Busby before and at the time of the making of the indenture thereinafter mentioned, was seised in his demesne as of fee, of and in the lands, &c., with the appurtenances thereinafter mentioned to have been demised to the defendant; and the said Busby being so seised on the 7th of November, 1833, by a certain indenture then made between the said Busby of the one part, and the defendant of the other part, [profert of the counterpart,] did demise unto the defendant certain lands with the appurtenances (habendum) unto the defendant,

his executors, administrators, and assigns from the 29th of September then last past for the term of seven years then next ensuing, yielding and paying therefor during the said term to Busby, his heirs and assigns, the clear yearly rent of 180*l.*, at or upon the four quarterly days therein mentioned, &c., by equal portions, clear of land tax, &c., the first payment thereof to be made on, &c.; and also yielding and paying unto Busby, his heirs and *assigns, at or upon the days and times aforesaid, over and above the said rent of 180*l.*, the rent of 100*l.* per acre by the year, and so in proportion for any greater or less quantity than an acre of the pasture land thereby demised, which the defendant, his executors, administrators, or assigns should at any time, during the term thereby granted, ear, plough, break up, dig, use, or convert to tillage, or for brick earth, *or for any other purpose whatsoever*, or should suffer to be so done; the first quarterly payment of such further rent to be made on the day of the payment of the first-named yearly rent which should first happen next after such earing, ploughing, breaking up, digging, using, or *converting to any other use than for meadow or pasture land;* and also yielding and paying unto Busby, his heirs or assigns, at or upon the days or times therein above limited for payment of the said yearly rent of 180*l.*, over and above the same rent, the sum of 50*l.* by the year, in case the defendant, his executors, administrators, or assigns should mow more than one crop in any one year of the said term without dunging the land so mown in a proper husbandlike manner, according to a covenant thereinafter contained; the first quarterly payment thereof to begin and be made on the day of payment of the said yearly rent of 180*l.*, which should happen next after such mowing and omission of dunging as aforesaid; and the defendant did thereby covenant, with Busby, his heirs and assigns, amongst other things, that he, the defendant, his executors, administrators, or assigns, should and would yearly, during the said term thereby granted, well and truly pay, or cause to be paid, unto the said Busby, his heirs or assigns, the said yearly rent of 180*l.*, and also the said several increased or contingent rents, if payable at the days and times thereinbefore limited and appointed for the payment thereof as aforesaid, according *to the respective reservations thereof, and the true intent and meaning of the said indenture; and also should [pay all taxes, &c.;] and also should and would at his and their own proper costs and charges from time to time, and at all times during the said term as occasion should require, repair, uphold, &c., the hedges, ditches, &c., belonging to the said lands and premises in, by, and with all and all manner of necessary reparations and amendments whatsoever; and should and would protect, preserve, and keep the quicksets and hedges of or belonging to the said demised lands and premises from spoil or hurt by great or small cattle, or otherwise; and should and would weed and take care of, by every means in his and their power, the said quicksets and hedges, and make good the parts that should die or decay; *and should and would use the said lands in all respects in a husbandlike manner*, and well and sufficiently manure and keep the said lands and premises in good heart and condition, and lay and spread thereon sometime during the third and sixth years of the said term, at and after the rate of twelve cart-loads of good rotten dung per acre, and should give notice to the said Busby, his heirs or assigns, or their agent or steward in London, of their intention of so manuring the same seven days previous to the said manure being spread upon the said land; and also should and would, at the expiration of the said term, peaceably leave and yield up the said lands and premises so well and sufficiently sustained, amended, maintained, and

kept trenched, scoured, and manured, unto the said Busby, his heirs or assigns, and leave the hedges, ditches, and fences in good state and condition as by the said indenture, reference being as by the said indenture, reference being thereunto had, would amongst other things more fully appear: by virtue of which said demise the defendant afterwards, to wit, on the day and *year first aforesaid, entered into and upon all and singular the said demised lands and premises, with the appurtenances, [*924 and became and was possessed thereof for the said term so to him thereof granted as aforesaid; and afterwards and during the said term and in the life-time of the said Busby, to wit, on the 1st of January, 1837, *the defendant used and converted to and for other and different uses and purposes than for meadow or pasture land*, to wit, *the uses and purposes of a race-course and ground for training horses*, divers portions of the said demised lands and premises being meadow and pasture land, to wit, four acres thereof, and kept and continued the same so used and converted as aforesaid for a long space of time, to wit, thence until and at the expiration of the said term; whereupon the defendant, under and by virtue of the said Busby, his heirs and assigns, upon and from the first day of payment of the said yearly rent, which happened next after his so using and converting the said portions of the said demised lands and premises as aforesaid, and thence during the remainder of the said term over and above the said rent of 180*l.*, the said additional rent of 100*l.* for each and every acre of the said demised lands and premises so used and converted as aforesaid, and which said further rent amounted in the whole to a large sum in each and every year, to wit, the sum of 400*l.* The declaration—after alleging that the lessor, Busby, during the continuance of the term devised a portion of the demised premises to one Aldridge in fee, and afterwards died seised of the reversion, and that upon the death of Aldridge intestate, and without issue, the plaintiff, as his eldest brother, and heir-at-law, became and was seised as of fee of and in the reversion of the said portion of the demised lands and premises, with the appurtenances so devised to the said Aldridge; and that the said Busby and Aldridge, *and the plaintiff respectively, [*925 at all times since the making of the said indenture hitherto, during the several periods in which they were respectively so seised as aforesaid, fulfilled and kept all things in the said indenture contained on their parts respectively to be fulfilled and kept according to the tenor, &c., of the said indenture—averred, nevertheless, that after the making of the said indenture, and during the said term thereby granted as aforesaid, and after the said respective deaths of the said Busby and Aldridge, and whilst the plaintiff was so seised of the said reversion of and in the said parcels of the said demised lands and premises with the appurtenances as aforesaid, to wit, on the 29th of September, 1840, a large sum of money, to wit, the sum of 405*l.* of the said yearly rent of 180*l.*, and a further large sum of money, to wit, the sum of 900*l.* of the said additional rent of 100*l.* per acre so payable as aforesaid, in respect of the said portions of the said demised lands and premises so used and converted as aforesaid, for two years and one quarter of a year of the said term, ending on the day and year last aforesaid, and which had elapsed since the said respective deaths of the said Busby and Aldridge, became and was due and in arrear in respect of the said demised lands and premises, with the appurtenances, under and by virtue of the said indenture; and although the plaintiff thereupon then became and was entitled to have and receive of and from the defendant, for and in respect of the said parcels of the said demised lands and premises, with the appurtenances, the reversion whereof had been so devised

to the said Aldridge, and had so descended to and vested in the plaintiff, and whereof he was then so seised as aforesaid, a certain large sum of money, to wit, the sum of 300*l.* from and out of the said sum of 405*l.*, and a further large sum, to wit, the sum of 600*l.* from and out of the said sum of 900*l.*, as *the proper share of and apportionment of the said arrears of rent due and payable to the plaintiff in that behalf, whereof the defendant then had notice: yet the said defendant did not nor would pay to the plaintiff the said last-mentioned sums, or either of them, or any part thereof, but the defendant had hitherto wholly neglected and refused so to do, and the same were still wholly due in arrear and unpaid, contrary to the tenor and effect of the said indenture, and of the said covenant of the defendant so in that behalf made as aforesaid: and the plaintiff said that after the making, &c., he, the defendant, did not nor would at his own proper costs and charges from time to time, and at all times as occasion required, repair, uphold, &c., the hedges, ditches, &c., belonging to the said parcels of the demised lands and premises, whereof the plaintiff had so become and was seised of the said reversion as aforesaid, in, by, and with all and all manner of necessary reparations and amendments whatsoever, and did not nor would at the expiration of the said term leave and yield up the same in such good state, order, and condition, according to the form and effect of the said indenture in that behalf; but on the contrary thereof the defendant, whilst he was so possessed of the said demised lands and premises with the appurtenances as aforesaid, after the said deaths of the said Busby and Aldridge respectively, after the plaintiff so became seised of the said reversion of and in the said parcels as aforesaid, to wit, on the said 18th of August, 1838, and thence until the expiration of the said term suffered and permitted the said hedges, ditches, &c., belonging to the said parcels of the said demised lands and premises of the reversion whereof the plaintiff had so become seised as aforesaid, to be and continue, and the same were for and during all that time, foul, miry, ruinous, broken down, and destroyed for want of *necessary trenching, scouring, &c., and amending the same; and at the expiration of the said term the defendant left and yielded up the same in such bad order and condition as last aforesaid, contrary to the form and effect of the said indenture and of the said covenant of the defendant so in that behalf made as aforesaid: and the plaintiff further said that after the making, &c., he, the defendant, did not nor would protect, preserve, and keep the quicksets and hedges of and belonging to the said parcels of the demised lands and premises of the reversion, whereof the plaintiff had so become and was seised as aforesaid, from spoil and hurt, by great and small cattle and otherwise; and did not, nor would by every means in his, the defendant's, power, weed and take care of the said quicksets and hedges, and make good the parts thereof that died away and decayed, and did not nor would at the expiration of the said term leave and yield up the said quicksets and hedges in such good order and condition, according to the form and effect of the said indenture in that behalf; but on the contrary thereof, the defendant, whilst he was so possessed of the said demised lands and premises with the appurtenances as aforesaid, after the said respective deaths of the said Busby and Aldridge, and after the plaintiff so became and was seised of the said reversion of and in the said parcels as aforesaid, to wit, on the said 18th of August, 1838, and thence until the expiration of the said term, suffered and permitted divers large portions, to wit, fifty perches of the quicksets and fifty perches of the hedges of the same parcels

respectively, to become and be, and the same during all the time last aforesaid were, greatly spoiled and hurt, full of weeds, disordered, dead, and decayed; and afterwards, at the expiration of the said term, the defendant left and yielded up the same in such bad order and condition as last aforesaid, contrary to *the form and effect of the said indenture, and of the said covenant of the defendant so in that behalf made as aforesaid: and the plaintiff further said, that after the making of the said indenture and during the continuance of the said term, and after the said respective deaths of the said Busby and Aldridge, and whilst the defendant was so possessed of the said demised lands and premises with the appurtenances as aforesaid, he, the defendant, did not nor would use the said parcels of the said demised lands and premises of the reversion, whereof the plaintiff had so become and was seised as aforesaid, in all respects in a good and husbandlike manner, nor well and sufficiently manure and keep the same in good heart and condition, nor lay and spread thereon during the sixth year of the said term, (being a period after the plaintiff so became seised as aforesaid,) at and after the rate of twelve cart loads of good rotten dung per acre, and did not, nor would at the expiration of the said term, leave and yield up the same parcels in such good heart and condition, and so well and sufficiently manured as aforesaid, according to the form and effect of the said indenture; but on the contrary thereof the defendant, whilst he was so possessed of the said demised lands and premises with the appurtenances as aforesaid, and after the said respective deaths of the said Busby and Aldridge as aforesaid, and after the said plaintiff so became seised of the said reversion of and in the said parcels of the said demised lands and premises as aforesaid, to wit, on the said 18th of August, 1838, and thence until the expiration of the said term, used the said parcels of the said demised lands and premises in a bad and negligent and unhusbandlike manner, and wholly omitted to manure the same, or to lay or spread thereon any good rotten dung, as well during the said sixth year of the said term as at other times after the plaintiff so became *seised as aforesaid; and the defendant afterwards, at the expiration of the said term, left and yielded up the said parcels in such bad heart and condition, and in an undressed and uncultivated and deteriorated state as aforesaid, contrary to the form and effect of the said indenture, and of the said covenant of the defendant so in that behalf made by the defendant as aforesaid. By reason whereof, and of the said parcels of the said demised lands and premises having been so left in such bad order, repair, and condition as aforesaid, the plaintiff had been hindered and prevented from letting or demising the same on such advantageous terms as he otherwise might and would have done, and the premises had become and were greatly deteriorated in value, and wholly useless and unproductive to the plaintiff, &c. [*928] [*929]

General demurrer to so much of the declaration as related to nonpayment of the said additional rent therein alleged to have become due and payable.(a) Joinder.

Plea *as to so much of the declaration as related to the sum of* 150*l.*, *parcel of the said alleged arrears of rent in the declaration first mentioned*, that after the same became due and before the commencement of the suit, to wit, on the 21st of June, 1839, the plaintiffs took and distrained divers, to wit, five stacks of hay, and divers goods and chattels, to

(a) The point marked for argument on the part of the defendant was as follows:—"The matter of law intended to be argued is, that using the ground as a race-course and ground for training horses was not a breach of the covenant, and did not entitle the plaintiff to the additional rent."

wit, of one Jackson, of great value, to wit, of the value of 300*l.* then being in and upon the said demised premises, to wit, in and upon the said parcels thereof to the reversion, whereof the plaintiff was so entitled as aforesaid, as and for a distress for the said arrears in the introductory part of the plea mentioned, and afterwards, to wit, on the 27th of June in the
*930] year *aforesaid, sold the same for a large sum of money greater than the amount of the said last-mentioned arrears and the costs of the said distress, to wit, the sum of 300*l.*, and thereby then satisfied and discharged the said last-mentioned arrears. Verification.

Replication to this plea, that the plaintiff did not by the distress in the said plea mentioned, satisfy and discharge the said arrears of rent in the introductory part of that plea mentioned, in manner and form as the defendant had in his said plea in that behalf alleged: concluding to the country.

Special demurrer to the replication, assigning for causes, that the same did not traverse any matter of fact stated in the plea, or confess and avoid the same, and improperly traversed and took issue upon an inference or conclusion of law only, resulting from the facts stated in the plea, namely, the conclusion of law from the facts therein stated, that thereby the rent was satisfied and discharged,—that such inference and conclusion of law was improperly involved and contained in the issue taken by the replication,—that if the replication took issue on any matter of fact stated in the plea therein alleged, and was therefore bad for duplicity and multifariousness,—that it was uncertain and ambiguous whether the replication was intended to traverse and put in issue the whole or any or either, and which, of the allegations contained in the plea and amounted to and was a negative pregnant, for that it was uncertain whether the plaintiff intended to deny the distress and admit the sale, or to admit the distress and deny the sale, or to admit both the distress and the sale, and merely to put in issue the amount for which the hay, goods, and chattels in the plea mentioned were sold by the plaintiff as alleged in the plea, or whether the replication
*931] intended to admit all the allegations stated in the *plea, except the allegation that the said arrears of rent were thereby satisfied and discharged—that the replication improperly referred matters to a jury that ought to be determined by the court, &c.

Shee, Serjt., (with whom was *Bovill*,) in support of the first demurrer. It is submitted that the declaration is insufficient; and this question depends on the construction of the covenant, and of the whole deed; for the intention of the parties with respect to the covenants is to be gathered from the whole instrument, reference being had to the object of the deed. The main object was to provide for the due cultivation of the land; and as pasture land is more valuable than arable to the lessor, the intention was that the pasture land should continue and be in the same state when the lease expired. Looking at this covenant with reference to the words immediately preceding it, nothing can be clearer than that no intention existed in the minds of the parties that the words "or any other purpose whatsoever," should bear the extended signification now attempted to be given to them. [TINDAL, C. J. The plaintiff has alleged in distinct terms, that the defendant used and converted part of the lands demised to and for other and different purposes than for meadow or pasture land, to wit, the uses and purposes of a race-course and ground for training horses. Whether these purposes are other and different purposes than for meadow or pasture ground is a question of fact.] The plain meaning of the covenant was to

prohibit the land from being put to uses by which it would cease to be pasture; but the mere using of pasture land for training horses is not at all incompatible with its continuing to be pasture. [TINDAL, C. J. If you are right, you are right on a matter of fact; for it is certainly more a *question of fact than of law. You had better amend on the usual terms.] [*932

Leave to amend on payment of costs.

Shee then proceeded to support the demurrer to the replication. There are two material allegations in the plea, which are neither traversed nor confessed and avoided by the replication. [ERSKINE, J. What do you say to the plea? It is rather in mitigation of damages than in bar to the action.] It is not pleaded to the whole declaration, but only to 150*l.* parcel of the debt. MAULE, J. If you look at the plea you will see that it is not pleaded to 150*l.*, but "as to so much of the declaration as relates to 150*l.* parcel," &c.] In *Wheeler* v. *Senior*, 7 M. & W. 562, 9 Dowl. P. C. 270, a plea, which, so far as regards the covenant, was substantially the same as this, appears to have been held good. Here, the plea is good, if it is meant to apply only to so much of the rent, and not to so much of the rent and damages. [TINDAL, C. J. What answer is there to the damages which the plaintiff has sustained by the non-payment of the rent? Yet the plea extends to such damages.] To debt for rent a tender may be pleaded; *Johnson* v. *Clay*, 7 Taunt. 486, 1 J. B. Moore, 200. [TINDAL, C. J. Debt stands on a very different footing from covenant. I do not see how you can get over the case of *Hare* v. *Savill*, 1 Brownlow & G. 19, 2 Brownlow, 273, 1 Roll. Abr. 459, e, 45, 5 Vin. Abr. 263, pl. 7, 6 Vin. Abr. 461, pl. 15, S. C. There "the plaintiffs made a lease for years to the defendant, rendering rent at two feasts, or within ten days after every of those, at the Temple Church, and the defendant covenanted to pay the rent according to the reservation; and for the non-payment of these the plaintiffs brought an action of covenant, to which the defendant pleads levied by distress, and upon this the *plaintiffs demurred; and adjudged with the plaintiffs accordingly, for that the defendant for his [*933
plea hath confessed that it was not paid according to the reservation, for the plaintiffs cannot distrain if it were not behind after the day." You can see whether you can amend.]

Leave to amend accordingly.

CROSBY v. HETHERINGTON.

It must be stated in a plea of payment under a foreign attachment, that the garnishee was within the jurisdiction of the lord mayor's court at the time of the awarding of the attachment.

***Semble*, that it should be alleged that execution was had against the garnishee.**

Upon a custom of the city of London being put in issue, the mayor and aldermen are commanded by certiorari—reciting that it pertains to the recorder to try the truth of the issue and to certify the custom—to certify whether there is such a custom as that alleged: and upon the recorder certifying in open court, the existence or non-existence of the custom pleaded, judgment is entered pursuant to such certificate.

ASSUMPSIT, upon an agreement of reference, and upon an award made in pursuance thereof, in favour of the plaintiff for the sum of 434*l.* 3*s.* 2*d.*; with counts for money paid, and for money found to be due upon an account stated.

Plea—as to the cause of action in the first count of the declaration alleged, so far as relates to the sum or 347*l.* 7*s.* 2*d.* parcel of the same sum of 434*l.* 2*s.* 3*d.* therein mentioned and claimed—that the city of London

is, and immemorially has been, an ancient city, and that there is, and immemorially has been, a custom therein, that if any person affirms, or has affirmed, a plaint in debt against another in the court of Her present Majesty or Her predecessors, holden or to be holden before the mayor and aldermen of the said city, for the time being, in the chamber of the Guildhall, within and according to the custom of the said city, and upon such plaint it is or has been commanded by the court to any of the serjeants-at-
*934] mace *and ministers of the said court, to summon such person named defendant in such plaint, to appear in the same court to answer the plaintiff in such plaint, and if it is or has been certified and returned by such serjeant-at-mace and minister of the court, that the defendant in such plaint has or has had nothing within the said city or the liberties thereof, whereby he can or could be summoned, nor is nor was to be found within the said city, and such defendant at that court being solemnly called makes or has made default, and in the same court it is or has been alleged by the plaintiff in the plaint, that any other person owes or has owed to any such defendant any sum of money amounting to the debt in such plaint specified, or any part thereof; then at the petition of such plaintiff, it is and has been commanded by the court, to one of the serjeants at-mace and a minister of the court, to attach such defendant in such plaint, by such sum of money so being in the hands or custody of such other person, so that such defendant appear at the then next court, to be holden before the said mayor and aldermen in the chamber of the Guildhall, to answer the plaintiff in the plea in such plaint specified : and then if such serjeants-at-mace and minister of the court return and certify to such court, such defendant to be attached by such sum of money so being in the hands or custody of such other person to be defended and kept, so that such defendant in such plaint named appear at the same, or the then next court holden or to be holden, to answer such plaintiff in the plea in such plaint specified and if the defendant at that, and three other courts then next severally holden or to be holden before the mayor and aldermen of the said city in the Guildhall of the said city being solemnly called, does not appear but makes default, and such four defaults, according to the custom of the said city are recorded against such
*935] *defendant at such four courts, after such attachment made; and if such plaintiff in such plaint named, at every of such four courts in his own person, or by his attorney, appears and offers himself against such defendant in the plea in such plaint specified, according to the custom of the said city, then, at the last of the said four courts, or at any court holden or to be holden after such four defaults recorded, at the petition of such plaintiff in such plaint named made to the court, it is and has been used for the court to command such or any other serjeant-at-mace and minister of the court, to warn such other person, according to the custom of the said city, to be and appear at any court afterwards to be holden before the mayor and aldermen, to show if any thing he has or knows to say for himself, why such plaintiff in such plaint ought not to have execution of such sum so attached as aforesaid; and if at such court such serjeant-at-mace returns and certifies such other person in whose hands such sum of money is or has been attached, to be warned according to such custom, to be and appear in the same court to show such cause, and if such person so warned, being solemnly called at such court, does not appear or has not appeared, but makes or has made default, then it is, and from time immemorial it has been used and accustomed, for such court to award such plain-

tiff to have execution of such sum so attached, to satisfy such plaintiff the debt in such plaint specified, or so much thereof as such sum so attached extends or has extended to satisfy, by sufficient pledges to be found and given by such plaintiff in such plaint named in the same court, according to such custom, to restore to such defendant such sum of money so attached if such defendant within a year and a day thence next ensuing, come, or has come into the court so holden, and disproves or avoids or has disproved or avoided such debt in such plaint *mentioned, according to the custom of the said city; and that after such pledges [*936 found and *execution had* of such sum so in the hands and custody of such other person attached and defended, by the plaintiff in such plaint named, such other person in whose hands or custody such sum is or has been attached and defended, is or has been discharged against such defendant of the sum so attached and had in execution, and such defendant in such plaint named is or has been discharged against the said plaintiff of so much of his debt in such plaint demanded by such plaintiff, so long as such judgment and execution remain in force and effect, not revoked or disproved by such defendant; and if such sum of money so attached and defended, and had in execution amounts not, nor has amounted, to the whole sum of the debt in and by the said plaint demanded by such plaintiff against such defendant, then such plaintiff by the custom of the said court is, and from time immemorial has been, used and accustomed to have process against such defendant according to such custom, for the residue of his debt by him in such plaint demanded: That the said custom and all other customs of the said city obtained and used in the said city during all the time aforesaid, were by authority of a parliament holden in the seventh year of the reign of His Majesty, Richard the Second, after the Conquest, late king of England ratified and confirmed to the then mayor and commonalty of the said city and their successors: That one Collins before the commencement of this action of the plaintiff against the defendant theretofore, to wit, on the 12th of November, 1841, in his own proper person, came into the court of our sovereign lady, then holden before the mayor and aldermen of the city of London, in the chamber of the Guildhall of the said city, according to such custom, and then and there affirmed a certain plaint against the now *plaintiff Walter Crosby in a plea of [*937 debt upon demand of 700*l.*, and the said Collins then in the same court, according to such custom, found pledges to prosecute such plaint, to wit, John Doe and Richard Roe; and then appeared in his stead G. T. R. Reynal his attorney against the said W. Crosby in the plea in the said plaint, according to such custom; and by his said attorney the said Collins then prayed process to be thereupon made to him against the said W. Crosby, according to such custom; and it was granted to him, &c.; whereupon, at the petition of the said Collins made to such court by his said attorney; and by virtue of such plaint, it was then commanded by the said court to C. Sewell, then being one of the serjeants-at-mace of such court, that he, according to such custom, should summon Crosby by good summoners, to appear at the same court so holden before the mayor and aldermen of the said city, in the chamber of the Guildhall of the said city, to answer the said Collins in the plea in such plaint specified, and that Sewell should return and certify what he should do by virtue of the said precept; and afterwards at the same court, the said Sewell, according to such custom, returned and certified to the same court, that Crosby had nothing

within the said city or the liberties thereof, whereby he could be summoned, nor was he Crosby found within the same; and thereupon the said Crosby was then at the same court solemnly called and did not appear, but made default; and thereupon afterwards, and before the commencement of this action, to wit, on the day and year last mentioned, at the same court it was alleged by the said Collins by his said attorney, that Hetherington owed to Crosby 347*l.* 7*s.* 2*d.*, in moneys numbered, as the proper moneys of Crosby, and then had and detained the same in his hands and custody; and thereupon the said Collins, by his said attorney, prayed process, ac-
*938] cording to such *custom, to attach Crosby by the said 347*l.* 7*s.* 2*d.*, so being in the hands and custody of Hetherington, that Crosby might appear at the next such court before the mayor and aldermen of the said city, in the chamber of the Guildhall of the said city, to answer the said Collins in the plea in such plaint specified; whereupon, at his said petition, it was then commanded by such court, before the commencement of this action, to the said serjeant-at-mace and minister of such court, that he, according to such custom, should attach Crosby by the said 347*l.* 7*s.* 2*d.*, so being in the hands and custody of Hetherington, and the same, in his hands and custody, defend and keep, according to such custom, so that the plaintiff might then appear at the then next such court to be holden before the said mayor and aldermen of the said city, in the Guildhall of the said city, to wit, on Saturday the 13th of November, 1841, according to such custom, to answer the said Collins in the plea in his plaint specified, and that the serjeant-at-mace and minister of such court should then return and certify to such court what he should do by virtue of that precept; and the same day was given to the said Collins; and afterwards, to wit, on the said then next court holden before the mayor and aldermen of the said city, in the chamber of the Guildhall of the said city, on the said 13th day of November in the year last aforesaid, the said Collins by his said attorney appeared; and the said serjeant-at-mace returned and certified to the same court, that he by virtue of the said precept had thereupon, to wit, on the 12th of November in the year last aforesaid, between the hours of ten and eleven of the clock in the forenoon, attached Crosby by the said 347*l.* 7*s.* 2*d.*, so being in the hands and custody of Hetherington, and the same had defended and kept in his hands and custody, according to such custom, so that Crosby might appear at the said court so holden on
*939] the said 13th *of November in the year last aforesaid, to answer the said Collins in the plea in his plaint specified;* and thereupon Crosby at the same court was solemnly called and did not appear, but then made a first default, which said first default at the same court was recorded, according to such custom; and thereupon, according to such custom, a further day was then given by the same court to Crosby to appear at the then next such court to or before the mayor and aldermen of the said city on Monday the 15th of November, in the year last aforesaid, to answer the said Collins in the plea in his plaint specified; and the same day was by the same court given to the said Collins in such plea, according to such custom; at which next such court holden on the day and year last aforesaid, the said Collins appeared and offered himself against Crosby in the plea in his plaint specified, according to such custom; and thereupon at the same court Crosby was again solemnly called and did not appear, but then made a second default; which was recorded at the same court, according to such custom; and thereupon, according to such custom, a further day was then given by the same court to Crosby to appear at the then

next such court before the mayor and aldermen of the said city of London, at the chamber of the Guildhall of the said city, on Tuesday the 16th of November, in the year last aforesaid, to answer the said Collins in the plea in his plaint specified; and the same day was by the same court given to the said Collins in such plea, according to such custom; at which said next such court holden on the day and year last mentioned, the said Collins appeared and offered himself against Crosby in the plea in his plaint specified, according to such custom, &c. The declaration then alleged a third and fourth default, and proceeded—and thereupon afterwards, and after four defaults had been recorded as aforesaid, at the same court against *Crosby in the plea aforesaid, according to such custom, the said [*940] Collins by his said attorney then at the same court prayed process, according to such custom, to warn Hetherington, the garnishee, to be and appear in such court, so as aforesaid to be holden, to show cause why the said Collins should not have execution of the said 347*l.* 7*s.* 2*d.* so attached in his said hands and custody; whereupon at such said court so holden as aforesaid, on the day and year last aforesaid, at the said petition of the said Collins made in such court, it was commanded by the same court to the said serjeant-at-mace, that he, according to such custom, should warn and make known to Hetherington to be and appear in such court to be so as aforesaid holden on Wednesday the 12th of January, 1842, to show cause why the said Collins should not have execution of the 347*l.* 7*s.* 2*d.* so attached in his hands and custody; and that the said serjeant-at-mace should then return and certify to the same court what he should do by virtue of such precept; and the same day was given by the same court to the said Collins to be there, according to such custom, &c.; at which said court so holden as aforesaid, to wit, on the said Wednesday the 12th of January, 1842, the said Collins by his said attorney appeared, and the said serjeant-at-mace then returned and certified to the same court, that he, by virtue of such precept to him directed, and according to such custom, had warned and made known to Hetherington, the garnishee, to be and appear at the same court to show such cause; and thereupon at the same court, Hetherington, the garnishee in such attachment, was solemnly called, according to such custom, and did not appear but made default; whereupon, according to such custom, it was considered by the same court that the said Collins should have execution of the said 347*l.* 7*s.* 2*d.* so attached, and that he should retain and hold the same in full satisfaction *of the like sum [*941] of 347*l.* 7*s.* 2*d.* parcel of the debt in the said plaint mentioned, by sufficient pledges to be found and given by the said Collins to the same court, according to such custom, to restore to Crosby the 347*l.* 7*s.* 2*d.* so attached, if Crosby within a year and a day thence next ensuing should come into the said court and disprove or avoid the same debt in the said plaint mentioned; whereupon the said Collins at the same court, according to such custom, found sufficient pledges, to wit, &c. &c., citizens of the said city, to restore to Crosby the said 347*l.* 7*s.* 2*d.* so attached, if Crosby within a year and a day thence next ensuing, should come into the same court, holden as aforesaid, and disprove or avoid the debt in the said plaint mentioned, according to such custom; and thereupon the said Collins then, to wit, at the same court *had execution of the said* 347*l.* 7*s.* 2*d.* according to the tenor of such judgment in that behalf given, as by the record and proceedings thereof remaining in the chamber of the Guildhall of the city of London aforesaid more fully appears. * * The declaration then alleged, that the said 347*l.* 7*s.* 2*d.* so attached, and of which the said Collins had

execution by virtue of such judgment, were so attached before the commencement of this suit, and were part and parcel of the said sum of 434*l.* 3*s.* 2*d.* in the said first count mentioned, and not other or different; and that Crosby the now plaintiff, and Crosby in the plaint of the said Collins mentioned, were one and the same person, and not other or different, and that Hetherington the present defendant, and Hetherington, in the aforesaid judgment and proceedings mentioned, were one and the same person, and not other or different; and that the said judgment and execution are still in force, and not in the least by Collins, or otherwise, disproved or avoided; and that the said 347*l.* 7*s.* 2*d.* parcel of the said sum of 434*l.* 3*s.*
*942] 2*d.*, in which Hetherington was indebted to Crosby, as in *the introductory part of this plea mentioned, was the very same and identical sum of 347*l.* 7*s.* 2*d.* so attached and taken in execution by the said Collins, by virtue of the judgment aforesaid. Verification; with a prayer of judgment, if Crosby the now plaintiff ought further to maintain his action thereof, &c.

As to the residue of the causes of action in the declaration mentioned, Hetherington brought into court 86*l.* 16*s.*, alleging that Crosby had not sustained damages to a greater amount than the said sum of 86*l.* 16*s.* in respect of the said residue of the causes of action in the declaration mentioned. Verification.

General demurrer to the first plea;(*a*) and joinder.

As to the second plea, the plaintiff replied by taking the money out of court in satisfaction and discharge of the causes of action in the introductory part of that plea mentioned.

Channell, Serjt. (with whom was *Russell Gurney*,) in support of the demurrer. The first point is, whether the custom set up in the plea is good, which alleges a right to summon *any other person* as garnishee, without averring such other person *to reside*, or *to be*, within the jurisdiction of the lord mayor's court. *Blacquiere* v. *Hawkins*, 1 Dougl. 378, shows that the courts will take judicial notice of such customs of the city of London, as have been once duly certified by the recorder. The question is what is the custom of London with respect to foreign attachments. It is said in a note to *Turbill's case*, 1 Saund. 67, that "this custom was certified by Starkey, recorder of London to be, that if a plaint be affirmed in London before,
*943] &c. against any person, and be it returned *nihil*, *if the plaintiff will surmise that another person *within the city* is a debtor to the defendant in any sum, he shall have garnishment against him, to warn him to come in and answer, whether he be indebted in the manner alleged by the other; and if he comes and does not deny the debt, it shall be attached in his hands, and after four defaults recorded on the part of the defendant, such person shall find new surety to the plaintiff for the said debt, and judgment shall be that the plaintiff shall have judgment against him, and that he shall be quit against the other *after execution sued* out by the plaintiff. 22 Ed. 4, 30 b. 1 Roll. Abr. 554, pl. 4, Godb. 400, 401, pl. 483, *Hern* v. *Stubbs*. But if no *execution* be sued out, the plaintiff may go on with the suit below, and the defendant may sue his debtor notwithstanding the judgment; Dy. 83, a, Dyer, 82, b; so certified by Brooke, recorder, 7 Ed. 6." In 1 Rolle's Abridgment, *Customs de London* (K.) p. 554, pl. 3; 7 Viner's

(*a*) The point marked for argument was, "The plaintiff means to contend that the first plea is insufficient, for not stating that the garnishee resides within the jurisdiction of the Lord Mayor's Court."

Abridgment, *Customs of London*, (K.) pl. 3, the custom is thus stated.(*a*) "If in bar of an action a foreign attachment is pleaded, that the custom is, that if any man brings his action against another for any debt, and upon a return made that he *non est inventus* and *quod nihil unde*, &c., and thereupon surmises that any other is indebted to the defendant, in such a sum, and thereupon to pay process to attach the sum in his hands, and to defend *ita quod*, the defendant appears to answer the plaintiff, and the serjeant returns that he hath attached him to defend the sum in his hands, and the defendant does not appear at four courts after, &c., that judgment shall be to recover it in his hands, &c.; this is no good custom without a surmise that the stranger who is indebted to the plaintiff is within the jurisdiction of the court; and the return of the serjeant is not sufficient that he hath attached him to defend it in his hands, for perhaps the serjeant *intends that he may attach the debt in his hands, though he be not within the jurisdiction of the court, and his return shall not bind the party without an actual surmise thereof by the party himself. Trin. 11, Car. B. R. between Sir *Nicholas Halse*, and *Walker;* adjudged upon a demurrer, where a foreign attachment in Exeter was pleaded, which was all one with the custom of London, and all customs there confirmed by parliament in the time of Queen Elizabeth." These authorities are supported by Com. Dig. *Attachment* (*Foreign*) (A.) (D.) *Customs of London* (N. 1.) In *Tamm*, v. *Williams*, 2 Chitty's Rep. 438, 3 Dougl. 281, it was held that in a plea of foreign attachment it must be stated that the garnishee is resident within the jurisdiction of the lord mayor's court; and in Manning's N. P. Digest, 350, it is said to have been decided in a case of *Traub* v. *Schmidt*, that in order to give the lord mayor's court jurisdiction, it is not sufficient that the garnishee resides within the city, but the cause of action must also have accrued there.(*b*) *Banks* v. *Self*, 5 Taunt. 234, n, will probably be cited on the other side. There the plea was the same as here, and, according to the marginal note, it was held not to be necessary to aver that the plaintiff in the principal case was indebted to the plaintiff below within the jurisdiction of the mayor's court. That proposition has no application to the present point, for a garnishee cannot dispute the debt in the court below; and it would appear that the objection now raised was not taken in that case. [TINDAL C. J., referred to *Huxham* v. *Smith*, 2 Camp. 19, as confirmatory of *Channell's* argument.] [*944

*Another objection to the plea is, that the plea does not state with sufficient certainty that execution was actually executed against the defendant as garnishee, in the lord mayor's court. The question is, whether the plea avers more than judgment, and award of execution, or it shows that execution was executed. Upon this point the learned serjeant cited *Roberthon et Uxor* v. *Norrey King-at-Arms*, Dyer, 82 b; *Wetter* v. *Rucker*, 1 Brod. & B. 491, 4 J. B. Moore, 172: and *Magrath* v. *Hardy*, 4 New Cases, 782, 6 Scott, 627. [*945

Talfourd, Serjt., (with whom was *Cowling*,) *contrà*. The first objection seems to be, not that the custom set out in the plea is bad, but that it differs from that certified by Starkey. It is submitted that such a certificate is only given with reference to the particular case, and to particular issues; see *Plummer* v. *Bentham*, 1 Burr. 248; and is not a certificate for all time;

(*a*) See *Bruce* v. *Waite*, antè vol. i. 125.

(*b*) There, the defendant in the foreign attachment having brought his *scire facias* to discharge himself pleaded that the cause of action did not accrue within the jurisdiction. The plaintiff replied as to part, that the garnishee resided within the jurisdiction, which replication was on demurrer, held, by the recorder, to be bad; and a writ of error upon that judgment not having been prosecuted for nine months, was superseded at the instance of the defendant.

of which the court will take judicial notice. [TINDAL, C. J. Though a custom be certified in a particular case, that does not make it less general when once certified.] In the certificate of the custom given by Brooke, recorder, in *Roberthon et Uxor* v. *Norrey King-at-Arms*, no reference is made to the necessity of the garnishee residing in the city of London. [*Manning*, Serjt., *amicus curiæ*, pointed out that Starkey, recorder, certified a different custom from that pleaded. TINDAL, C. J. The important point is that suggested by my brother *Manning*, that the custom as certified is different from that pleaded. The reason of the thing is in favour of the garnishee residing in London; otherwise one cannot see how the process of the court can be served.] The plea states that money was attached in the hands of the defendant as garnishee; he must therefore have been
*946] within the city when attached. It is necessary *that the debt should be attached, but it is not requisite that the garnishee should reside in London; for it will be sufficient if he is attached when within the city for a temporary purpose; and the words used by Starkey, "within the city," by no means imply that the party must be resident there. [ERSKINE, J. Your plea does not state that the attachment was within the city.] According to the practice it can only take place within the city. Supposing the court, as matter of law, to take notice of the custom as certified, the decision in *Morris* v. *Ludlam*, 2 H. Bl. 362, would appear to be wrong. It was there held, that if a plea of foreign attachment state the custom to be, "that if any person be or hath been indebted to any other person within the said city," &c., it ought to aver that the defendant in the plaint was indebted to the plaintiff within the city. According, however, to Starkey's certificate no such allegation is requisite. If the argument on the other side be correct, Starkey's certificate will have the force of an act of parliament. [TINDAL, C. J. It cannot be put higher than a *private* act; for it relates only to the city of London. The judges must take notice of it *ex officio*, in the same manner as they take notice of the custom of gavelkind. *Tamm* v. *Williams*, 2 Chitt. Rep. 438, 3 Dougl. 281, and 1 Rolle's Abridgement, 554, pl. 4,(a) seem to be direct authorities that the plea ought to have stated that the garnishee was within the jurisdiction of the lord mayor's court. You had better amend.]

Leave to amend on the usual terms.

The plea was afterwards amended by introducing at the * antè, p. 939, the following allegation. "And the defendant avers that the said serjeant had
*947] duly attached *the now plaintiff by the said money so being in the hands of the now defendant in manner as certified by the said serjeant, *he the now defendant at the time of the said attachment being within the said city*;" and this allegation at the ** antè, p. 941. "Which execution was on the day and year last aforesaid, duly sued out and executed, and the said Collins, on the same day and year, duly had and received the same sum of money of and from the now defendant, the garnishee, under and by virtue and in pursuance of the said judgment, award, and execution, according to the said custom."

To the plea so amended the following replication was pleaded:—"And the plaintiff says, as to the plea of the now defendant by him first above pleaded, that he the now plaintiff ought not, by reason of any thing in that plea alleged, to be barred from further maintaining his action in respect of the said sum of 347*l.* 7*s.* 4*d.*, parcel, &c., because he says that there is not,

(a) Translated, 7 Vin. Abr. 252, pl. 4, referring to the certificate of *Starkey*, recorder, in 22 E. 4, fo. 30.; as to which, see antè, vol. i. 39, (b), (c).

nor has there immemorially been, in the said city of London, the said custom in the said first plea mentioned, in manner and form as in the said first plea is alleged; and this the plaintiff prays may be inquired of when and where, &c., as the court may consider. And the defendant doth the like, &c. And as to the plea of the defendant by him lastly above pleaded, the plaintiff accepts and takes out of court the said sum of 86*l.* 16*s.* in full satisfaction and discharge of the said causes of action in the introductory part of the said last plea mentioned; therefore, as to such last-mentioned causes of action the plaintiff is satisfied; and he prays judgment for his costs and charges in this behalf, &c."

To this replication the following suggestion was added, which was entered pursuant to a rule which had been obtained by *Channell*, Serjt., on the part of the plaintiff, in Hilary term, 1843, for a suggestion, and also for a writ to the mayor and aldermen commanding them to *certify as to the custom, which rule was, in the same term, made absolute by consent. [*948

"And hereupon it is suggested, and manifestly appears to the court, that there is, and immemorially has been, in the said city of London, a certain custom therein used and approved of, that when any issue in any(*a*) court of our Lady the Queen, or Her predecessors, is or has been joined therein as aforesaid, upon any custom of the said city used and had, the mayor and aldermen of the said city have from time immemorial certified to, and informed, the said court and the judges thereof, and ought from time immemorial, and still ought so to certify and inform the said court and the judges thereof the said custom, and of and concerning the same, and by the learned recorder of the said city verbally: and the plaintiff prays a writ of our Lady the Queen to be directed to the mayor and aldermen of the said city, commanding them to certify to, and inform, the justices of Her Majesty of the Bench here, in manner aforesaid, whether there is, and immemorially has been, in the said city such custom as the defendant has above alleged: and because the defendant does not deny this, therefore the said writ is granted to the plaintiff, returnable, &c. The same day is given to the said parties at the same place."

In pursuance of the rule above set forth the following writ was issued.

"Victoria, &c. to the mayor and aldermen of Our city of London, greeting: Whereas a certain action hath been lately brought, and is now pending in Our court of Common Pleas at Westminster, before our justices there, between Walter Crosby, plaintiff, and William Hetherington, defendant, for the non-performance of certain promises by the said Crosby alleged to have been *made to him by the said Hetherington, in which action a certain issue hath arisen, and is joined, between the said parties, as We are informed, whether there is, and has immemorially been, in the said city of London a certain custom therein, that is to say, if any person affirms or has affirmed a plaint in debt against another in Our court, or the court of Our predecessors, holden or to be holden before the mayor and aldermen of the said city for the time being, in the chamber of the Guildhall, within, and according to the custom of, the said city, and upon such plaint it is, or has been, commanded by the court to any of the serjeants-at-mace and minis- [*949

(*a*) The language of the suggestion in *Longo Quinto*, fo. 30, is not less general, "*en ascun lieu ou courts de Roy.*" It was there said (fo. 31,) by Danby, Chief Justice of C. P., that the defendant might have traversed the suggestion.

ters of the said last mentioned court, to summon such person named defendant in such plaint to appear in the same court to answer the plaintiff in such plaint; and if it is, or has been, certified and returned by such serjeant-at-mace and minister of the court, that the defendant in such plaint has, or has had, nothing within the said city or the liberties thereof whereby he can or could be summoned, nor is, nor was found within the said city, and such defendant at that court being solemnly called makes or has made default, and in the same court it is, or has been, alleged by the plaintiff in the plaint, that *any other person* owes or has owed to any such defendant any sum of money amounting to the debt in such plaint specified, or any part thereof, then, at the petition of such plaintiff, it is, and has been, commanded by the court to one of the serjeants-at-mace and a minister of the court to attach the defendant in such plaint by such sum of money so being in the hands or custody of such other person, so that such defendant appear at the then next court to be holden before the said mayor and aldermen in the chamber of the Guildhall, to answer the plaintiff in the plea in such plaint specified; and then, if such serjeant-at-mace and min-
950*] ister of the court returns and certifies to such court *such defendant to be attached by such sum of money so being in the hands or custody of such other person to be defended and kept, so that such defendant in such plaint named appear at the same or the then next court holden or to be holden to answer such plaintiff in the plea in such plaint specified; and if the defendant at that and three other courts then next severally holden, or to be holden, before the mayor and aldermen of the said city, in the Guildhall of the said city, being solemnly called, does not appear, but makes default, and such four defaults, according to the custom of the said city are recorded against such defendant at such four courts after attachment made; and if such plaintiff in such plaint named, at every of such four courts in his own person or by his attorney appears and offers himself against such defendant in the plea in such plaint specified, according to the custom of the said city, then at the last of the said four courts, or at any court holden, or to be holden, after such four defaults recorded at the petition of such plantiff in such plaint named, made to the court, it is, and has been, used for the court to command such or any other serjeants-at-mace and minister of the court to warn such other person according to the custom of the said city, to be and appear at any court afterwards to be holden before the mayor and aldermen, to show if any thing he has, or knows to say for himself, why such plaintiff in such plaint ought not to have execution of such sum so attached as aforesaid; and if at such court such serjeant-at-mace returns, and certifies such other person in whose hands such sum of money is, or has been, attached, to be warned, according to such custom, to be and appear in the same court to show such cause; and if such person so warned being solemnly called at such court does not appear, or has not appeared, but makes or has made default, then it is, and from
951*] time immemorial it has been, used and accustomed *for such court to award such plaintiff to have execution of such sum so attached, to satisfy such plaintiff the debt in such plaint specified, or so much thereof as such sum so attached extends, or has extended, to satisfy by sufficient pledges to be found and given by such plaintiff in such plaint named in the same court, according to such custom, to restore to such defendant such sum of money so attached, if such defendant within a year and a day thence next ensuing come, or has come into the court so holden, and dis

proves or avoids, or has disproved or avoided, such debt in such plaint mentioned, according to the custom of the said city; and that after such pledges found, and execution had of such sums so in the hands and custody of such other person attached and defended by the plaintiff in such plaint named, such other person in whose hands or custody such sum is, or has been, attached, is, or has been, discharged against such defendant of the sum so attached and had in execution; and such defendant in such plaint is or has been discharged against the said plaintiff of so much of his debt in such plaint demanded by such plaintiff, so long as such judgment and execution remain in force and effect, not revoked or disproved by such defendant; and if such sum of money so attached and defended and had in execution amount not, nor has amounted, to the whole sum of the debt in and by the said plaint demanded by such plaintiff against such defendant, then such plaintiff, by the custom of the said court is, and from time immemorial has been, used and accustomed to have process against such defendant according to such custom, for the residue of his debt by him in such plaint demanded: and because it pertaineth to you, by the recorder of the said city, according to the custom of the said city, from time immemorial used and approved of therein, to try the truth of the aforesaid issue so joined between the said W. Crosby and W. Hetherington, and to certify the aforesaid custom *by word of mouth, and not otherwise, [*952
We command you, that you certify and make known in manner aforesaid to Our justices of the Bench at Westminster, on the 15th day of April next, whether there is, and immemorially has been, in the said city of London such custom as in the said issue is stated or not; and have there this writ. Witness, Sir Nicolas Conyngham Tindal, knt., at Westminster, the 31st day of January in the sixth year, &c."

The recorder, (before whom the matter had been previously argued by Russell Gurney for the plaintiff, and Cowling for the defendant,) on Wednesday the 10th of May, 1843, appeared at the bar of the court, and *Channell*, Serjt., having moved for the return of the writ, the recorder, at the desire of the Lord Chief Justice, read the writ and the following endorsement thereon: "The execution of this writ appears in a certain certificate of us the mayor and aldermen of the said city of London, made by the recorder of the said city at the day and place within contained, according to the custom of the said city, by word of mouth, as is within commanded."

The certificate or return to the certiorari, which the recorder also read, was as follows:—

"The answer of John Humphrey, Esq., mayor, and of the aldermen of the said city.

"We the said mayor and aldermen of the said city, by the Honourable Charles Ewan Law, recorder of the said city, by word of mouth of the said city, do, in obedience to the annexed writ, humbly certify that in the said city of London there is not now, nor has there immemorially been in the said city of London, such custom as in the said issue is stated."

This return was signed by the mayor and fifteen aldermen.

TINDAL, C. J. The certiorari must be filed, and the return made recorded.

*953] **Channell*, Serjt., in the course of the same day, moved that judgment be entered for the plaintiff.

Judgment for the plaintiff.

The rule afterwards drawn up was in the following terms:—"Upon reading a rule made on Monday the 30th day of January last, and the writ of certiorari issued between the said parties, and the mayor of the city of London, to wit, John Humphery, Esq., and the aldermen of the said city, by the Honourable Charles Ewan Law, recorder of the same city, having this day certified and made known to this court in pursuance of the said writ, by word of mouth,(*a*) according to the custom of the said city, that there is not now, nor has there immemorially been, in the said city of London, such custom as in the issue joined between the parties in this cause is stated, and upon hearing counsel on behalf of the plaintiff, it is ordered that judgment be thereupon entered for the plaintiff; and it is further ordered that the said writ of certiorari, and the certificate of the said mayor and aldermen(*b*) in writing thereto annexed, be filed among the records of this court."

(*a*) So, by the custom of London, a record is to be certified *ore tenus*; Brownlow, Brevia Judicialia, 14, 16.

(*b*) This certificate, or return to the certiorari, is the certificate of the mayor and aldermen, not of the *recorder*, who acts merely as their mouth-piece, if the return be false, an action lies, not against the recorder, but against the mayor and aldermen; *Day* v *Savadge*, Hob. 85, 87 Sir F. Moore, 871; *Appleloft* v. *Stoughton*, Sir W. Jones, 412; antè, 869; and see Pulling' Law, &c., of London, 2d ed. 4.

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*954] *EVANS and Others *v.* HUTTON and Others.

In assumpsit upon an undertaking to carry goods in the defendant's ship to Canton, and to deliver them to the plaintiff's agents at Canton, dangers and accidents of the seas and navigation excepted; the defendants pleaded—that they caused the ship to sail to Canton; that the ship arrived with the goods on board, near to the port of Canton; that certain persons *then there being officers of our Lady the Queen, duly authorised on that behalf*, and then exercising the powers of Her Majesty's government there, to wit, one C. Elliott then being chief superintendent of the trade of Her Majesty's subjects, to and from the dominions of the Emperor of China, according to the form of the statute in that case made and provided (3 & 4 W. 4 c. 93,) and one Smith then being captain of Her Majesty's ship, the Volage, and then being the commanding officer of Her Majesty's naval forces there, *did for divers good and sufficient and lawful causes and reasons them in that behalf moving*, and not for any wrongful, negligent, unlawful, or improper act or behaviour of the defendants, their masters or mariners, or any of them done or committed, &c., *forcibly interrupt the said ship*, being a British ship, and all other British ships, *from further proceeding on its and their said voyage to Canton*, and did prohibit, prevent, and discharge the said ship from proceeding to Canton, and did, by virtue of the powers and authorities to them committed and by means of Her Majesty's naval forces then there being under their commands, and by the force and duress thereof, forcibly compel the said ship, and from thence continually had compelled the same not to proceed to Canton, *and thereby prevented* and thenceforth always continually had prevented, and still did prevent, *the defendants* from delivering *the goods at Canton*:

Held, on special demurrer, that the plea was bad, for not sufficiently disclosing that Captains Elliott and Smith, as chief superintendent and commander of the naval forces in the Chinese seas, respectively, had authority to act in the manner alleged.

ASSUMPSIT. The declaration stated that, in consideration that the plaintiffs, at the request of the defendants, then shipped, in good order and condition, in and upon the ship called the Manilla then lying in the port of Liverpool, and bound for Canton, twenty bales and twenty-five cases of merchandize of the plaintiffs, of great value, to wit, of the value of 700*l.*, to be carried and conveyed by the defendants therein from Liverpool aforesaid, to Canton aforesaid, for certain freight and reward to be paid by the plaintiffs to the defendants in that behalf, the defendants promised the plain-

proceeding on its and their said voyage to Canton; and did, to wit, then tiffs to deliver, and cause to be delivered, the said goods in like good order and condition at the port of Canton aforesaid, all and every dangers and accidents of the seas and *navigation of what nature or kind soever excepted, unto certain persons, to wit, Eglentoun, M'Lean, and Co., [*955 or their assigns; that the defendants had and received the said goods on board the said ship for the purpose aforesaid, nevertheless, the defendants did not nor would deliver, or cause to be delivered, the said goods at the port of Canton to the said E., M. and Co., or to their assigns, or otherwise howsoever, although not prevented therefrom by any danger or accident of the seas or navigation, but, on the contrary thereof, wrongfully omitted and refused so to do: that the plaintiffs, by their agents duly authorised in that behalf, &c., sold the said goods at and for certain large prices, to wit, to the amount of 3000*l.*; and that, by reason of the non-delivery thereof by the defendants, they the plaintiffs were unable to deliver the same to the said purchasers, and all the benefit and advantage of the same sale, and the interest and profit or price thereof became and were wholly lost to the plaintiffs; that afterwards, to wit, on the 1st of March, 1840, the defendants unloaded the said goods out of the said ship at a certain place far distant from Canton, to wit, at Manilla, and the plaintiffs became liable to pay and expend, and were forced and obliged to pay and expend, divers sums of money, amounting to a large sum of money, to wit, 1000*l.*, in and about defraying the expenses incurred in respect of the said goods at Manilla, and causing the same to be conveyed from thence to Canton; and that afterwards, to wit, on the 1st of April in the year last aforesaid, the plaintiffs were forced and obliged to sell the said goods at a very reduced price from the price for which the same had been so previously sold, to wit, at 1000*l.* lower price, and the plaintiffs had, by reason of the premises, been otherwise injured.

Eighth plea,—to the breach of promise first above assigned: that, after the making of the promises in the *declaration mentioned, and before any breach thereof, to wit, on the 6th of April, 1839, being a [*956 reasonable time in that behalf, the defendants caused the said ship in the declaration mentioned, having the said goods of the plaintiffs so on board thereof, to sail and proceed, and the said ship then sailed and proceeded, on its voyage from Liverpool to Canton, in the dominions of the Emperor of China, being the port of Canton aforesaid; and in a reasonable time in that behalf, to wit, on the 29th of October, 1839, the said ship with the said goods so on board thereof as aforesaid, arrived near to the said port of Canton, to wit, on the high seas there adjacent; that, after the said ship had so proceeded and arrived as aforesaid, to wit, on the day and year last aforesaid, *certain persons then being officers of our Lady the Queen duly authorised in that behalf, and then exercising the powers of H. M.'s government there, to wit, one Charles Elliott then being chief superintendent of the trade of H. M.'s subjects to and from the dominions of the Emperor of China, according to the form of the statute in such case made and provided, and one Smith then being captain of H. M.'s ship the Volage, and then being commanding officer of H. M.'s naval forces there*, did, for divers good and sufficient and lawful causes and reasons them in that behalf moving, and not for any wrongful, negligent, unlawful or improper act or behaviour of the defendants, their master or mariners or any of them, done or committed, or supposed or alleged to have been done or committed, forcibly interrupt the said ship, being a British ship, and all other British ships, from further

prohibit, prevent and discharge the said ship from proceeding to Canton, and did, by virtue of the powers and authorities to them in that behalf committed, and by means of H. M.'s naval forces then there being under their command, and by the force and duress *thereof, forcibly com- *957] pel the said ship, and from thence continually had compelled the said ship, not to proceed to Canton, and thereby prevented, and thenceforth always hitherto have prevented, and still did prevent, the said defendants from delivering the said goods and merchandises at Canton; and because of the said force and prevention of the said officers as aforesaid, and because of H. M.'s forces, and the restraint and duress and prevention thereof, the defendants could not, at any time from the making of their said promise, hitherto deliver the said goods at the port of Canton, wherefore they did not deliver the same at Canton, as on the said declaration mentioned. Verification.

Ninth plea—to the whole of the declaration—that, after the making of the promises, and before any breach thereof, to wit, on the 6th of April, 1839, being a reasonable time in that behalf, the defendants caused the said ship, having the said goods so on board thereof, to sail and proceed; and the said ship then sailed and proceeded on its voyage from Liverpool to Canton, in the dominions of the Emperor of China, being the port of Canton in the declaration mentioned, and in a reasonable time in that behalf, to wit, on the 29th of October, 1839, arrived near to the said port of Canton, to wit, on the high seas adjacent thereto; that, after the said ship had so proceeded and arrived as aforesaid, to wit, on the day and year last aforesaid, *certain persons then being officers of our Lady the Queen duly authorised in that behalf, and then exercising the powers of H. M.'s government there, to wit, one Charles Elliott, then being chief superintendent of the trade of H. M.'s subjects to and from the dominions of the Emperor of China, according to the form of the statute in such case made and provided, and one —— Smith, then being captain of H. M.'s ship Volage, and then being commanding officer of H. M.'s naval forces there*, for divers good *958] and sufficient and lawful causes *and reasons them in that behalf moving, and not for any wrongful, negligent, unlawful, or improper act or behaviour of the defendants, their master or mariners or any of them, by them the defendants, their master or mariners or any of them, done or committed, or supposed or alleged to have been done or committed, did forcibly prevent, hinder, and restrain the said ship from further proceeding on its said voyage to Canton; and did, to wit, then forcibly prevent and hinder and restrain, and thenceforth always hitherto had prevented, hindered, and restrained, and did still prevent, hinder, and distrain upon the said ship, and all other British ships, from proceeding to Canton, and did, by virtue of the powers and authorities to them in that behalf committed, and by means of H. M.'s naval forces then there being under their command, and by the force and duress thereof, forcibly compel the said ship, and from thence continually had constrained and compelled the said ship, not to proceed to Canton, and thereby prevented, and from thence hitherto continued and still continued to prevent, the defendants from delivering the said goods at Canton, wherefore the defendants never delivered the same goods or any of them at Canton, as is in and by the declaration in that behalf above alleged; that, before the defendants or their agents had received any notice of the promises, and before the said officers and forces had in any ways prevented the said ship from proceeding to Canton, the said ship proceeded on its voyage to Canton, to parts

far distant from Liverpool, to wit, to the high seas near to Canton, on the day and year last aforesaid; that a certain place called Hong Kong was then a place of safety for the said ship and a place to which the said officers and forces did not prevent the said ship from proceeding, and a place near to Canton, and a place from which the said ship and the goods on board thereof might speedily have been conveyed to Canton of the *said officers and forces aforesaid, had at any time ceased to prevent the said ship from proceeding to Canton, and because of the premises, [*959 and because it was then a reasonable and discreet measure for the interests of the plaintiffs as owners of the said goods, and for the interests of those concerned in the said adventure, for the said ship and the cargo thereof to proceed to Hong Kong; and because to have proceeded to any other place than Hong Kong, would have been an unreasonable and indiscreet measure in that behalf, and injurious to the plaintiffs as such owners of the said goods, the defendants, by their servant and agent in that behalf, to wit, one William Pearson, then being the master of the said ship, and the servant and agent of the defendants duly authorised in that behalf, caused the said ship, with all reasonable dispatch, after the said ship was so prevented as in this plea mentioned, to proceed to Hong Kong, being the only safe and proper place in that behalf, to wit, on the 29th of October, 1839; that the said W. Pearson did, whilst the said ship was at Hong Kong aforesaid, and in a reasonable time after the arrival of the ship there, to wit, on the day and year last aforesaid, give to the said E., M. & Co., the said persons in the said declaration named, notice of the said several premises, and did then offer the said E., M. & Co. to deliver the said goods to them there, and did then request them to accept and receive the said goods from him, and to give him, the said W. Pearson, orders what to do with the said goods; and that the said E., M. & Co. then refused to receive the said goods, or to give any orders in respect thereof; that the said ship remained at Hong Kong a reasonable time in that behalf, to wit, until the said *Charles Elliott, so being such chief superintendent as aforesaid*, and the said —— *Smith so being such officer as aforesaid* on the 1st of December, 1839, required and ordered, and compelled, by means of H. M.'s *naval forces there, [*960 the said ship to depart from Hong Kong; that, because of the said requirement and orders being lawful requirement and orders in that behalf, and because of the said force and compulsion, the said ship, to wit, on the day and year last aforesaid, sailed from and left Hong Kong; that, after the said ship left Hong Kong as last aforesaid, the said W. Pearson, in a reasonable time in that behalf, to wit, on the day and year last aforesaid, gave notice to the said E., M. and Co. of the premises, and then requested them to receive the same goods, and to give orders concerning the said goods, and the said E., M. and Co. then wholly refused so to do; and because the neighbourhood of Canton and of Hong Kong was, then, and from thence continually had been and still was, dangerous for the said ship to remain in, on account of the perils of the seas and navigation, and of the enemies of our Lady the Queen then and there being; and because it was then expedient for the interests of the plaintiffs, that the said goods of the plaintiffs should be deposited in some place of safety; and because Manilla was a safe and convenient, the nearest and most convenient, place of deposit, and the only safe and convenient place of deposit within a reasonable distance from the said place where the said ship then was and from Canton; therefore, the said W. Pearson caused the said ship to sail, and the said ship then sailed, to Manilla for the purpose of there depositing the said

goods as in this plea mentioned; and the said goods were, on the 5th of April, 1840, unloaded from and out of the said ship at Manilla, and delivered at Manilla to certain persons there, to wait the orders of the plaintiffs to certain persons trading there, under the firm of Kerr, Murray and Co., then being the agents and correspondents of the plaintiffs at Manilla, duly authorised in that behalf, and being proper and reasonable persons in that
*961] behalf with whom *to leave and deposit, and to whom to trust the said goods, which was the same unloading in the declaration complained of, of all which premises the plaintiffs, in a reasonable time in that behalf, to wit, on the 1st of July, 1840, had notice; that the acts of the defendants, and of the said W. Pearson so being such master as aforesaid, in respect of the said goods from the time of the making of the said promises, hitherto were and each of them was a reasonable and discreet act, and a reasonable and discreet act in that behalf, and were and each of them was truly and honestly, and discreetly, done by the defendants and the said W. Pearson as such master, with a reasonable discreet, and honest view to the interests of the plaintiffs as such owners, and were and each of them was such acts and act as an honest and discreet person would, in the exercise of a sound discretion in that behalf, have done under the circumstances aforesaid, and such as it then became and was the duty of the defendants and of the said master under the circumstances aforesaid to do. Verification.

Special demurrer to the eighth plea—assigning for causes—that the authority of the officers, Elliott and Smith, to interrupt and prohibit, and prevent and discharge, the ship from proceeding to Canton, was not shown or stated in the said eighth plea, as it ought to have been if any such authority existed—that no such authority was conferred upon them by common or statute law, and that, if they had any such authority, its nature, and how conferred upon them, ought to have been stated and shown in the plea—that it was not shown how or by what authority the officers exercised the powers of H. M.'s government, as it ought to have been if such authority was exercised—that H. M.'s government did not by law possess the powers in the eighth plea claimed on behalf of the officers—that the expression,
*962] "H. M.'s government," was insensible and *ambiguous, and had no known, definite, or understood meaning in the law—that it was not stated in the plea, as it ought to have been, what were the causes and reasons moving the officers to interrupt, &c., the ship on her voyage—that any force and prevention of such officers, unless legal and authorised by law, constituted no excuse or defence to the breach of contracts complained of in the declaration, &c.—Joinder.

Special demurrer to the ninth plea, assigning the same causes of demurrer as to the eighth plea, and also that so much of the matter contained in the ninth plea, as was in addition to the matter stated in the eighth plea, was pleaded to damage only, and was untechnical and improper, and inartificially pleaded, and rendered the last plea of a great and wholly unnecessary and improper length—that it consisted of matter upon which the plaintiffs could not take or offer any certain issue, &c.—Joinder.

Bompas, Serjt., (with whom was *Martin*,) in support of the demurrers. The main grounds of demurrer are applicable to both pleas. The contract entered into by the defendants is an absolute contract to deliver the goods at Canton. The bill of lading contains no exception as to the Queen's enemies, the only exception being of the dangers and accidents of the seas and navigation. It is submitted that the eighth and ninth pleas do not dis-

close any sufficient excuse for the non-performance of the defendants' contract. One of the leading cases upon this subject is *Paradine* v. *Jane*, Aleyn, 27, where "the plaintiff declared in debt upon a lease for years, rendering rent at the four usual feasts; and for rent behind for three years ending at the feast of the Annunciation, 21 Car., brought his action. The defendant *pleaded that a certain German Prince, by name Prince [*963] Rupert, an alien born, enemy to the king and kingdom, had invaded the realm with a hostile army of men, and with the same force did enter upon the defendant's possession, and him expelled and held out of possession from the 19th of July, 18 Car., till the feast of the Annunciation, 21 Car.; whereby he could not take the profits. Whereupon the plaintiff demurred. And it was resolved, that the matter of the plea was insufficient; for though the whole army had been alien enemies, yet he ought to pay his rent. And this difference was taken, that where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him. As in the case of waste, if a house be destroyed by tempest or by enemies, the lessee is excused; *Anon.* Dyer, 33 a, Co. Litt. Inst. 53 a, 283 a, *The Abbott of Shirbourne's case*, M. 12 H. 4, fo. 5, 6, pl. 11. So, of an escape; *Luttrell's case*, Co. 4, 84 b, *Jack Cade's case*, H. 33 H. 6, fo. pl. 3. So, in 9 E. 3, 16, a supersedeas was awarded to the justices,(a) that they should not proceed in a *cessavit* upon a *cesser* during the war. But when the party, *by his own contract*, *creates a duty or charge upon him- [*964] self, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And, therefore, if the lessee covenant to repair a house, though it be burnt by lightning or thrown down by enemies, yet he ought to repair it; Dyer, 33 a, H. 40 Ed. 3, fo. 5 & 6, pl. 11."

That case has been repeatedly recognised and affirmed in more modern decisions. It is not necessary to contend, that if the delivery of the goods at Canton had become *unlawful*, the defendants would have been bound to perform their contract. It is sufficient to say, that neither of these pleas shows that the delivery of the goods at Canton had become unlawful. The pleas undoubtedly allege, that certain persons duly authorised, and exercising the powers of H. M.'s government at Canton, prevented the landing of the goods; but it ought to have been shown what authority these persons had; for it is impossible to understand what is meant by the phrase, "exercising the powers of H. M.'s government there." It may be admitted, that if there were any statute which empowered Captain Elliott or Captain Smith to restrain the vessel from proceeding to Canton, the court must take judicial notice of such statute. The only act, however, at all bearing on

(a) But not acted upon. P. 9 Ed. 3, fo. 16, pl. 30, was a *cessavit* brought in the county of Northumberland. Parnell, the tenant's serjeant, pleaded to the jurisdiction.—"that the commonalty of the county had made their plaint and suggestion to King Edward, father of the now king, that the said county had been destroyed by the war of Scotland, so that the people could not take the profits of their lands, and that the lords had brought their writs of *cessavit* to recover the lands; wherefore the king (Edward II.) forbad that any writ of *cessavit* should be granted against the people of that country during the said war until otherwise commanded; and that the said late king had sent to this court his writ, commanding that if any such writ was sent before you here, you should surcease from holding that plea. And we say that the war still continues; wherefore we do not intend that you will hold this plea. Whereupon the writ was read, which was to the effect pleaded. And the writ was of the date of the twelfth year of the father of the now king, &c. Herle, C. J. We have a command by the writ of the king that now is, to hold this plea. Therefore we will not surcease by reason of any writ sent to us by the king that is dead. Wherefore answer."

the subject, is the 3 & 4 W. 4, c. 93, which authorises the Crown to appoint a superintendent at Canton. But the pleas contain no averment that Captain Elliott had been appointed chief superintendent under the act; and
*965] what authority *Captain Smith could have as commanding officer of H. M.'s naval force, does not appear; for there is no allegation of any embargo or blockade. Neither is any fact stated which would render it illegal for the ship to go to Canton. It was held in *Gosling* v. *Higgins*, 1 Campb. 451, that if goods put on board a ship to be carried from one place to another, are wrongfully seized by the officers of the government, so that they cannot be delivered to the consignee, the owner of the goods has an action for the non-delivery against the owner of the ship, who must seek his remedy over against the officers of government. So, in *Hill* v. *Idle*, 4 Campb. 327, the consignee of a particular parcel of goods by a general ship, was held liable to the owner for not taking them from the ship in a reasonable time, although the delay arose from the necessity of procuring an order from the Treasury to land the goods, which order the consignee used the utmost diligence to obtain. *Barker* v. *Hodgson*, 3 M. & Sel. 267, is a stronger case. It was there held, that a charterer of a ship who covenants to send a cargo alongside at a foreign court, is not excused from sending it alongside, though, in consequence of the prevalence of an infectious disorder at the port, all public intercouse is prohibited by the law at the port, and though he could not have communication without danger of contracting and communicating the disorder. Lord Ellenborough says, "the question is, on which side the burden is to fall. If, indeed, the performance of this covenant had been rendered *unlawful* by the government of this country, the contract would have been dissolved on both sides; and this defendant, as he had been thus compelled to abandon his contract, would have been excused for the non-performance of it, and
*966] not liable to damages. But, *if in consequence of events which happen at a foreign port, the freighter is prevented from furnishing a loading there, which he has contracted to furnish, neither is the contract dissolved, nor is he excused for not performing it, but must answer in damages." It is laid down in Abbott on Shipping, 428, 5th ed., (7th ed. 597,) citing *Blight* v. *Page*, 3 B. & P. 295, n, that "if a merchant hire a ship to go to a foreign port, and covenant to furnish a loading there, a prohibition by the government from that country to export the intended articles, neither dissolves the contract nor excuses a non-performance of it, for the laws of one nation do not give effect to the positive institutions of another inconsistent with its own." It is not sufficient for a defendant to show that he has been prevented from performing his contract. He must go further, and establish that the parties who prevented him had a right to do so; and the authority of these parties ought to have been set out, in order to enable the court to judge whether it was legal.

The ninth plea attempts to justify the landing of the goods at Manilla. Admitting, for the sake of argument, that it was unlawful to go to Canton, the defendants had no right to discharge the goods at Manilla. If they were legally prevented from delivering their goods to the consignees at Canton they should have returned them to the plaintiff. For there is nothing in the plea to show that the goods were landed at Manilla for the purpose of being afterwards conveyed to Canton. Moreover, the defendants should have kept the goods on board until they could proceed with them to Canton; for it is consistent with all that is stated, that the ship could have gone to Canton the next day; for there is no averment of any

blockade, or of any war with China. In *Hadley* v. *Clarke*, 8 T. R. 259, the defendants contracted to carry the plaintiff's goods from Liverpool to Leghorn; on the *vessel arriving at Falmouth, in the course of her voyage, an embargo was laid on her "until the further order of council;" and it was held that such embargo only suspended, but did not dissolve, the contract between the parties, and that even after two years, when the embargo was taken off, the defendants were answerable to the plaintiff in damages for the non-performance of their contract. [*967

Channell, Serjt. The authority of *Paradine* v. *Jane*, for the general rule there laid down, is not denied; and it is conceded that an embargo by a foreign government furnishes no excuse to an English ship-owner for the non-performance of his contract. Admitting the general rule, however, it is contended that an exception necessarily arises where the performance of a contract is forbidden by the country of which the contracting parties are subjects; and it is submitted that such an implied exception is sufficiently made out by the facts stated in these pleas. The defendants are not driven to contend that there has been any dissolution of the contract; they contend merely for a suspension. *Hadley* v. *Clarke*, in some respects, resembles the present case; but here the prohibiting to land the goods is stated as continuing down to the time of action. *Touteng* v. *Hubbard*, 3 B. & P. 291, proceeded very much on the principle now contended for, which is laid down in the judgment of Lord ELLENBOROUGH in *Barker* v. *Hodgson*, cited on the other side.(*a*) The question is, whether it sufficiently appears in the pleas, that the defendants were prevented from landing the goods by the authority of the government of this country. Generality of pleading is allowed in many cases where more particularity would lead to prolixity, or where the facts are incapable of being precisely stated. Whether the authority is sufficiently set out in these pleas must be determined with reference *to the circumstances disclosed. It is obvious that the same precision which is necessary in many cases is not required here. It cannot be expected that the defendants should state the authority, step by step, of the parties who prohibited them from landing the goods, or set out the reasons which led to the prohibition; for acts of state policy are necessarily secret in their nature. It is submitted that the pleas are good in substance, and that the allegations as to the defendants being prevented from performing their contract by the acts of officers or servants of the government, lawfully authorised, are made with all the particularity of which the case will admit. [*968

Bompas, Serjt., in reply. The argument advanced on the part of the defendants is, that the interruption on the part of Capt. Elliott, and Capt. Smith, created a suspension only. This shows the two special pleas to be bad. The defendants have failed to make out that the act of those officers, in preventing the delivery of the goods, was lawful. It has been contended that the act of those officers was the act of the British government. But it is not stated that the act complained of was done under any authority. The pleas contain no allegation of the existence of war, or of any danger of war. As no lawful interference is shown, the plaintiffs are entitled to judgment.

TINDAL, C. J. I am of opinion that the two pleas which have been demurred to are bad in point of law. The only ground upon which they could be an answer to the declaration would be, that the contract was dissolved by some superior authority. But the allegation amounts to no more than this,—that, after the arrival of the ship and goods at Canton, certain

(*a*) Antè, p. 965.

persons, then being officers of the Queen, and duly authorised in that behalf, and then exercising the powers of Her Majesty's government there, *969] to wit, one Charles *Elliott, then being chief superintendent of the trade of Her Majesty's subjects to and from the dominions of the Emperor of China, according to the form of the statute in such case made and provided, and one Smith, then being captain of H. M.'s ship the Volage, and then being the commanding officer of H. M.'s naval forces there, did, for divers good and sufficient and lawful reasons, them in that behalf moving, and not for any wrongful, negligent, unlawful, or improper act or behaviour of the defendants, their master, or mariners, or any of them, done or committed, or supposed or alleged to have been done or committed, forcibly interrupt the said ship, being a British ship, and all other British ships, from further proceeding on its and their said voyage to Canton, and did, to wit, then prohibit, prevent and discharge the said ship from proceeding to Canton, and did, by virtue of the powers and authorities to them in that behalf committed, and by means of H. M.'s naval forces then there being under their command, and by force and duress thereof, forcibly compel the said ship, and from thence continually had compelled the same, not to proceed to Canton, and thereby prevented, and thenceforth always hitherto had prevented, and still did prevent, the defendants from delivering the said goods at Canton. It is not said that this was done in the exercise of any prerogative of the Crown, to which it belongs to declare war and to make peace. But if war had been declared between England and China, it would not have been a case in which the contract of the parties would have been dissolved, as when a declaration of war has been held to put an end to a contract to carry goods to those who are now become enemies. Here, the engagement is to deliver goods to the agent of the shipper. The pleas seek to qualify the non-performance of the contract, under the act of the chief superintendent, Capt. Elliott. We must see whether the act of *970] the 3 and 4 W. *4, c. 93, gives any such authority. By the 5th section, after reciting that it is expedient, for the objects of trade and amicable intercourse with the dominions of the Emperor of China, that provision be made for the establishment of a British authority in the said dominions, enacts "that it shall and may be lawful for His Majesty, by any commission, or commissions, or warrant, or warrants, under His Royal sign manual, to appoint not exceeding three of His Majesty's subjects, to be superintendents of the trade of His Majesty's subjects to and from the said dominions, for the purpose of protecting and promoting such trade, and by any such commission or warrant as aforesaid, to settle such gradation and subordination among the said superintendents, one of whom shall be styled the chief superintendent, and to appoint such officers to assist them in the execution of their duties and to grant such salaries to such superintendents and officers as His Majesty shall from time to time deem expedient." By this section the commissioner is armed with power to regulate the rotation of trade between this country and the dominion of the Emperor of China. By sect. 6, it is provided "that it shall be lawful for His Majesty, by any such order or orders, commission or commissions as to His Majesty in council shall appear expedient and salutary, to give to the said superintendents, or any of them, powers and authorities over and in respect of the trade and commerce of His Majesty's subjects within any part of the said dominions, and to make and issue directions and regulations touching the said trade and commerce, and for the government of His Majesty's subjects within the said dominions, and to impose penalties, forfeitures, or imprisonments,

for the breach of any such directions or regulations, to be enforced in such manner as in the said order or orders shall be specified, and to create a court of justice, with criminal and admiralty jurisdiction, for the trial of offences committed by His Majesty's *subjects within the said dominions, and the ports and havens thereof, and on the high seas [*971 within one hundred miles of the coast of China, and to appoint one of the superintendents hereinbefore mentioned, to be the officer to hold such court, and other officers for executing the process thereof, and to grant such salaries to such officers," &c.

Under this section, Capt. Elliott *might* have been armed with sufficient power to make regulations for the government of the war, both between British subjects and the subjects of the Emperor of China. But the pleas do not state that any orders were issued by the Privy Council. Capt. Elliott may have exercised a sound discretion in preventing the goods from being landed at Canton. That however does not constitute a legal answer to the complaint of the non-delivery of the goods. It is not shown that the contract made by the defendant to deliver the goods to the plaintiff's agent at Canton had been dissolved.

COLTMAN, J. I am of the same opinion. The question appears to me to be a very narrow one. It is agreed on both sides, that unless the delivery of the goods at Canton is shown to have been prevented by some competent authority, the two pleas demurred to cannot be supported. The authority must be stated on the face of the pleas. The defendants not being in privity with the party who makes the order, may not be bound to show the authority with the same particularity as would be necessary where such privity exists. I do not say how that would be. But here, we find no statement at all of any authority under which Captain Elliott acted. The mere fact of his being superintendent without any order from the Privy Council, does not import that he had authority to make or to issue directions and regulations under the sixth section. The fifth section confers *very limited powers. It gives nothing further than what is [*972 necessarily implied in the term "superintendent." Both these pleas appear to me to be substantially defective in not containing an allegation of any power conferred on Capt. Elliott by an order in council.

ERSKINE, J. It has been properly admitted by my brother *Bompas*, that if the defendants were prevented from delivering the goods by any person having due authority from this country, there would be a good answer to the present action. I am of opinion that no such authority appears in either of the pleas.

MAULE, J. I am of the same opinion. It has not been argued that any general prerogative exists under which these acts on the part of Captain Elliott and Captain Smith could be justified. Then the statute only empowers them to act under an order made by the King in council, and there is nothing to show that any order in council has been made.

Judgment for the plaintiff.

LEAKE v. LOVEDAY and BROOKS.

A. in 1837 bought goods of B., and allowed B. to remain in possession of them up to 1839, when B. became bankrupt. B.'s assignees made no claim, and B. retained possession of the goods until 1841, when the sheriff under a *fi. fa* against B., seized and sold the goods. After the sale B.'s assignees gave notice of their claim to the sheriff, who, upon receiving an indemnity, handed over the proceeds to them.

In trover brought by A. against the sheriff, *held*:—that, under the plea of not possessed, the sheriff might set up the title of the assignees.

CASE. The first count of the declaration stated that one Cox was tenant to the plaintiff of certain premises in the county of Oxford under a demise
*973] thereof at *a certain weekly rent, to wit, the weekly rent of 5s., of which 42l. was in arrear; that the plaintiff had seized divers goods as for and in the name of a distress, and had impounded them in a certain messuage; and that the defendants broke the pound and took away the goods. The second count was in trover.

Pleas: first, not guilty to the whole declaration; secondly, to the first count, that Cox did not hold as tenant to the plaintiff, *modo et formâ;* thirdly, to the first count, that the rent was not in arrear; fourthly, to the first count, that the plaintiff did not seize the goods as and for a distress; fifthly, to the first count, that the plaintiff did not impound the goods; sixthly, to the first count, that before the plaintiff had seized and impounded the goods, a writ of *habere facias possessionem* issued to the defendant Loveday, as sheriff of the county of Oxford; that the messuage in which the plaintiff had impounded the goods was parcel of the tenements in the writ mentioned, and thereupon the defendant Loveday as sheriff, and the defendant Brooks as his servant, entered upon the messuage; that because the defendant Loveday could not give possession of the messuage without removing the goods, and because the plaintiff refused to remove them, the defendants removed the goods and deposited them at a reasonable distance for the use of the person entitled thereto: verification.

Seventh plea, to the second count, that the plaintiff was not possessed, as of his own property, of the goods in that count mentioned, or any part thereof, *modo et formâ:* concluding to the country.

The eighth plea set up a justification of the conversion of the goods in the second count similar to that contained in the sixth.

The plaintiff, by his replication, joined issue on the first, second, third,
*974] fourth, fifth, and sixth pleas. To *the sixth he new assigned that the pound broken by the defendants was another and a different pound from that mentioned in the sixth plea. There was also a new assignment to the eighth plea that the defandant, on another and different time, and for another and different occasion, converted the goods mentioned in the second count.

Pleas to the first new assignment: first, not guilty; secondly, that the defendants did not impound the goods. To the new assignment to the eighth plea the defendants pleaded, first, not guilty; and, secondly, that the plaintiff was not possessed as of his own property of the goods in the second new assignment mentioned, or any part thereof, *modo et formâ.*

Upon all these pleas the plaintiff joined issue.

At the trial, before ERSKINE, J., at the last Oxfordshire summer assizes, it appeared that a person of the name of Cox had, previously to the year 1837, been a partner with Messrs. Morrell in a bank at Oxford, and had resided in the upper part of the house in which the banking establishment was conducted; and that after the dissolution of the partnership, Messrs. Morrell, to whom the house belonged, permitted him to occupy the same apartments without paying rent. In June, 1837, Cox's goods were seized under a *fi. fa.* issued upon a judgment recovered against him by Cullis and Woodhouse, and the goods having been appraised at 350l., the sheriff, on the 1st of January, 1838, on receiving that amount from the plaintiff, executed a bill of sale to him of the goods, and gave him possession thereof. On the 4th of January Cox entered into an agreement with the plaintiff, whereby he agreed to pay the plaintiff 12s. a week for the goods,

and attorned tenant to him of the rooms in which the goods were placed, at 5s. a week. On the 15th of December a fiat issued against Cox, under which he was declared a bankrupt; and on the 23d of January, *1839, assignees were duly appointed. Soon after the adjudication [*975 a messenger of the court of bankruptcy went to Oxford in order to take possession of the bankrupt's goods; but, on Cox showing him the bill of sale, he withdrew, leaving Cox in possession of the goods. On the 20th of July, 1841, the plaintiff put in a distress for 42l., the arrears of the weekly rent, under which he seized certain other goods belonging to Cox. On the 25th or 26th of July the defendant Brooks entered the premises under a writ of *habere facias possessionem* issued upon judgment signed by Messrs. Morrell, by virtue of a warrant of attorney, to confess judgment in an action of ejectment which had been executed by the bankrupt, and removed both the goods included in the bill of sale and also the goods which had been distrained upon, into the street. The goods were afterwards placed by a third party in an empty house adjoining. On the 11th of August the defendant Loveday seized the goods under two writs of *fi. fa.* issued against Cox at the suit of two different creditors, and on the 20th sold them by auction. After the sale the assignees of Cox gave notice to the sheriff that they claimed the goods; whereupon the sheriff, on receiving an indemnity from the assignees, paid over to them the net proceeds of the sale, amounting to 232l. 18s. 2d.

The bankruptcy of Cox, as also the trading petitioning creditors' debt and the act of bankruptcy, and the appointment of assignees were admitted. The fact of the sheriff being indemnified by the assignees was proved by the undersheriff, who was called as a witness on the part of the plaintiff.

It was contended for the defendants that the bill of sale was colourable and fraudulent, and that no property in the goods included in it ever passed to the plaintiff. It was also insisted that, even assuming the transaction to be *bonâ fide*, as the plaintiff had allowed *the goods to [*976 remain in the order and disposition of the bankrupt, the assignees were entitled to them. For the plaintiff it was argued that the defendant could not, under the plea of "not possessed," set up the right of third parties, the only question under that plea being whether the plaintiff was entitled to the goods as against the defendants. The learned judge expressed an opinion that it was not open to the defendants to set up the title of the assignees; and, after directing a verdict to be entered for the defendants upon so much of the first issue as related to the first count, with respect to which no case had been made out; and also upon the fifth, sixth, and seventh issues, he left it to the jury to say whether the bill of sale was *bonâ fide* or was fraudulent and colourable.

The jury having returned a verdict for the plaintiff upon all the issues arising out of the count in trover, with 253l. 3s. 6d. damages, it was agreed that the defendants should be at liberty to move to enter a verdict for them upon the issues raised by the pleas of "not possessed," in case the court should be of opinion that the goods, at the time of the bankruptcy, were left in the order and disposition of the bankrupt, with the consent of the true owner, and that the defendants were not precluded from setting up the title of the assignees.

Talfourd, Serjt., having, on a former day in this term, obtained a rule nisi,

Channell, Serjt., (with whom was *W. J. Alexander*,) now showed cause.

The question in this case is, whether the sheriff, having sold the goods under two writs of execution, can set up the title of Cox's assignees in order to disprove the plaintiff's property in the goods; and it is submitted that he cannot do so. It is not denied that the plea of "not possessed" raises
*977] the question *of property, to a certain extent. If the assignees had been the defendants, they might have set up this defence; but it is not competent to the defendants, who have seized and sold the goods as the goods of Cox, to turn round and say that they belonged to his assignees. It is not contended that a defendant may not set up the title of a third party under a plea of "not possessed;" but it must be the title of some person connected with the defendants, and identified with them in point of interest; but here the assignees must be considered as strangers to the sheriff; for he seized and sold the goods, not on their account, but adversely to their claim. [Maule, J. This is not an action of tresspass, but of trover.] There is no distinction, so far as this case is concerned, between trespass and tròver. In *Carne* v. *Brice*, 7 M. & W. 183, 8 Dowl. P. C. 884, which was an issue under the interpleader act to try whether wearing apparel taken in execution under a *fi. fa.* against one Morgan, was his property or not: Lord Abinger, C. B., rejected evidence of Morgan's bankruptcy, which was tendered to show that, at all events, the property was not vested in him but in his assignees; and this ruling was confirmed by the court of Exchequer. *Chase* v. *Goble*(a) may be cited as qualifying the doctrine laid down in *Carne* v. *Brice.* In that case, however the defendant was a creditor, and he had an interest in supporting the claim of the assignees by the deed, which amounted to an act of bankruptcy. *Owen* v. *Knight*, 4 New Cases, 54, 5 Scott, 307, and *Butler* v. *Hobson*, 4 New Cases, 290, 5 Scott, 798, will probably be also alluded to by the other side. But in *Owen* v. *Knight* the defendant asserted a property in himself. So, in *Butler* v. *Hobson*; for there likewise the assignees had an interest in setting up the title of the third party, inasmuch as the pro-
*978] perty in the hands of such party would by a *fund in which all the creditors would share. [Coltman, J. Has not the sheriff an interest here? If he were to pay the proceeds over to the plaintiff, would he not be liable to an action at the suit of the assignees?] Here, the assignees do not make any claim until after the seizure and sale; and the sheriff having sold the goods as the goods of Cox, is estopped from setting up any authority subsequently derived from the assignees, which can only have a retrospective operation. In Brooke's Abr. tit. *Justification*, pl. 14, (citing Year Book 7 H. 4, 13,(b) it is said that if a man, having no right, distrain in his own right, and after justify as bailiff of the lord, this is not a good justification; but if he distrained as bailiff, though he were not so in fact, and the lord afterwards agreed to the taking, such justification would be good. [Maule, J. Suppose the defendants had pleaded that the goods were the goods of the assignees?] They are not justifying a conversion, but are only stating facts to show that the plaintiff has no right to complain of a conversion. [Tindal, C. J. If the sheriff, instead of defending the action, had come to the court under the interpleader act, might not the assignees, under an issue, have set up that the goods belonged to them by reason of Cox having been in possession of them with the consent of the true owner?] In that case the plaintiff would have

(a) Antè vol. ii. p 930, 3 Scott, N. R. 245.

(b) The case here intended to be referred to would rather appear to be H. 7 H. 4 fo 34, pl. 1. And see 4 N. & M. 804.

known that the defendants meant to set up that defence in addition to the objection to the bill of sale, and the contest would then have been with the execution creditor. Had this been an issue the case would not have been distinguishable from *Isaac* v. *Belcher*, 5 M. & W. 139, 7 Dowl. P. C. 516, where it was held that in trover, the plea that the plaintiff was not possessed, puts in issue the *right of the plaintiff to the possession of the goods as against the defendant at the time of the conversion. [*979 In *Fyson* v. *Chambers*, 9 M. & W. 460, it was held that a party who, after the death of an intestate, has taken possession of the goods, cannot set up as a defence to an action of trover by the administrator that the intestate had been first insolvent and then bankrupt, and had not paid 15*s.* in the pound under the fiat, and that therefore the property in the goods vested absolutely in the assignees, the goods having been acquired by the intestate after the bankruptcy, and he having been allowed by the assignees to retain possession of them. Here, the assignee, after the title accrued, sent down a messenger who examined the bill of sale with the goods, and then withdrew. The assignees having thus repudiated their title, the sheriff cannot be allowed to set it up. They allowed Cox to remain in possession of the goods, not in his own right, but under his agreement with the plaintiff; and having assented to Cox's holding the goods under the plaintiff, it is doubtful whether they can now say that the goods vested in them. As against the execution creditors, it is clear that the plaintiff has a right to the goods.

Talfourd, Serjt., (with whom was *Keating*,) in support of the rule. After the cases of *Lingard* v. *Messiter*, 1 B. & C. 308, 2 D. & R. 495, and *Watson* v. *Peache*, 1 New Cases, 327, 1 Scott, 149, it cannot be disputed that at the time of the bankruptcy, the assignees became entitled to the goods which were in the order and disposition of Cox, with the consent of the true owner; and if so, it is clear that the assignees are not precluded from asserting their title, because an ignorant messenger, after looking at the bill of sale, withdrew from the premises. *Isaac* v. **Belcher* shows that they may set up their title under the plea of not possessed. [*980 The assignees might have waived the *tort*, and brought an action for money had and received, if the proceeds of the sale had not been paid over to them. In trover a plaintiff is bound to make out an absolute title, as against all the world. No authority has been produced to show that in trover (whatever may be the case in trespass) a sheriff situated like the defendant Loveday is estopped from setting up the right of third parties. In trover the plaintiff complains not of a wrongful taking, but of a wrongful conversion. Trover, therefore, essentially differs from trespass, and gives rise to a question as to the property in the goods. The case cited from the Year-book is not in point. It was an action of trespass, and the issue taken was, whether at the time of seizing the goods the party was the bailiff of the lord. In *Carne* v. *Brice* the evidence was rejected, not because it was inadmissible, but because it would have been against good faith and the understanding of the parties to allow it to be given. Here, the plaintiff was not taken by surprise by the title of the assignees being set up, for he knew they were the real defendants, and that the sheriff had paid over the money to them on an indemnity, and proved that fact as part of his case. *Owen* v. *Knight*, *Butler* v. *Hodson*, and *Chase* v. *Goble* are in favour of the defendants, and cannot be distinguished in point of principle from this case.

TINDAL, C. J. It seems to me that the verdict in this case ought to be

entered for the defendants, the parties having very properly agreed that instead of there being a new trial, the verdict should be so entered if the court should be of opinion that the plaintiff was not entitled to recover. The main question which was raised at the trial, and which has been argued before us, is, whether upon the pleadings as they stand, and under *981] the *circumstances proved, the sheriff had a right to set up the *jus tertii*. If he had, there can be no doubt that the property of the goods in respect of which the action is brought, must be regarded as having vested in the assignees of Cox from the time of his bankruptcy. This is not like the ordinary case of goods left in a ready-furnished house, by which no false colour is held out to the world by reason of the apparent ownership of the bankrupt. Here, it appears that the goods were originally the property of Cox, and that they were assigned to the plaintiff by a bill of sale, no alteration being made in their place of deposit; so that the bankrupt still continued to have them in his order and disposition. The case therefore falls within the principle of *Lingard* v. *Messiter*, *Watson* v. *Peache*, and that class of cases; and I have no hesitation in saying, that if the sheriff can avail himself of the title of the assignees, the right to the goods is in them. The action is trover, to which the defendants have pleaded not guilty, and that the plaintiff was not possessed of the goods as his own property; and the question is, whether, under the latter plea, the title of third persons may be set up. It seems to me, that from the very form of that plea, the plaintiff is called upon to prove the goods to be his property, and that the defendants are let into any evidence which will show that such goods are not the plaintiff's. The count in trover contains two allegations, both of which under the old rules of pleading were put in issue by the plea of not guilty; namely, that the goods were the property of the plaintiff, and that they had been converted by the defendants. Many cases occurred previously to the new rules, in which a defendant was permitted to set up the *jus tertii*. For instance, in *Blainfiel l* v. *March*, 1 Salk. *982] 285, where the plaintiff *brought trover as administra'or, and declared on the possession of the intestate; and upon not guilty pleaded, the counsel for the defendant at the trial, offered to give in evidence that the pretended intestate made a will and appointed an executor, but HOLT, C. J., overruled it, and took this diversity, that where an administrator brings trover upon his own possession, the defendant may give in evidence a will, and an executor upon not guilty, otherwise if it be in the possession of the intestate, (as in the principal case,) for there the defendant ought to plead it in abatement; and if he does not, he shall not give it in evidence. So in *Dawes* v. *Peck*, 8 T. R. 330, in an action on the case by the consignor of goods against a common carrier for not safely carrying according to his undertaking, the carrier was permitted to show that the property in the goods was not in the consignor but in the consignee. These authorities are sufficient to show, that formerly in trover it was competent to a defendant, under not guilty, to set up the right of a third person as an answer to the action. I do not see why the same course should not be allowed under the plea of not possessed. *Carne* v. *Brice*, 7 M. & W. 183, 8 Dowl. P. C. 884, at first sight appears to be in favour of the plaintiff; but the proper answer seems to have been given to it, namely, that it was an issue directed by the court to try the particular fact, and, therefore, peculiarly under the guidance and control of the court, who might well refuse to allow the *jus tertii* to be set up in surprise of the plaintiff. That, however, is not the case here; neither was there any surprise;

for the fiat and the proceedings thereon had been admitted between the parties, and the plaintiff himself called a witness to prove that the sheriff was indemnified by the assignees. It is clear that the real battle was between the plaintiff and the assignees; though the plaintiff may have thought that *the main contest would be with respect to the validity of the bill of sale, and so have overlooked this line of defence. But whether that be so or not, as the objection was taken before the verdict was given, the defendants had a right to insist upon it; and as I am of opinion that if the point had been left to the jury they must have found that the goods were in the control and disposition of the bankrupt, the verdict ought to be entered for the defendants. [*983

COLTMAN, J. I also am of opinion that upon the facts of this case the verdict on the issue alien on the plea of not possessed ought to be entered for the defendants. In the first place, has the plaintiff any property in the goods? The alleged conversion takes place when the goods are seized by the sheriff; and it is said that the sheriff was, at that time, as against the plaintiff, a wrongdoer, inasmuch as the assignees had not then come forward to assert their title. But they do assert it afterwards; and the effect is, to vest the property of the goods in them from the time of the bankruptcy. Upon this state of facts the sheriff is clearly not a trespasser as against the plaintiff; for he has seized, not *his* goods, but the goods of the assignees. That being so, the issue is found for the defendants, provided they are not estopped from setting up the title of the assignees. The rule whereby a party is precluded from availing himself of the *jus tertii* is not so extensive as has been contended. I have always understood it to apply only to cases where a person has placed himself in a position which prevents him from setting up a title in a third party.

ERKSINE, J. At the trial two points were insisted on by the defendants under the plea of not possessed; first, that the plaintiff never had any property in the *goods, inasmuch as the bill of sale under which he claimed was fraudulent, the goods being bought with the bankrupt's money. That question was left to the jury, who found that the transaction was *bona fide*, and that the goods were the property of the plaintiff at the time of Cox's bankruptcy. The second ground of defence was, that admitting that the goods passed to the plaintiff under the bill of sale, yet inasmuch as they were in the order and disposition of Cox at the time of his bankruptcy, with the consent of the plaintiff, the true owner, they vested in the assignees. It occurred to me at the trial, that if the assignees had been the defendants, they might clearly have set up as a defence to the action that the goods were theirs, and might have urged that defence successfully; for the goods having been Cox's originally, and the bill of sale having been kept secret from the world, it was one of those cases for which the legislature meant to provide. But it also occurred to me, that inasmuch as the assignees were not the defendants, and as the sheriff did not set up any authority from them, the defence that the goods belonged to the assignees was not open to him. I am now satisfied that I was wrong, and that the verdict ought to be entered for the defendants. The plea of "not possessed" puts in issue, not the right of the sheriff to seize the goods, but the plaintiff's property in them. The plaintiff, therefore, was bound to prove, not only that the goods became his in 1837, the date of the bill of sale, but that they continued his property down to the time of their being seized by the sheriff. It appeared to me, as the goods were in the plaintiff's possession, and the assignees had then asserted no right to them, [*984

the sheriff, by selling them, was guilty of a complete conversion. But I now agree with the rest of the court, that the goods were at that time the property of the assignees; and as they afterwards asserted their right to them,
*985] and called upon *the sheriff to pay over the proceeds of the sale, the defendants were at liberty to set up the title of the assignees as an answer to this action.

MAULE, J. The right of the assignees to the goods in question depends upon whether those goods were in the order and disposition of Cox at the time of his bankruptcy, with the consent of the true owner, within the meaning of the 6 G. 4, c. 16, s. 72. The cases show that when assignees assert their title, as has been done here, the goods vest in them from the time of the bankruptcy. The observation of PARKE, J., in *Isaac* v. *Belcher*, 5 M. & W. 139, 7 Dowl. P. C. 516, "that the plea that the plaintiff was not possessed, in this form of action puts in issue the right of the plaintiff to the possession of the goods *as against the defendant*, at the time of the conversion," is to be understood, not as narrowing but as enlarging the defence under that plea. There, under "not possessed," the defendants as assignees claimed, not an actual property in the goods, but a right to take them as being in the order and disposition of the bankrupt at the time of his bankruptcy; and on its being contended that this could not be given in evidence under that plea, PARKE, B., in effect states, that the defendants might say, though the plaintiff has the property in the goods, he has none as against us. The question here is, whether the sheriff may set up the title of the assignees; and when the nature of the issue is looked at, the evidence is clearly admissible. This is not an action of trespass, for damage done to some chattel which the plaintiff asserts to be his. In trover the plaintiff seeks to recover for the wrongful conversion of property which he admits to have come lawfully into the possession of the defendants. The
*686] allegation in the declaration is, that the *plaintiff was lawfully possessed of the goods as of his own property. The effect of denying that averment is, to raise a question whether the plaintiff has such a title as will enable him to maintain an action of trover in respect of it. The defendant may show, either that the plaintiff has no right against any body, or that he the defendant has some right which prevents the plaintiff from maintaining the action against him. Here, the defendants say that the plaintiff has no right to the goods at all. The evidence given by them was offered, not to show the right of third persons, but to prove that the goods were not the property of the plaintiff. It is clear that the evidence was admissible; and I cannot understand how the defendants could be prevented from giving it unless by reason of some estoppel. An estoppel, however, can only arise out of some mutuality between the parties; but here the defendants are mere strangers. If such evidence were not admissible, the allegation that the plaintiff was possessed as of his own property, would become an idle averment, and the effect would be to destroy the distinction existing between trespass and trover.

Rule absolute to enter a verdict for the defendants on the issues raised by the pleas of not possessed to the second count and new assignment thereon.

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*987] *DOE dem. HENRY *v.* GUSTARD.

It is no ground for staying proceedings in ejectment for a forfeiture, that the lessor of the plaintiff had previously brought an ejectment for the same premises in a different court, in respect of a former forfeiture, in which action a rule for entering a nonsuit is still pending.

EJECTMENT brought upon a clause of re-entry in an indenture of lease for a forfeiture by reason of non payment of rent.

On the 9th of April last the lessor of the plaintiff brought a similar action in the court of Queen's Bench, in which he obtained a verdict. An objection was taken at the trial of that cause that the demand of the rent was on a later day than that on which it ought to have been made, and a rule nisi was granted in Trinity term for entering a nonsuit upon that ground, which rule was still pending. The present action had been commenced subsequently for a fresh forfeiture in respect of the nonpayment of rent for two other quarters.

Dowling, Serjt., now moved for a rule to show cause why the present action should not be stayed until the determination of the other action in the court of Queen's Bench. [COLTMAN, J. It does not follow that the action in the Queen's Bench will decide this.] The lessor of the plaintiff should either abandon the action in the Queen's Bench or that in this court. [TINDAL, C. J. The rule only applies where the second action is for the *same* forfeiture. Here, the lessor of the plaintiff is proceeding for a fresh cause of action.] It is said in Archb. Pr. by Chitty, 991, 7th ed., that "the courts have stayed the proceedings in a second ejectment until the special verdict in the former one should be determined;" for which position *Smith d. Dormer* v. *Parkhurst*(*a*) is cited. Supposing the defendant to succeed in the action in the Queen's Bench, he will be entitled to costs; but he will be prevented, by the bringing of the second action, from getting them.

*TINDAL, C. J. You do not say that the lease is void, and [*988 yet you do not pay the rent at the time when it ought to be paid according to the reservation. How can we prevent the lessor of the plaintiff from bringing another action? *Smith d. Dormer* v. *Parkhurst*, as reported by Strange, does not support the position for which it is cited in Archbold's Practice. It is said to be more fully given in Andrews; and if you find that the latter report bears out your motion, you can renew it to-morrow; but as at present advised I think it ought not to be granted, as this, on your own showing, is a fresh action.

The rest of the court concurred. Rule refused.(*b*)

(*a*) 2 Str. 1105. But no such point appears either in the short note in Strange, or in the full report in Andrews, 315.

(*b*) The application was not renewed.

PERKINS *v.* VAUGHAN.

In trespass by A. against B. for false imprisonment, B. justified on the ground that A. being possessed of a bill of exchange drawn by C. upon D., forged the acceptance of D. Issue being joined upon a replication *de injuria*, a witness called by A. proved that A. and B. went with him to D. on the day following that on which the bill had been dishonoured, when B. reminded D. that D. had on the presentment of the bill for payment stated that A. had forged D.'s acceptance, and that D. neither admitted nor denied that he had made such a statement. A witness called by B. sated that D., when he dishonoured the bill, did say that the acceptance was forged by A. *Held*, that this statement was admissible in evidence in mitigation of damages.

Semble, that this statement would have been evidence for B., even if evidence of the subsequent conversation had not been given by A.

TRESPASS for assaulting the plaintiff and compelling him to go to a police station-house, and thence to a police court, and imprisoning plaintiff twelve hours.

Pleas: first, not guilty; secondly, leave and license; thirdly, that before the committing of the trespasses, to wit, on the 14th of September, 1841,

*989] the plaintiff *having in his possession a bill of exchange, the tenor whereof was and is as follows:—"15*l*. Eton, September 14th, 1841. Two months after date pay to my order 15*l*. for value received. Robert Perkins. To Mr. John Dreweatt, 25 Bucklesbury, London;" he the plaintiff did feloniously forge on the said bill a certain false and counterfeit acceptance of the said bill, by writing on and across the said bill; which false, forged, and counterfeit acceptance of the said bill was and is as follows:—"Accepted, John Dreweatt;" with intent to defraud the defendant, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her Crown, and dignity; wherefore the defendant well knowing the plaintiff to be guilty of the said felony, did, at the said time when, &c., give the plaintiff in charge to one Lawrence Anderson, then being a police and peace officer of our Lady the Queen, duly authorised in that behalf, and then requested the said L. A., so being such police and peace officer, to take the plaintiff into his custody, and safely keep him, and carry, and convey him before some police magistrate and justice of the peace of our said Lady the Queen duly authorised in that behalf, to answer the premises and to be dealt with according to law; wherefore the said L. A., so being such police and peace officer, did, at the request of the defendant, take the plaintiff into his custody, and forced and compelled him to go in and along the said public streets to the nearest police station-house, being the said police station-house in the declaration first above mentioned, in order there to enter the said complaint and charge against the plaintiff concerning the premises, and there safely to keep and imprison the plaintiff until the plaintiff could be conveniently conveyed and carried before some police magistrate or justice of the peace of our Lady
*990] the Queen duly authorised in that behalf, to answer the *premises; and because there was not then at the last mentioned police station-house a proper police officer in that behalf ready and willing to take the charge against the plaintiff, and because the plaintiff could not be then and there conveniently kept and imprisoned as aforesaid, the said L. A., then being such police and peace officer as aforesaid, at the request of the defendant then forced and compelled the plaintiff to go from and out of the last mentioned police station-house into the public street, and forced him to go in and along divers other streets to a certain other police station-house, being the police station-house in the declaration secondly above mentioned, in order there to enter the said complaint and charge against the plaintiff concerning the premises, and there safely to keep and imprison the plaintiff until the plaintiff could be conveniently conveyed and carried before some police magistrate or justice of the peace of our said Lady the Queen duly authorised in that behalf, to answer the premises; and the said L. A., then being such police and peace officer as aforesaid, at the request of the defendant afterwards and as soon as conveniently could be, conveyed and carried the plaintiff in and along divers other streets to a certain police court, before J. R., Esq., then being a police magistrate and justice of the peace then acting and duly authorised to act in that behalf, for examination concerning the premises, and to be dealt with according to law; which are the same, &c.: verification.

A fourth plea differed from the third in stating that the plaintiff uttered the bill, knowing the acceptance to be forged, instead of alleging that it was forged by the plaintiff.

The plaintiff added the similiter to the first plea, and took issue upon the

other pleas, by traversing the leave and license in the second, and by replying *de injuriâ* to *the third and fourth. To these three traverses the similiter was added on the part of the defendant. [*891

At the trial, before MAULE, J., at the sittings at Westminster, in Easter term last, the imprisonment was proved. A witness called by the plaintiff stated, upon his examination in chief, that the plaintiff and the defendant went with the witness to Dreweatt on the day following the dishonour of the bill; that the defendant, in the presence of the plaintiff, reminded Dreweatt that on the preceding day Dreweatt had charged the plaintiff with having forged the acceptance; and that Dreweatt neither admitted nor denied that he had made such a charge.

One Vaughan, a cousin of the defendant, who proved the dishonour of the bill, was asked what Dreweatt said at the time he refused to pay the bill. This question being objected to, the learned judge overruled the objection, and Vaughan answered that Dreweatt then stated that the plaintiff had forged the acceptance.

A verdict having been found for the defendant upon the third issue,

Talfourd, Serjt., in the same term, moved for a new trial, on the ground that the question had been improperly allowed to be put. The only measure of damage in this case is, the amount of suffering and injury actually sustained, whatever the impression on the mind of the defendant may have been.

Channell, Serjt., in Trinity term showed cause. The evidence was tendered and received, not to prove a forgery actually committed, but to lessen the damages. The statement of Dreweatt was a declaration accompanying an act done. It could not be a *defence* to this action that the defendant had reasonable ground to suspect that the plaintiff had forged Dreweatt's acceptance. *It was merely evidence in mitigation of damages. [*992
If when a bill is presented for payment to bankers they say that there are no effects, that is a declaration which may be given in evidence, as it accompanies the act of refusal. The statement made by Dreweatt was calculated to make a considerable difference in the amount of damages, and it would clearly have been admissible in evidence. [CRESSWELL, J. That would be on a totally distinct ground from being a declaration accompanying an act.] The damages would be assessed upon the issue of not guilty; and that is so, whether the general issue is pleaded alone or with special pleas. Any facts which go to show that the damages are less than the plaintiff seeks to recover are admissible upon the general issue. It cannot be said that the statement given in evidence was irrelevant to the matters into which the jury had to inquire.

Talfourd, Serjt., in support of the rule. The plaintiff complains of the damage which he has sustained by the imprisonment, and not of the motives of the defendant. The defence which it was sought to set up by the alleged conversation was pleadable. Reasonable ground of suspicion might have been pleaded after an allegation, that a felony had been committed by some one. [COLTMAN, J. That allegation could not have been made in this case. MAULE, J. There was no ground for supposing that any other person had committed the felony. That shows that the defence could not have been pleaded. Part of my brother *Channell's* argument is therefore left unanswered.] The plaintiff had no means of cross-examining the witness upon this statement, nor could he anticipate that any such statement would be attempted to be proved. [MAULE, J. Your objection would exclude a statement made by the defendant himself

*993] at that time. [TINDAL, C. J. Facts *cannot be given in evidence which might have been pleaded.] It was formerly supposed that circumstances of suspicion might be given in evidence. [MAULE, J. Pleas of justification are not drawn so as to enable the party to be put upon his trial as upon an indictment. A felony is not laid to have been committed against the peace.] That is no doubt, generally so; but here it is so drawn. The plaintiff contends that the evidence is not relevant, and that supposing it to be so, it is *res inter alios acta*.

TINDAL, C. J., now delivered the judgment of the court.

This was an action of trespass and false imprisonment, in which the defendant pleaded—first, not guilty; secondly, leave and license; thirdly, that the plaintiff had forged an acceptance of a bill of exchange, and that the defendant had caused the plaintiff to be arrested upon that charge. The jury having found a verdict for the defendant on the third issue, the plaintiff obtained a rule to show cause why there should not be a new trial, on the ground of the admission of improper evidence.

The evidence objected to was this. One Vaughan was called by the defendant to prove the dishonour of the bill when presented for payment to Dreweatt, on whom the bill was drawn, and who *appeared* on the face of the bill to have accepted it; and this witness stated that he accompanied the defendant to Dreweatt's, and that Dreweatt refused to pay the bill; whereupon the witness was asked what Dreweatt said at the time of the refusal. It was objected by the plaintiff's counsel that such question could not be put to the witness; but the objection being overruled, the witness answered that Dreweatt said, in effect, that the acceptance in his name was a forgery by the plaintiff. The only point that has been argued before us is, whether the question was a proper question, and one which ought to *994] have been *allowed to be put to the witness. And we are of opinion that, upon the course which the evidence took on the trial of this case, the question was very properly allowed, and that the answer was admissible evidence in the cause. Even if the inquiry before us had depended on the determination of the point whether evidence by the defendant of the dishonour of the bill and of the circumstances attending such dishonour, was relevant to the question then before the jury of the acceptance by the plaintiff, it would have been difficult altogether to exclude such evidence on the score of its irrelevancy; but upon the trial the plaintiff had made it part of his own evidence; and his first witness had proved on his examination in chief, that the plaintiff and the defendant went with him to Dreweatt's on the day following that of the dishonour of the bill, and that the defendant, in the presence of the plaintiff, reminded Dreweatt of the charge of forgery which he had made against the plaintiff the day before, and had asked him to repeat his conversation; and the plaintiff's witness proceeded to state Dreweatt's answer, which neither admitted nor expressly denied that such conversation had taken place. In this state of the evidence it was certainly competent to the defendant to prove by his own witness, who was present at such conversation, what had really taken place between Dreweatt and the defendant, and that the conversation was such as the defendant had stated in the presence of the plaintiff. The plaintiff's object was, to lead the jury to believe that the defendant had referred to a *fictitious* conversation. It was perfectly competent, therefore, to the defendant to show, on his part, that such conversation was real and not fictitious, and to follow up the plaintiff's account with his own.

Upon this ground we are of opinion that the question was properly allowed, and that the answer was properly admitted as evidence, and that the rule must be discharged.

Rule discharged.

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*JOHN HAMPDEN GLEDSTANES v. The Right Honourable JOHN WILLIAM Earl of SANDWICH and JOHN WISBY. [*995

Grants from the crown may be avoided upon three grounds:

First. Where the crown professes to give a greater estate than it possessed in the subject matter of the grant.

Secondly. Where the same estate, or part of the same estate, has already been granted to another.

Thirdly. Where the crown has been deceived in the consideration expressed in the grant.

In 1594, Queen Elizabeth, by letters patent, granted the manor of Dale in reversion to A. for twenty-one years, to expire in 1646, at a rent of 26*l.* 13*s.* 4*d.* In 1624, James I. by indenture demised the manor, without any reservation of rent, to B. and C., trustees for Prince Charles, for ninety-nine years, to expire in 1722. in 1626, B. and C. demised the manor to D. for thirty-one years from the expiration, in 1646, of the term granted to A. at the same rent. 29th March, 1628, B. and C. assigned to D. the residue of their term of ninety-nine years, at the same rent of 26*l.* 13*s.* 4*d.* till the expiration of the existing leases (in 1677) and from that time at the rent of 40*l.* 2d July, 1628, Charles I., by letters patent, confirmed the former leases to D. for a valuable consideration, and granted the reversion of the manor to E. in fee, to be held of the crown by knight's service and without any rent during the residue of the term for ninety-nine years, (ending in 1722,) and from that time at a fee farm rent of 40*l.*: in which letters patent there was a clause *releasing all the rent made payable by the indenture of* 1624. In 1644, Charles II., by letters patent, granted to F. in tail male, "all that yearly rent of 26*l.* 13*s.* 4*d.*" by the letters patent of Charles I., of 2d July, 1628, to the king, "his heirs and successors," reserved, or mentioned to be reserved, out of the manor of Dale.

Held, that although there was a misdescription in this grant to F.—inasmuch as the rent of 26*l.* 13*s.* 4*d.* was reserved by the letters patent of Car. I. *for a term*, and not *in fee*, yet, as there was a rent of 40*l.* thereby reserved in fee—the crown had a sufficient estate in rent both as to interest and value, out of which the intention of the grant might be carried into effect; and, therefore, that such misdescription did not avoid the grant.

In 1798 the rental books of the entailees were destroyed by fire, from which time they had been in the perception of a rent of 26*l.* 13*s.* 4*d.* paid by the tenants of the manor.

Held, that in the absence of any evidence that such rent commenced at that period, it was a legitimate inference that it had been paid from the period when it would become payable to the entailees under the patent of Car. II.

In 1723 G. (claiming under E.) conveyed the manor to H. by a deed, which contained a covenant against incumbrances, with an exception "of a fee farm rent payable to the crown."

Held, that this covenant (coupled with the statement of the rents in the demises to D. and the grant to E.) showed that the owner of the manor had express notice of the existence of such rent.

Held, also, that there having been so long a perception of rent in the entailees, and the owners of the manor having had notice of the reservation of a rent to the crown, every intendment was to be made in favour of the grant to F.

REPLEVIN. The defendants avowed and made cognizance, first under a distress for a fee farm rent claimed to be issuing out of the manor of Allfarthing, in the parish of Wandsworth, in the county of *Surrey, [*996 whereof it was alleged that the said Earl of Sandwich was seised in fee; and, secondly, under a distress for a fee farm rent, claimed to be issuing out of the same manor, alleged to have been granted by King Charles the Second, as in the avowry and cognizance particularly mentioned;(*a*) and, issue having been joined upon the pleas in bar taking issue thereon, the following case was by the order of the Right Honourable Mr. Justice ERSKINE, and by the consent of the parties, stated for the opinion of this court.

(*a*) Vide post, in the judgment, p. 1020.

STEMMA TITULI.

Abbot of Westminster.	Queen Elizabeth.		King James I.	King Charles I.	King Charles II
1533. Demise of manor to Cromwell, 1534 to 1594.	1570 Demise of Manor in reversion to Snowe, 1594 to 1625.	1594 Demise of Manor in reversion to Bowyer, 1625 to 1646.	1624 Demise of manor in reversion to Hobart and others, 1623 to 1722.	1628 Grant of manor to Thomas Porter, in fee.	1664 Grant of rent of 26*l.* 13*s.* 4*d.* to Earl of Sandwich in tail male.

1625	1628
Sublease of manor to E. Porter, 1646 to 1677.	Assignment of residue of term created by demise of manor to Hobart, demised to E. Porter, 1677 to 1722.

— February, 25 H. VIII. 1533 (153$\frac{3}{4}$.)—By an indenture of this date, under the conventual seal of the late monastery of St. Peter at Westminster, the said manor was demised to Thomas Cromwell, Knight, for the
*997] term *of sixty years, beginning from the feast of St. Michael the Archangel then next ensuing.

25th July, 12 Eliz. 1570.—By letters patent of this date, the said manor was granted in reversion to Elizabeth Snowe for the term of thirty-one years, beginning from the expiration, surrender, forfeiture or determination of the prior demise to Cromwell.(*a*)

12th April, 36 Eliz. 1594.—By letters patent of this date, the said manor was granted to John Bowyer for the term of twenty-one years, to begin from the expiration, surrender, forfeiture, or determination of the former grant to Elizabeth Snowe.(*b*)

15th June, 22 Jac. I. 1624.—By an indenture of this date, made between his Majesty (King James I.) of the one part, and Henry Hobart, Knight and Baronet, Chief Justice of the Court of Common Pleas, and Chancellor of the Prince of Wales, James Fullerton, Knight, then Master of the Wards and Liveries, John Walter, Knight, then Attorney-General, and Thomas Trevor, Knight, then Solicitor-General, of the other part; His said late Majesty, of his special grace, certain knowledge, and mere motion, and at the request and nomination of Charles then Prince of Wales, did give, grant, and to farm let to the said Henry Hobart, James Fullerton, John Walter, and Thomas Trevor, (*inter alia*,) the said manor with the appurtenances, therein particularly mentioned to be of the yearly rent and value (beyond reprises) of 25*l.* 3*s.* 3*d.*, and to have been parcel of the possessions of the late monastery of Westminster, and afterwards annexed to the honour of Hampton Court, for the term of ninety-nine years from the feast of St. Michael the Archangel then last past before the date of the said indenture.

*998] 8th March, 1 Car. I. 162$\frac{5}{6}$.—By an indenture of *this date, between the said John Walter, James Fullerton, and Thomas Trevor, (who had survived the said Henry Hobart,) of the one part, and Endimion Porter, Esq., one of the grooms of the chamber, of the other part, the said manor was, by Walter, Fullerton and Trevor, granted in reversion to the said Endimion Porter for the term of thirty-one years, beginning from the feast of St. Michael the Archangel, 1646, or from the end, surrender, forfeiture, or determination of the term then existing.(*a*)

(*a*) Vide post, in the judgment, p. 1020.
(*b*) See further particulars as to the two grants of Elizabeth in the judgment, p. 1220

Upon this ground we are of opinio[n] [illegible]
owed, and that the answer was p[illegible]
the rule must be discharged.

*JOHN HAMPDEN GLE[DSTANES] [illegible]
JOHN WILLIAM Earl o[f] [illegible]

Grants from the crown may be [illegible]
First. Where the crown prof[illegible]
matter of the grant.
Secondly. Where the sam[e] [illegible]
another.
Thirdly. Where the cr[own] [illegible]
In 1594, Queen Elizab[eth] [illegible]
twenty-one years, t[illegible]
ture demised the [illegible]
Charles, for nine[ty] [illegible]
to D. for thirty [illegible]
same rent. 29 [illegible]
nine years, a[illegible]
1677) and f[illegible]
confirmed t[illegible]
the manor [illegible]
during th[e] [illegible]
at a fee f[illegible]
made pa[illegible]
to F. in [illegible]
2d Jul[y] [illegible]
out of [illegible]
Held, th[illegible]
26*l*. [illegible]
as t[illegible]
bot[h] [illegible]
eff[illegible]
In 1[illegible]
bee[n] [illegible]
He[illegible]

I[illegible]

[illegible] date, made between [illegible] Trevor of the one part, [illegible] the said John Walter, [illegible] special warrant of His Majesty [illegible] direction of James, Earl of Marlborough [illegible] and others the commissioners [illegible] consideration of the yearly rent in [illegible] reserved, and thereout to be paid by the [illegible] administrators and assigns, and in [illegible] money by the said Endimion Porter to [illegible] paid, and for divers other good causes and [illegible] Walter, James Fullerton and Thomas Trevor [illegible] Endimion Porter, the said manor of Allfar[illegible] and all the right, estates, title, interest, term [illegible] reversions, claim and demand whatsoever [illegible] Walter, James Fullerton and Thomas Trevor, and [illegible] the said manor, except as by the said now [illegible] excepted; to have and to hold the same unto [illegible] Porter, his executors, administrators and as- [*999
[illegible] residue of the said term of ninety-nine years; yielding and paying therefor yearly, during all the residue of the said term, to the said John Walter, James Fullerton and Thomas Trevor, their executors, administrators and assigns, to the use of his said late Majesty, his heirs and successors, the yearly rents following, that is to say, during all the term then to come and unexpired of and in the said letters patent of 12th of April, 36 Eliz., and the indenture of demise of 8th of March, 1 Car. I., or either of them, the yearly rent of 26*l*. 13*s*. 4*d*.; and after the expiration of the term aforesaid, then yielding and paying during all the residue of the said term of ninety-nine years, then to come and unexpired, the yearly rent of 40*l*., at the feasts of St. Michael the Archangel, and the Annunciation of the Blessed Virgin Mary, by equal and even portions, into the hands of the receiver of the revenues of the Prince of Wales, or the receiver of the county of Surrey, for the time being.(a)

2d July, 4 Car. I. 1628.—By letters patent of this date, after reciting the indenture of 15th of June, 22 Jac. I., and also reciting that the said John Walter, James Fullerton and Thomas Trevor, (who had survived the said Henry Hobart,) were possessed, by virtue of the demise contained in the said indenture of the 15th of June, 22 Jac. I., of, among other things, the said manor, by right of accruer, for the whole residue of the said term of years then to come and unexpired, and also reciting that by a certain indenture, bearing date the 29th day of March, then last past, made between the said John Walter, James Fullerton and Thomas Trevor of the one part, and the said Endimion Porter of the other part, the said John Walter, James Fullerton and Thomas *Trevor, by the special warrant of [*1000
the said late King, and by the direction of James, Earl of Marlborough, the said late King's Treasurer of England, and other the commissioners authorised for the sale of lands, and in consideration of the annual rent, in and by the same indenture reserved, and from thence payable and to be paid, by the said Endimion Porter, his executors, administrators and assigns, and also in consideration of a competent sum of money, by the said Endimion Porter, for the use of the said late King, paid, and for divers other good causes and considerations, the said John Walter, James Fuller-

(a) Vide post, in the judgment, p. 1023.

Trevor thereunto moving, granted and assigned to the ...ion Porter the said manor of Allfarthing, with the appur... all the right, estate, title, interest, term of years to come ...rsion and reversions, claim and demand whatsoever, of them ...hn Walter, James Fullerton and Thomas Trevor, and either of ..., in and to the said manor, with its rights, members and appur...es whatsoever, and of, in and to whatever is part and parcel thereof; ...ept as by the said last recited indenture is excepted, which manor, it ... by the now stating letters patent alleged, had been demised, by indenture, under the conventual seal of the late monastery of St. Peter's at Westminster, bearing date the last day of February, in the twenty-fifth year of the reign of the Lord Henry, late King of England, the Eighth, to Thomas Cromwell, Knight, for a term of sixty years, beginning from the feast of St. Michael the Archangel, then next following; and had been afterwards granted, in reversion, to one Elizabeth Snowe, by letters patent, of the late Queen Elizabeth, bearing date at Gorhambury, the 25th day of July, in the twelfth year of her reign, for a term of thirty-one years, to begin from the expiration, surrender, forfeiture or *determination of the former lease, so made to the said Thomas Cromwell, Knight, and had [*1001 been afterwards granted in reversion to John Bowyer, by letters patent of the said Queen Elizabeth, dated the 12th day of April, in the thirty-sixth year of her reign, for a term of twenty-one years, beginning from the expiration, surrender, forfeiture or determination of the former letters patent, made to the said Elizabeth Snowe; and then lately granted in reversion to the said Endimion Porter, by indenture of the said John Walter, James Fullerton and Thomas Trevor, dated the 8th of March, in the first year of his then Majesty's reign, for a term of thirty-one years, beginning from the feast of St. Michael the Archangel, 1646, or from the end, surrender, forfeiture or determination of the term then being, which should first and next happen; to have and to hold the said manor, with its appurtenances, to the said Endimion Porter, his executors, administrators and assigns, during the residue of the said term of ninety-nine years before mentioned, and then to come and unexpired; yielding and paying annually during the whole residue of the said term thence to come, to the said John Walter, James Fullerton and Thomas Trevor, their executors, administrators and assigns, for the use of the said late King Charles I., his heirs and successors, the annual rent following; (that is to say,) for and during the whole term thence to come and unexpired, of and in the aforesaid letters patent and indenture of lease aforesaid, or either of them, the annual rent of 26*l.* 13*s.* 4*d.*; and, after the expiration of the term aforesaid, then yielding and paying during the whole residue of the said term of ninety-nine years then to come and unexpired, the annual rent of 40*l.*, at the feasts of St. Michael the Archangel and the Annunciation of the Blessed Virgin Mary, by even and equal portions, into the hands of the receiver of the said rent, appointed *by the said late King Charles I., when he was Prince of Wales, or to his said Majesty's receiver of the said county of Surrey, for [*1002 the time being, the said late King Charles I., of his special grace, certain knowledge and mere motion, the said indenture, bearing date the aforesaid 29th day of March, to the said Endimion Porter, as is set forth, and all and singular grants, assignments, thing and things whatsoever, in the same mentioned and contained, approving and the same allowing and granting, and every of them, and the said manor and all and singular other the premises, under the rents covenants, conditions and agreement and during the term.

known that the defendants meant to set up that defence in addition to the objection to the bill of sale, and the contest would then have been with the execution creditor. Had this been an issue the case would not have been distinguishable from *Isaac* v. *Belcher*, 5 M. & W. 139, 7 Dowl. P. C. 516, where it was held that in trover, the plea that the plaintiff was not possessed, puts in issue the *right of the plaintiff to the possession of the goods as against the defendant at the time of the conversion. [*979 In *Fyson* v. *Chambers*, 9 M. & W. 460, it was held that a party who, after the death of an intestate, has taken possession of the goods, cannot set up as a defence to an action of trover by the administrator that the intestate had been first insolvent and then bankrupt, and had not paid 15*s.* in the pound under the fiat, and that therefore the property in the goods vested absolutely in the assignees, the goods having been acquired by the intestate after the bankruptcy, and he having been allowed by the assignees to retain possession of them. Here, the assignee, after the title accrued, sent down a messenger who examined the bill of sale with the goods, and then withdrew. The assignees having thus repudiated their title, the sheriff cannot be allowed to set it up. They allowed Cox to remain in possession of the goods, not in his own right, but under his agreement with the plaintiff; and having assented to Cox's holding the goods under the plaintiff, it is doubtful whether they can now say that the goods vested in them. As against the execution creditors, it is clear that the plaintiff has a right to the goods.

Talfourd, Serjt., (with whom was *Keating*,) in support of the rule. After the cases of *Lingard* v. *Messiter*, 1 B. & C. 308, 2 D. & R. 495, and *Watson* v. *Peache*, 1 New Cases, 327, 1 Scott, 149, it cannot be disputed that at the time of the bankruptcy, the assignees became entitled to the goods which were in the order and disposition of Cox, with the consent of the true owner; and if so, it is clear that the assignees are not precluded from asserting their title, because an ignorant messenger, after looking at the bill of sale, withdrew from the premises. *Isaac* v. **Belcher* shows that they may set up their title under the plea of not possessed. [*980 The assignees might have waived the *tort*, and brought an action for money had and received, if the proceeds of the sale had not been paid over to them. In trover a plaintiff is bound to make out an absolute title, as against all the world. No authority has been produced to show that in trover (whatever may be the case in trespass) a sheriff situated like the defendant Loveday is estopped from setting up the right of third parties. In trover the plaintiff complains not of a wrongful taking, but of a wrongful conversion. Trover, therefore, essentially differs from trespass, and gives rise to a question as to the property in the goods. The case cited from the Year-book is not in point. It was an action of trespass, and the issue taken was, whether at the time of seizing the goods the party was the bailiff of the lord. In *Carne* v. *Brice* the evidence was rejected, not because it was inadmissible, but because it would have been against good faith and the understanding of the parties to allow it to be given. Here, the plaintiff was not taken by surprise by the title of the assignees being set up, for he knew they were the real defendants, and that the sheriff had paid over the money to them on an indemnity, and proved that fact as part of his case. *Owen* v. *Knight*, *Butler* v. *Hodson*, and *Chase* v. *Goble* are in favour of the defendants, and cannot be distinguished in point of principle from this case.

TINDAL, C. J. It seems to me that the verdict in this case ought to be

entered for the defendants, the parties having very properly agreed that instead of there being a new trial, the verdict should be so entered if the court should be of opinion that the plaintiff was not entitled to recover. The main question which was raised at the trial, and which has been argued before us, is, whether upon the pleadings as they stand, and under

*981] the *circumstances proved, the sheriff had a right to set up the *jus tertii*. If he had, there can be no doubt that the property of the goods in respect of which the action is brought, must be regarded as having vested in the assignees of Cox from the time of his bankruptcy. This is not like the ordinary case of goods left in a ready-furnished house, by which no false colour is held out to the world by reason of the apparent ownership of the bankrupt. Here, it appears that the goods were originally the property of Cox, and that they were assigned to the plaintiff by a bill of sale, no alteration being made in their place of deposit; so that the bankrupt still continued to have them in his order and disposition. The case therefore falls within the principle of *Lingard* v. *Messiter*, *Watson* v. *Peache*, and that class of cases; and I have no hesitation in saying, that if the sheriff can avail himself of the title of the assignees, the right to the goods is in them. The action is trover, to which the defendants have pleaded not guilty, and that the plaintiff was not possessed of the goods as his own property; and the question is, whether, under the latter plea, the title of third persons may be set up. It seems to me, that from the very form of that plea, the plaintiff is called upon to prove the goods to be his property, and that the defendants are let into any evidence which will show that such goods are not the plaintiff's. The count in trover contains two allegations, both of which under the old rules of pleading were put in issue by the plea of not guilty; namely, that the goods were the property of the plaintiff, and that they had been converted by the defendants. Many cases occurred previously to the new rules, in which a defendant was permitted to set up the *jus tertii*. For instance, in *Blainfield* v. *March*, 1 Salk.

*982] 285, where the plaintiff *brought trover as administrator, and declared on the possession of the intestate; and upon not guilty pleaded, the counsel for the defendant at the trial, offered to give in evidence that the pretended intestate made a will and appointed an executor, but Holt, C. J., overruled it, and took this diversity, that where an administrator brings trover upon his own possession, the defendant may give in evidence a will, and an executor upon not guilty, otherwise if it be in the possession of the intestate, (as in the principal case,) for there the defendant ought to plead it in abatement; and if he does not, he shall not give it in evidence. So in *Dawes* v. *Peck*, 8 T. R. 330, in an action on the case by the consignor of goods against a common carrier for not safely carrying according to his undertaking, the carrier was permitted to show that the property in the goods was not in the consignor but in the consignee. These authorities are sufficient to show, that formerly in trover it was competent to a defendant, under not guilty, to set up the right of a third person as an answer to the action. I do not see why the same course should not be allowed under the plea of not possessed. *Carne* v. *Brice*, 7 M. & W. 183, 8 Dowl. P. C. 884, at first sight appears to be in favour of the plaintiff; but the proper answer seems to have been given to it, namely, that it was an issue directed by the court to try the particular fact, and, therefore, peculiarly under the guidance and control of the court, who might well refuse to allow the *jus tertii* to be set up in surprise of the plaintiff. That, however, is not the case here; neither was there any surprise;

for the fiat and the proceedings thereon had been admitted between the parties, and the plaintiff himself called a witness to prove that the sheriff was indemnified by the assignees. It is clear that the real battle was between the plaintiff and the assignees; though the plaintiff may have thought that *the main contest would be with respect to the validity of the
bill of sale, and so have overlooked this line of defence. But [*983
whether that be so or not, as the objection was taken before the verdict was given, the defendants had a right to insist upon it; and as I am of opinion that if the point had been left to the jury they must have found that the goods were in the control and disposition of the bankrupt, the verdict ought to be entered for the defendants.

COLTMAN, J. I also am of opinion that upon the facts of this case the verdict on the issue alien on the plea of not possessed ought to be entered for the defendants. In the first place, has the plaintiff any property in the goods? The alleged conversion takes place when the goods are seized by the sheriff; and it is said that the sheriff was, at that time, as against the plaintiff, a wrong-doer, inasmuch as the assignees had not then come forward to assert their title. But they do assert it afterwards; and the effect is, to vest the property of the goods in them from the time of the bankruptcy. Upon this state of facts the sheriff is clearly not a trespasser as against the plaintiff; for he has seized, not *his* goods, but the goods of the assignees. That being so, the issue is found for the defendants, provided they are not estopped from setting up the title of the assignees. The rule whereby a party is precluded from availing himself of the *jus tertii* is not so extensive as has been contended. I have always understood it to apply only to cases where a person has placed himself in a position which prevents him from setting up a title in a third party.

ERKSINE, J. At the trial two points were insisted on by the defendants under the plea of not possessed; first, that the plaintiff never had any property in the *goods, inasmuch as the bill of sale under which he
claimed was fraudulent, the goods being bought with the bankrupt's [*984
money. That question was left to the jury, who found that the transaction was *bona fide*, and that the goods were the property of the plaintiff at the time of Cox's bankruptcy. The second ground of defence was, that admitting that the goods passed to the plaintiff under the bill of sale, yet inasmuch as they were in the order and disposition of Cox at the time of his bankruptcy, with the consent of the plaintiff, the true owner, they vested in the assignees. It occurred to me at the trial, that if the assignees had been the defendants, they might clearly have set up as a defence to the action that the goods were theirs, and might have urged that defence successfully; for the goods having been Cox's originally, and the bill of sale having been kept secret from the world, it was one of those cases for which the legislature meant to provide. But it also occurred to me, that inasmuch as the assignees were not the defendants, and as the sheriff did not set up any authority from them, the defence that the goods belonged to the assignees was not open to him. I am now satisfied that I was wrong, and that the verdict ought to be entered for the defendants. The plea of "not possessed" puts in issue, not the right of the sheriff to seize the goods, but the plaintiff's property in them. The plaintiff, therefore, was bound to prove, not only that the goods became his in 1837, the date of the bill of sale, but that they continued his property down to the time of their being seized by the sheriff. It appeared to me, as the goods were in the plaintiff's possession, and the assignees had then asserted no right to them,

the sheriff, by selling them, was guilty of a complete conversion. But I now agree with the rest of the court, that the goods were at that time the property of the assignees; and as they afterwards asserted their right to them, *985] and called upon *the sheriff to pay over the proceeds of the sale, the defendants were at liberty to set up the title of the assignees as an answer to this action.

MAULE, J. The right of the assignees to the goods in question depends upon whether those goods were in the order and disposition of Cox at the time of his bankruptcy, with the consent of the true owner, within the meaning of the 6 G. 4, c. 16, s. 72. The cases show that when assignees assert their title, as has been done here, the goods vest in them from the time of the bankruptcy. The observation of PARKE, J., in *Isaac* v. *Belcher*, 5 M. & W. 139, 7 Dowl. P. C. 516, "that the plea that the plaintiff was not possessed, in this form of action puts in issue the right of the plaintiff to the possession of the goods *as against the defendant*, at the time of the conversion," is to be understood, not as narrowing but as enlarging the defence under that plea. There, under "not possessed," the defendants as assignees claimed, not an actual property in the goods, but a right to take them as being in the order and disposition of the bankrupt at the time of his bankruptcy; and on its being contended that this could not be given in evidence under that plea, PARKE, B., in effect states, that the defendants might say, though the plaintiff has the property in the goods, he has none as against us. The question here is, whether the sheriff may set up the title of the assignees; and when the nature of the issue is looked at, the evidence is clearly admissible. This is not an action of trespass, for damage done to some chattel which the plaintiff asserts to be his. In trover the plaintiff seeks to recover for the wrongful conversion of property which he admits to have come lawfully into the possession of the defendants. The *686] allegation in the declaration is, that the *plaintiff was lawfully possessed of the goods as of his own property. The effect of denying that averment is, to raise a question whether the plaintiff has such a title as will enable him to maintain an action of trover in respect of it. The defendant may show, either that the plaintiff has no right against any body, or that he the defendant has some right which prevents the plaintiff from maintaining the action against him. Here, the defendants say that the plaintiff has no right to the goods at all. The evidence given by them was offered, not to show the right of third persons, but to prove that the goods were not the property of the plaintiff. It is clear that the evidence was admissible; and I cannot understand how the defendants could be prevented from giving it unless by reason of some estoppel. An estoppel, however, can only arise out of some mutuality between the parties; but here the defendants are mere strangers. If such evidence were not admissible, the allegation that the plaintiff was possessed as of his own property, would become an idle averment, and the effect would be to destroy the distinction existing between trespass and trover.

Rule absolute to enter a verdict for the defendants on the issues raised by the pleas of not possessed to the second count and new assignment thereon.

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*987] *DOE dem. HENRY v. GUSTARD.

It is no ground for staying proceedings in ejectment for a forfeiture, that the lessor of the plaintiff had previously brought an ejectment for the same premises in a different court, in respect of a former forfeiture, in which action a rule for entering a nonsuit is still pending.

EJECTMENT brought upon a clause of re-entry in an indenture of lease for a forfeiture by reason of non payment of rent.

On the 9th of April last the lessor of the plaintiff brought a similar action in the court of Queen's Bench, in which he obtained a verdict. An objection was taken at the trial of that cause that the demand of the rent was on a later day than that on which it ought to have been made, and a rule nisi was granted in Trinity term for entering a nonsuit upon that ground, which rule was still pending. The present action had been commenced subsequently for a fresh forfeiture in respect of the nonpayment of rent for two other quarters.

Dowling, Serjt., now moved for a rule to show cause why the present action should not be stayed until the determination of the other action in the court of Queen's Bench. [COLTMAN, J. It does not follow that the action in the Queen's Bench will decide this.] The lessor of the plaintiff should either abandon the action in the Queen's Bench or that in this court. [TINDAL, C. J. The rule only applies where the second action is for the *same* forfeiture. Here, the lessor of the plaintiff is proceeding for a fresh cause of action.] It is said in Archb. Pr. by Chitty, 991, 7th ed., that "the courts have stayed the proceedings in a second ejectment until the special verdict in the former one should be determined;" for which position *Smith d. Dormer* v. *Parkhurst*(a) is cited. Supposing the defendant to succeed in the action in the Queen's Bench, he will be entitled to costs; but he will be prevented, by the bringing of the second action, from getting them.

*TINDAL, C. J. You do not say that the lease is void, and yet you do not pay the rent at the time when it ought to be paid according to the reservation. How can we prevent the lessor of the plaintiff from bringing another action? *Smith d. Dormer* v. *Parkhurst*, as reported by Strange, does not support the position for which it is cited in Archbold's Practice. It is said to be more fully given in Andrews; and if you find that the latter report bears out your motion, you can renew it to-morrow; but as at present advised I think it ought not to be granted, as this, on your own showing, is a fresh action. [*988

The rest of the court concurred. Rule refused.(b)

(a) 2 Str. 1105. But no such point appears either in the short note in Strange, or in the full report in Andrews, 315.

(b) The application was not renewed.

PERKINS v. VAUGHAN.

In trespass by A. against B. for false imprisonment, B. justified on the ground that A. being possessed of a bill of exchange drawn by C. upon D., forged the acceptance of D. Issue being joined upon a replication *de injuria*, a witness called by A. proved that A. and B. went with him to D. on the day following that on which the bill had been dishonoured, when B. reminded D. that D. had on the presentment of the bill for payment stated that A. had forged D.'s acceptance. and that D. neither admitted nor denied that he had made such a statement. A witness called by B. sated that D., when he dishonoured the bill, did say that the acceptance was forged by A. *Held*, that this statement was admissible in evidence in mitigation of damages.

Semble, that this statement would have been evidence for B., even if evidence of the subsequent conversation had not been given by A.

TRESPASS for assaulting the plaintiff and compelling him to go to a police station-house, and thence to a police court, and imprisoning plaintiff twelve hours.

Pleas: first, not guilty; secondly, leave and license; thirdly, that before the committing of the trespasses, to wit, on the 14th of September, 1841,

*989] the plaintiff *having in his possession a bill of exchange, the tenor whereof was and is as follows:—"15*l*. Eton, September 14th, 1841. Two months after date pay to my order 15*l*. for value received. Robert Perkins. To Mr. John Dreweatt, 25 Bucklesbury, London;" he the plaintiff did feloniously forge on the said bill a certain false and counterfeit acceptance of the said bill, by writing on and across the said bill; which false, forged, and counterfeit acceptance of the said bill was and is as follows:—"Accepted, John Dreweatt;" with intent to defraud the defendant, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her Crown, and dignity; wherefore the defendant well knowing the plaintiff to be guilty of the said felony, did, at the said time when, &c., give the plaintiff in charge to one Lawrence Anderson, then being a police and peace officer of our Lady the Queen, duly authorised in that behalf, and then requested the said L. A., so being such police and peace officer, to take the plaintiff into his custody, and safely keep him, and carry, and convey him before some police magistrate and justice of the peace of our said Lady the Queen duly authorised in that behalf, to answer the premises and to be dealt with according to law; wherefore the said L. A., so being such police and peace officer, did, at the request of the defendant, take the plaintiff into his custody, and forced and compelled him to go in and along the said public streets to the nearest police station-house, being the said police station-house in the declaration first above mentioned, in order there to enter the said complaint and charge against the plaintiff concerning the premises, and there safely to keep and imprison the plaintiff until the plaintiff could be conveniently conveyed and carried before some police magistrate or justice of the peace of our Lady
*990] the Queen duly authorised in that behalf, to answer the *premises; and because there was not then at the last mentioned police station-house a proper police officer in that behalf ready and willing to take the charge against the plaintiff, and because the plaintiff could not be then and there conveniently kept and imprisoned as aforesaid, the said L. A., then being such police and peace officer as aforesaid, at the request of the defendant then forced and compelled the plaintiff to go from and out of the last mentioned police station-house into the public street, and forced him to go in and along divers other streets to a certain other police station-house, being the police station-house in the declaration secondly above mentioned, in order there to enter the said complaint and charge against the plaintiff concerning the premises, and there safely to keep and imprison the plaintiff until the plaintiff could be conveniently conveyed and carried before some police magistrate or justice of the peace of our said Lady the Queen duly authorised in that behalf, to answer the premises; and the said L. A., then being such police and peace officer as aforesaid, at the request of the defendant afterwards and as soon as conveniently could be, conveyed and carried the plaintiff in and along divers other streets to a certain police court, before J. R., Esq., then being a police magistrate and justice of the peace then acting and duly authorised to act in that behalf, for examination concerning the premises, and to be dealt with according to law; which are the same, &c.: verification.

A fourth plea differed from the third in stating that the plaintiff uttered the bill, knowing the acceptance to be forged, instead of alleging that it was forged by the plaintiff.

The plaintiff added the similiter to the first plea, and took issue upon the

other pleas, by traversing the leave and license in the second, and by replying *de injuriâ* to *the third and fourth. To these three traverses [*891 the similiter was added on the part of the defendant.

At the trial, before MAULE, J., at the sittings at Westminster, in Easter term last, the imprisonment was proved. A witness called by the plaintiff stated, upon his examination in chief, that the plaintiff and the defendant went with the witness to Dreweatt on the day following the dishonour of the bill; that the defendant, in the presence of the plaintiff, reminded Dreweatt that on the preceding day Dreweatt had charged the plaintiff with having forged the acceptance; and that Dreweatt neither admitted nor denied that he had made such a charge.

One Vaughan, a cousin of the defendant, who proved the dishonour of the bill, was asked what Dreweatt said at the time he refused to pay the bill. This question being objected to, the learned judge overruled the objection, and Vaughan answered that Dreweatt then stated that the plaintiff had forged the acceptance.

A verdict having been found for the defendant upon the third issue,

Talfourd, Serjt., in the same term, moved for a new trial, on the ground that the question had been improperly allowed to be put. The only measure of damage in this case is, the amount of suffering and injury actually sustained, whatever the impression on the mind of the defendant may have been.

Channell, Serjt., in Trinity term showed cause. The evidence was tendered and received, not to prove a forgery actually committed, but to lessen the damages. The statement of Dreweatt was a declaration accompanying an act done. It could not be a *defence* to this action that the defendant had reasonable ground to suspect that the plaintiff had forged Dreweatt's acceptance. *It was merely evidence in mitigation of damages. [*992 If when a bill is presented for payment to bankers they say that there are no effects, that is a declaration which may be given in evidence, as it accompanies the act of refusal. The statement made by Dreweatt was calculated to make a considerable difference in the amount of damages, and it would clearly have been admissible in evidence. [CRESSWELL, J. That would be on a totally distinct ground from being a declaration accompanying an act.] The damages would be assessed upon the issue of not guilty; and that is so, whether the general issue is pleaded alone or with special pleas. Any facts which go to show that the damages are less than the plaintiff seeks to recover are admissible upon the general issue. It cannot be said that the statement given in evidence was irrelevant to the matters into which the jury had to inquire.

Talfourd, Serjt., in support of the rule. The plaintiff complains of the damage which he has sustained by the imprisonment, and not of the motives of the defendant. The defence which it was sought to set up by the alleged conversation was pleadable. Reasonable ground of suspicion might have been pleaded after an allegation, that a felony had been committed by some one. [COLTMAN, J. That allegation could not have been made in this case. MAULE, J. There was no ground for supposing that any other person had committed the felony. That shows that the defence could not have been pleaded. Part of my brother *Channell's* argument is therefore left unanswered.] The plaintiff had no means of cross-examining the witness upon this statement, nor could he anticipate that any such statement would be attempted to be proved. [MAULE, J. Your objection would exclude a statement made by the defendant himself

*993] at that time. [TINDAL, C. J. Facts *cannot be given in evidence which might have been pleaded.] It was formerly supposed that circumstances of suspicion might be given in evidence. [MAULE, J. Pleas of justification are not drawn so as to enable the party to be put upon his trial as upon an indictment. A felony is not laid to have been committed against the peace.] That is no doubt, generally so; but here it is so drawn. The plaintiff contends that the evidence is not relevant, and that supposing it to be so, it is *res inter alios acta*.

TINDAL, C. J., now delivered the judgment of the court.

This was an action of trespass and false imprisonment, in which the defendant pleaded—first, not guilty; secondly, leave and license; thirdly, that the plaintiff had forged an acceptance of a bill of exchange, and that the defendant had caused the plaintiff to be arrested upon that charge. The jury having found a verdict for the defendant on the third issue, the plaintiff obtained a rule to show cause why there should not be a new trial, on the ground of the admission of improper evidence.

The evidence objected to was this. One Vaughan was called by the defendant to prove the dishonour of the bill when presented for payment to Dreweatt, on whom the bill was drawn, and who *appeared* on the face of the bill to have accepted it; and this witness stated that he accompanied the defendant to Dreweatt's, and that Dreweatt refused to pay the bill; whereupon the witness was asked what Dreweatt said at the time of the refusal. It was objected by the plaintiff's counsel that such question could not be put to the witness; but the objection being overruled, the witness answered that Dreweatt said, in effect, that the acceptance in his name was a forgery by the plaintiff. The only point that has been argued before us is, whether the question was a proper question, and one which ought to
*994] have been *allowed to be put to the witness. And we are of opinion that, upon the course which the evidence took on the trial of this case, the question was very properly allowed, and that the answer was admissible evidence in the cause. Even if the inquiry before us had depended on the determination of the point whether evidence by the defendant of the dishonour of the bill and of the circumstances attending such dishonour, was relevant to the question then before the jury of the acceptance by the plaintiff, it would have been difficult altogether to exclude such evidence on the score of its irrelevancy; but upon the trial the plaintiff had made it part of his own evidence; and his first witness had proved on his examination in chief, that the plaintiff and the defendant went with him to Dreweatt's on the day following that of the dishonour of the bill, and that the defendant, in the presence of the plaintiff, reminded Dreweatt of the charge of forgery which he had made against the plaintiff the day before, and had asked him to repeat his conversation; and the plaintiff's witness proceeded to state Dreweatt's answer, which neither admitted nor expressly denied that such conversation had taken place. In this state of the evidence it was certainly competent to the defendant to prove by his own witness, who was present at such conversation, what had really taken place between Dreweatt and the defendant, and that the conversation was such as the defendant had stated in the presence of the plaintiff. The plaintiff's object was, to lead the jury to believe that the defendant had referred to a *fictitious* conversation. It was perfectly competent, therefore, to the defendant to show, on his part, that such conversation was real and not fictitious, and to follow up the plaintiff's account with his own.

13s. 4d. from the manor of Allfarthing. The proof *of this is not carried further back, it is true, than 1798, when the documents [*1018 were destroyed by fire, but receipts for that sum are brought down from that time to 1837. On the other hand, the earliest receipt which the plaintiff is enabled to produce is in 1814. No receipt on the part of the Crown is shown either of the 26l. 13s. 4d. or of the 40l. Under these circumstances, every fair presumption will be made in favour of the rent which has been paid to the Earls of Sandwich for so long a period.

The term of thirty-one years, granted to Endimion Porter in 1626, would merge in the term of ninety-nine years granted to him in reversion by the deed of assignment of March, 1628. [*Manning*, Serjt., admitted that would be so.(a) COLTMAN, J. May there not be some doubt as to that? Can one term be merged in another?] Perhaps it would be more proper to describe it as a re-union of the two estates than as a destruction of the former estate. There may be a question, perhaps, whether under that assignment of 1628, the rent of 26l. 13s. 8d. was to run on to 1646 (when the second term demised by Queen Elizabeth would expire) or to 1677 (when the first lease to E. Porter would terminate,) for that rent is reserved "during all the term" in the said letters patent of Queen Elizabeth and the demise of Charles I., "or either of them;" but whether the rent of 40l. was to commence from 1646 or from 1677 is not very material. For the grant by Charles I. of July, 1628, to T. Porter in fee, recites the previous grant to E. Porter, and the *terms thereof, and releases the rents which E. Porter had to pay, reserving a rent of 40l. in fee after the [*1019 expiration of the ninety-nine years in 1722. Then comes the grant by Charles II. of the rent of 26l. 13s. 4d. to the Earl of Sandwich, in tail, which could not commence till 1722. It is clear that the Crown intended to deal with some rent payable from T. Porter under the grant of July, 1628, for that grant is referred to in the letters patent; and that fact materially distinguishes the present case from *Alcock* v. *Cooke*. That was a grant in possession of property which was already in the possession of another by a previous grant, and it was held that this second grant was void, as it was inconsistent with the King's honour, that he should grant the right of possession in the same thing to two persons at the same time. The second grant in that case did not notice the previous lease, which, having been enrolled, must have been in the knowledge of the second grantee; and therefore it was held that the King was deceived by him, and that the grant was void. No such objection exists in this case, and the court will make every necessary presumption to give effect to the King's grant.

Manning, Serjt., in reply. The claim set up on the other side, is, for the rent of 26l. 13s. 4d. as parcel of the rent of 40l. But in that case what becomes of the residue 13l. 6s. 8d., being one-third of the rent of 40l.? The Crown has never received it. The court will not presume that a portion of the 40l. rent was granted, so as to render the tenant liable to two distresses instead of one. Charles II. granted an *entire* rent, *totum illum redditum*.

Cur. adv. vult.

(a) These were not two successive terms. The term of thirty-one years created in 1626, was a sublease made by persons holding for a term of ninety-nine years, and carved out of their estate. The sublessee might therefore surrender to his lessors, or his lessors might release to him their reversion; in either case, the sublease would merge in the larger estate out of which it had been taken. If the conveyance of the 29th of March, 1628 operated as an assignment, the payments therein reserved as rent would be sums in gross Vide 5 M. & R. 157.

TINDAL, C. J., now delivered the judgment of the court.

*1020] The question before us arises upon a special case *stated by consent of the parties under the order of my brother ERKSINE, and made after the proceedings on the record had gone on to the joining of issue on the pleas in bar in an action of replevin. The distress had been made for two years' arrears of an annual fee-farm rent of 26*l.* 13*s.* 4*d.*, alleged to be issuing out of the manor of Allfarthing, in the parish of Wandsworth and county of Surrey, and to have been due at Old Michaelmas, 1839.

The defendants in their first avowry and cognizance, claim it to be a fee-farm rent of 26*l.* 13*s.* 4*d.*, whereof the Earl of Sandwich was seized in fee. In the second avowry and cognizance they allege that King Charles I. was seised in fee of the manor of Allfarthing, subject to a term of ninety-nine years granted by King James I. to Sir Henry Hobart, Sir James Fullerton, Sir John Walter and Sir Thomas Trevor, (which term had ended long before the said time when, &c.,) and that King Charles I. granted to Thomas Porter, Esq., and his heirs, the reversion of the said manor, expectant on the determination of the said term of ninety-nine years, to hold by the service of half a knight's fee, and without rent, during the remainder of the term of ninety-nine years, and after that term rendering yearly to the King, his heirs and successors 40*l.*, out of the said manor of Allfarthing, at Michaelmas, and the feast of the annunciation, by equal portions, with a clause of distress; and they further allege, that afterwards, and before the expiration of the said term of ninety-nine years, King Charles II., by letters patent, dated the 4th February, in the fifteenth year of his reign, granted to Edward, Earl of Sandwich, and the heirs male of his body, the annual rent of 26*l.* 13*s.* 4*d.* of the said annual rent of 40*l.*, so by the said letters patent of Charles I, reserved as aforesaid, to the said King Charles I., his heirs and successors; to hold the said rent of 26*l.* 13*s.* 4*d.* to the
*1021] said Edward, Earl of Sandwich, and the heirs *male of his body, together with the said power of distress; and they then deduce the title of the present Earl, the defendant, to such rent, as heir male of the body of the said original grantee.

Various pleas in bar were pleaded, to which it is unnecessary particularly to refer, as the broad question stated in the case, and which formed the principal ground of argument before us, was whether the Earl of Sandwich had established his right, either to a fee-farm of 26*l.* 13*s.* 4*d.* in fee, or to a rent of 26*l.* 13*s.* 4*d.*, *parcel* of the annual Crown rent of 40*l.* in tail mail, under the grant of Charles II., set out in the second avowry.

It may be advisable, before we consider the objections raised against the grant of King Charles II., to ascertain how long and under which circumstances the annual rent of 26*l.* 13*s.* 4*d.*, has been actually paid by the tenant for the time being of the manor, and actually taken and enjoyed by the present Earl and his ancestors. And it appears from the statement in the case that at least from the year 1798, down the time of the accruing of the arrears for which the distress was put in, that is, down to Old Michaelmas day 1837, in annual rent of 26*l.* 13*s.* 4*d.*, issuing out of the manor of Allfarthing, has been paid by the tenants of the manor and received by the Earls of Sandwich, by half-yearly payments at Lady-day and Michaelmas, in every year. This was proved by the earliest rental and stewart's book in existence, viz., the book of the year 1798; and, as all the rentals and stewards' books of an earlier date are stated to have been destroyed by an accidental fire some years since at the mansion house of the Earl, we think the fair and necessary inference which a jury ought to have drawn, and

would have drawn from those premises is, that the payment of the rent did not commence originally in 1798, but must have been a payment continued by the tenants of the manor to the Earls of *Sandwich, from some earlier period; there being nothing whatever to show any legal ground of its commencement in 1798, rather than any other year: and, as there is no period to which upon the facts stated in this case, a jury could reasonably assign the date of its commencement other than the year at which it would become payable to the Sandwich family, under the grant of Charles II., the inference is that it has been paid from that time, that is, at all events, if such grant is valid, and free from the objections which had been urged against it in argument; a point which we shall presently take into consideration. [*1022

It further appears, from the special case, that the owners of the manor of Allfarthing, at all times had notice of the existence of an annual rent reserved out of the same manor to the Crown; that is, first, of the rent of 26*l.* 13*s.* 4*d.* payable for a term of years, and afterwards of the rent of 40*l.* reserved and payable in fee. The earlier leases set out in the special case do not, indeed, state what rents were reserved; but we have, since the hearing of the argument, with the consent of the learned counsel, received a certificate from the officers of the Rolls chapel, from which it appears that the rent reserved in the lease granted by Queen Elizabeth, in the twelfth year of her reign, to Elizabeth Snowe, and also in the reversionary lease granted by the same Queen, in the thirty-sixth year of her reign, to John Bowyer, was the annual rent of 26*l.* 13*s.* 4*d.*; and we have ourselves inspected the original indenture of the 8th of March, 1 Car. I., which was brought to us by the officers of the Duchy of Cornwall, from which it appears that Sir John Walter and the other lessees of the Crown, under the lease which had been granted to them in the fifteenth year of King James I. for ninety-nine years, as trustees for the then Prince of Wales, afterwards Charles I., demised to Endimion Porter for the term of thirty-one years, to commence in 1646, *"under the *antient* yearly rent or sum of 26*l.* 13*s.* 4*d.*" We have have also inspected the original indenture of the 29th of March, in the fourth year of Charles I., by which the same trustees, by the direction of Charles I., assign to Endimion Porter the whole of their interest in the term of ninety-nine years, at and under the yearly rent of 26*l.* 13*s.* 4*d.*, until the expiration of the then existing leases, that is, until the year 1677, and from that year until the determination of the said term of ninety-nine years, at and under the yearly rent of 40*l.* We think, therefore, there is express notice to Endimion Porter, and all claiming under him, during the continuance of those terms, of the existence of the reservation of those rents. And, when King Charles I., by his letters patent of the 2d of July, in the fourth year of his reign, confirms those leases so granted to Endimion Porter, and in consideration of the 300*l.* by him paid, grants the reversion of the manor, after the determination of the said term of ninety-nine years, to Thomas Porter in fee, subject to the annual rent of 40*l.*, payable to the Crown for ever; there is again express notice to Thomas Porter, and all claiming the manor under him, of the perpetual charge of a rent of 40*l.*; indeed when John Porter, by indentures of lease and release of the 28th and 29th of January, 1723, (the year next after the expiration of the term of ninety-nine years,) conveys the same manor of Allfarthing to the Sutton family, the covenant against incumbrances contain an express exception "of a fee-farm rent of 40*l.* payable to the Crown, in respect of the said manor." [*1023

Under these circumstances, it is unnecessary to say that every intendment ought to be made to support the grant of a rent, which has been accompanied, on the one hand, with actual perception and enjoyment for so many years, and, on the other, with full notice to those who have become
*1024] owners of the manor for the time being, *that a rent of 26*l.* 13*s.* 4*d.* was payable out of the manor to the Crown, or the Crown's grantee down to the year 1677; and that, from that period, the larger rent of 40*l.* was payable thereout to the Crown for ever.

Still the question arises, and must be determined, whether the grant to the Earl of Sandwich is valid in point of law. It is objected, on the part of the plaintiff, that there is in that grant such mistake and misdescription, as to the subject matter thereof, and as to the Crown's interest therein, that, upon the general rule of law applicable to the construction of the King's grants, it must be taken that King Charles II. was deceived in his grant; and consequently that the same is void.

This question involves an inquiry into two points:—first, whether there is any and what mistake or misdescription in the grant; secondly, if mistake or misdescription exists, whether it is of such nature, character and quality, as will have the effect of avoiding the grant of the King.

The first inquiry can only be determined by investigating, from the documents referred to in the case, the exact state of the rent granted by the letters patent of Charles II., at the precise period of time when such grant was made, and by comparing such state of the rent with the terms of the grant itself.

Now, by referring to the documents which we have already mentioned, it will appear that the reservation of annual rents to the Crown out of the manor of Allfarthing stood thus:—an annual rent of 26*l.* 13*s.* 4*d.* had been reserved by the Crown, under the demise granted by Queen Elizabeth in the year 1570, and the same annual rent had been continued under successive demises, either immediately or mediately, from the Crown, from that year down to the year 1677. From the year 1677, the annual rent of 40*l.*
*1025] had been reserved by the indenture *of assignment made by the trustees of the Crown to Endimion Porter, which latter rent continued to exist down to the year 1722; and from the latter year the annual rent of 40*l.* had been reserved to the Crown, in fee, under the letters patent of the 2d July, 4 Car. I.

But it will be proper to consider the operation and effect of those letters patent upon the rents reserved under the indentures of demise of the 8th of March, 1625, and the 29th of March, 1628: for, in the course of the argument, it seems to have been considered that such rents were, by those letters patent, released by the Crown.

By those letters patent, reciting the indenture under the great seal of the 15th of June in the 22 Jac. I., whereby the king demised to Sir Henry Hobart, Sir John Walter and others, the manor of Allfarthing (amongst other premises,) to hold for the term of ninety-nine years from Michaelmas then last past (which demise, by reference thereto, appears to have been made to them as trustees for the then Prince of Wales;) and also reciting the indenture of the 29th of March then last past, made to the said Endimion Porter by Sir Thomas Walter and the other surviving trustees therein named, King Charles I. ratifies and confirms the said last-mentioned indenture, and all the matters therein contained, approving and accepting of the same and the premises therein mentioned, *under the rents*, covenants, conditions and agreements, and during the term in and by the said indenture

specified: and the King then (according to the proper construction of the original letters patent, *which accompany and form part of the case*) releases the said Endimion Porter from all the rents reserved and made payable, "in and by the said indenture by the late King James I. made payable, and all arrears thereof;" and the King then, for the considerations therein mentioned, proceeds to grant the reversion *of the manor to Thomas Porter, in fee, under the reservation of the annual rent of [*1026 40*l.*, for ever. Under these letters patent, therefore, the rents reserved and mentioned in the indenture of the 29th of March then last past, continue in full force, and nothing is released to Endimion Porter but the rents, whatever they may be, which are reserved by the said indenture of lease of King James, a clause of release which could only have been introduced, *ex abundanti cauteld* in favour of the grantees of the Crown, as, in fact, upon reference to that indenture, no rents were reserved or made payable by the trustees to the Crown. Looking, therefore, at the general effect of all these grants, it appears that at the precise time of the execution of the grant by King Charles II. to the Earl of Sandwich, in 1664, the annual rent of 26*l.* 13*s.* 4*d.*, which commenced at least as early as the year 1570, was still in existence and payable out of the manor, and would continue in existence and payable, until the year 1677; and that the annual rent of 40*l.* payable out of the manor, in fee, would become payable to the Crown in the year 1677, but not before.

Now, the description of the rent in the letters patent of the 3d of February, 15 Car. II, is this—"All that yearly rent of 26*l.* 13*s.* 4*d.* by certain letters patent of Our said father, under the great seal of England, bearing date the 2d of July, in the fourth year of his reign (to Thomas Porter of London, Esq., made,) to Our said father, his heirs and successors, issuing or reserved, or mentioned to be reserved, out of or for all that manor or lordship of Allfarthing."(*a*) And, beyond all doubt, *upon comparing the terms of the grant with the state of the rent actually in [*1027 existence and vested in the Crown at the time, there is between the two some variance and misdescription. Up to a certain point both well agree together. There was upon the 3d of February, 1664, a rent of 26*l.* 13*s.* 4*d.* vested in the Crown, and issuing and reserved out of the manor or lordship of Allfarthing; and this rent, although not originally reserved by the letters patent of the 2d of July, 4 Car. I, is yet a rent "reserved or mentioned *to be*(*b*) reserved" to the Crown in such letters patent; the indenture of 1628 being confirmed thereby, and such rent being made payable at the exchequer for the use of the Crown. So far, therefore, the description in the grant may be held, as it appears to us, to agree with the real state of the King's title. But, the difference between the two is this, that whereas such rent is described in the letters patent of Charles II. to have been reserved to King Charles I., *his heirs and successors*,(*c*) in truth it was reserved for a term only, by those letters patent, namely, for a term which expired in 1677, after which it became an annual rent of 40*l.*, con-

(*a*) Ac tot. ill. annual. reddit. viginti et sex librar. tresdecim solidor. & quatuor denarior. legal. monet. Angl. p. quasd. lras paten. dci patr. nri sub magno sigil. suo Angl. geren. dat. secundo die Julij anno regni sui quart. Thome Porter de London. Ar. confect. p'fat. patr. nro hered. & successoribz suis exeun. sive reservat. vel mentionat. fore reservat. de aut p. tot. ill. domin. sive maner. de Allfarthing."

(*b*) These English words are ambiguous; but the construction put upon them would appear to require "*fuisse*" instead of "*fore*" in the original. Vide antè, 1025, 1026. (c)

(c) This description appears to be correct. A party seised in fee who demises for a term rendering rent, has a descendible interest in such rent.

tinuing down to the year 1722, and from that time an annual rent,(a) of the same amount, for ever.

Such, therefore, being the exact state of the misdescription in the grant, the question arises whether it is of such nature, quality and character, as that, according to the decided cases, it must have the effect of avoiding the King's grant. If the rent issuing out of the manor of Allfarthing, which was vested in Charles II. at the time of making his grant, had been a rent *1028] of 26*l.* 13*s.* 4*d.* for the then residue of a term of years only, *and nothing more had been vested in the Crown, no doubt the grant would have been void. In that case, the King, by professing to grant an estate in fee-tail, in a rent which he held for a term of years only, would have professed to grant a larger estate than he had himself, and must be held to have been deceived in making such grant. Such was the case of *Alton Woods*, 1 Co. Rep. 40, and many other cases there referred to. But, in the case now before us, King Charles II. was not only possessed of the rent of 26*l.* 13*s.* 4*d.*, issuing out of the manor of Allfarthing for the residue of a term of years, but was also possessed of a rent of larger amount, namely, of the amount of 40*l.* *per annum*, issuing out of the same manor, commencing immediately on the expiration, or other sooner determination, of the former rent, and continuing for ever. And this larger rent the Crown might undoubtedly, by its prerogative, apportion and divide amongst different grantees, in such quantities and proportions as the Crown might think fit, without any attornment of the tenant of the land, or any other ceremony; Co. Litt. 148 a, 309 b. It is manifest, therefore, that King Charles II., at the time of his making the grant, was possessed of a rent issuing out of this manor, sufficient in quantity of estate, and more than sufficient in value, to satisfy the grant so then made to the Earl of Sandwich, in tail male.

And, upon consideration of the cases in which the King's grant has been held to be avoided by reason of any misdescription or mistake thereon, they will be found to fall under one of three classes: first, where the King has by his grant professed to give a *greater estate* than he had himself in the subject matter of the grant; as in the case of *Alton Woods* and the other cases above considered; secondly, where the King has already granted the *1029] *same estate*, or part of the same *estate, to another; in which case the second grant would work injustice, or, at all events, great inconvenience; such was the case of *Alcock* v. *Cooke*, 5 Bingh. 340, 2 M. & P. 625, cited by the plaintiff in argument, and *The Earl of Rutland's Case*, 8 Co. Rep. 57; or, thirdly, where the King has been deceived in the *consideration* expressed in his grant; as where the consideration has been untruly stated, or the subject of the grant has been recited to be of less value than it really is, or where, as in the case of *Mead* v. *Lenthall*, 2 Roll. Abr. 189, the King recites a former grant of an office for life, and a surrender; and then grants the same office to J. S., whereas, in truth, either the King had not granted the office for life, or the office had not been surrendered; here the grant would be void, because there was no such consideration as was recited.

The present case, however, stands manifestly clear from the grounds of objection which apply to the two latter classes; and we think it is equally distinguishable from the cases of the first description; for there appears to be nothing to prevent the intention of King Charles II., as expressed in his letters patent, from being carried into effect; for as those letters patent re-

(a) And fee-farm.

fer to the grant of the 4 Car. I., they make the terms of that grant part of the description of the subject matter of the letters patent of Charles II. It is manifest, therefore, by reference to the former grant, that the King had sufficient estate in a rent, both in respect of interest and value, out of which the intention of the Crown might be satisfied and carried into effect; as in fact it has been satisfied and carried into effect from the time of the grant down to the present time. And we think the present case is to be governed by the principle laid down in the case of *Rex et Regina* v. *Kempe*, 1 Lord Raym. 49, that where the King is not deceived in his consideration, nor otherwise to *his prejudice, by any suggestion on the part of the grantee, but the intent was to pass the interest expressed in the [*1030 grant, only the King has been mistaken *in the law*,(a) there he shall not be said to be deceived, to the avoidance of the grant. This doctrine is laid down by EYRE, J., in giving his judgment for the defendant, in the case above referred to; and HOLT, C. J., in giving his judgment also in favour of the defendant, expresses no dissent from the principle so laid down.

Upon the whole, therefore, we come to the conclusion that the manor of Allfarthing is still liable to the payment of the annual rent of 26*l.* 13*s.* 4*d.*, as claimed by the Earl of Sandwich in tail male; and we therefore direct, under the agreement stated in the special case, that a judgment of *nolle prosequi* be entered on the record.

Judgment for the defendants.(b)

(a) Here the King, being entitled to the benefit of a rent of 26*l.* 13*s.* 4*d.* issuing out of a term, and of a rent of 40*l.* issuing out of another term, and being seised of a rent of 40*l* expectant upon the determination of both terms, in fee, must be taken from the recitals to have been informed that he had one rent of 26*l.* 13*s.* 4*d.* The mistake in law would appear to consist in imagining that the rent of 40 pounds reserved by Charles I. was a rent of 40 marks, the amount reserved on former occasions where the grants were for a term only. The letters patent of Charles II. grant forty-eight different rents to the Earl of Sandwich, and in the great majority of cases the subject granted is "rent or fee-farm;" but in that part of the grant which relates to a rent issuing out of the manor of Allfarthing, the words are *totum illum redditum de* 26*l.* 13*s.* 4*d.*, not as in other cases, *totum illum redditum vel* feodi firmam, which seems to lead to the inference that the grant was of the rent of 26*l.* 13*s.* 4*d.*, and not of the fee-farm, or any part of the fee-farm, of 40*l.*

(b) It was advised that an application should be made for leave to turn the case into a special verdict, for the purpose of obtaining the opinion of a court of error as to whether a grant from the Crown was vitiated by a misdescription not falling within any of the three classes to which former cases of misdescription were reducible. See *The Earl of Kent's case* upon a petition of right, H. 21 E. 3, fo. 46, pl. 68. But the plaintiff, who had no personal interest, considered that, as a trustee, he would be justified in acquiescing in the judgment already pronounced.

*SCOTT v. CRAWFORD and Others. [*1031

Under an arrangement between A., a merchant at Manchester, and C., a merchant at Liverpool, A bought goods for C. in A.'s name, and consigned them for sale in A.'s name, to houses in India, the correspondents of B. At the time of the arrangement and of the shipment of the goods, C. was the factor of B. at Liverpool (which fact was known to A.,) and advised B. of the shipments, and as to the advances B. might make thereon to A. B. had from time to time accounted with A., and handed over to him the balance of the proceeds of each shipment, after deducting commission, &c. C. having become bankrupt, B. refused to pay over to A. the balance in his hands, claiming a lien thereon in respect of the debt due to him from C. on the ground that the goods were the property of C. and not of A., and alleging that the course of dealing between A. and C. was a fraud upon B. A. having brought an action for money had and received against B., the judge left it to the jury at the trial to say; first, whether, as between A. and B., the goods were the property of A.; and, secondly, whether the transaction between A. and C. amounted to a fraud on B., which was productive of injury to the latter. The jury having found a verdict for A. for the amount of the balance in the hands of B., the court refused to grant a rule nisi for a new trial.

ASSUMPSIT for money paid, money had and received, interest, and money found due upon an account stated.

Pleas: non assumpsit; and, secondly, payment; on which issue was taken by the replication.

At the trial, before TINDAL, C. J., and a special jury at the sittings in London after Hilary term last, the following facts appeared. The plaintiff is a merchant carrying on business at Manchester; and the defendants, Messrs. Crawford, Colvin and Co., are merchants in London, and are the agents or correspondents of the houses of Remington and Co. of Bombay, and Colvin, Ainslie, Cowie and Co. of Calcutta.

The plaintiff had been in the habit of buying, in his own name, goods on commission for a Mr. John Coupland, a merchant, residing at Liverpool. About the year 1830 it was arranged between the plaintiff and Coupland that the former should purchase, on Coupland's account, large quantities of goods, to be shipped to Bombay and Calcutta through the house of Craw-
*1032] ford, Colvin and *Co.; and, in pursuance of this arrangement, the plaintiff from time to time purchased goods under instructions received from Coupland, which were consigned in the plaintiff's name to Remington and Co. at Bombay, and Colvin, Ainslie and Co. at Calcutta, for sale on commission. The defendants made advances to the plaintiff on the goods so consigned upon the understanding that they were to be repaid such advances, and also their commission and charges for insurance, &c., out of the proceeds which were to be remitted to them from the houses in India; the balance to be transmitted to the plaintiff. Some shipments were also made of goods purchased by the plaintiff, and shipped on his own account, and others of goods bought by Coupland himself, and shipped in the name of the plaintiff; but in all the transactions the plaintiff appeared to be the shipper.

During the period covered by these transactions the defendants employed Coupland as *their factor or agent at Liverpool*, for which he received a commission. The invoices of the goods, consigned as above-mentioned, were made out in the plaintiff's name. When Coupland himself bought goods and shipped them in the plaintiff's name, he sent the invoices to the plaintiff, who copied them, and transmitted such copies to the houses in India; but Coupland gave instructions to the houses in India as to the sale and returns of the goods. Coupland also forwarded the bills of lading to the defendants, and advised them of the shipment, and *instructed them as to the amount they might advance on each consignment*. A separate account was kept of each shipment. The accounts sales and accounts currents from the houses in India were rendered direct to the plaintiff; they were made out in his name, and he was always treated and considered as the *bonâ fide* owner of the goods shipped. The proceeds of sale were remitted on the plaintiff's account to the defendants, who, after deducting the
*1033] *advances they had made, their commission, and the premiums of insurance and other charges, they handed over the balance to him, or, in case of a deficiency, which occasionally happened, the defendants claimed and received from the plaintiff the amount over advanced.

The invoices of goods consigned in the plaintiff's name were headed—"Invoice of twenty casks of, &c., shipped per Fatima to Calcutta, and consigned to Messrs. Colvin and Co. (or as the case might be) on account of David Scott, Esq."

The defendants, on receipt of the bill of lading and advice of shipment from Coupland, wrote to the plaintiff to the following effect:—

"Sir,—Under Mr. Coupland's instructions this morning received, we pay to your credit with the Manchester Branch Bank 500*l*., as our advance on your shipment of copper per Fatima; and we insure as follows, &c.

(Signed) "CRAWFORD, COLVIN and Co."

The account sales of the goods rendered to the plaintiff by the houses in India were headed as follows:—"Account sales of thirteen casks of copper nails, &c., ex Fatima, sold by Colvin and Co. on account of David Scott, Esq." The accounts current which accompanied the account sales were headed—"Dr.—David Scott, Esq., in account with Colvin, Ainslie and Co.,—Cr." The defendants, upon receipt of remittances from India, rendered accounts to the plaintiff of each shipment in the following form:—"Dr.—D. Scott, Esq., for —— casks, &c., per Fatima,—Cr."

The whole or the greater part of the advances made by the defendants to the plaintiff were paid over by him to Coupland. On the 1st of January, 1836, a Mr. Duncan entered into partnership with Coupland, and the plaintiff continued to deal with Coupland and Duncan in the same manner until they became bankrupts in November, 1836. At the time of Coupland and Duncan's *bankruptcy, Coupland owed the plaintiff about 5600*l*., and Coupland and Duncan were also indebted to him to nearly the same extent. Coupland was likewise indebted to the defendants in about 18,000*l*. [*1034

Besides the consignments made in the plaintiff's name, Coupland employed other parties to make purchases for him, and made other shipments in the names of other parties, amongst whom were a Mr. Mallalieu and a Mr. Wood.

On the 28th of December, 1836, the following notice was served upon the defendants by the assignees of Coupland and Duncan:—

"We, the undersigned, the assignees, &c., of John Coupland and Frederick Duncan, of Liverpool, merchants and factors, against whom a fiat in bankruptcy is now in prosecution, do hereby give you notice that David Scott of Manchester, merchant, Samuel Wood of Manchester, merchant, James Mallalieu of Manchester, manufacturer, and Robert Baird of Liverpool, merchant,—in whose names various shipments of goods were made through the said John Coupland alone, or the said J. Coupland and F. Duncan in partnership, to your correspondents, Messrs. Remington and Co. of Bombay, and Messrs. Colvin, Ainsle and Co. of Calcutta, and upon which shipments you came under advances to the respective shippers,—were not the true owners of the shipments made in their respective names, and that such shipments were in fact for the account, and upon the risk, of the said J. Coupland, individually, or of the said J. Coupland and F. Duncan, in copartnership, the said D. Scott, &c., having agreed to lend their names to the said J. Coupland and F. Duncan, to conceal the fact of their being engaged in shipments on their own account. And we do further give you notice, and require of you not to pay or deliver over to the said D. Scott, &c., or any of them, any goods, bills, or specie shipped or *remitted to you by the said Messrs. Remington and Co., and Messrs. Colvin, Ainslie and Co., or either of them, as or in part of return for any shipments made by the said nominal shippers through the said J. Coupland alone, or the said J. Coupland and F. Duncan in partnership; but to pay or deliver all such goods, specie and bills to us as assignees, &c.; we, the said assignees, claiming and insisting upon the returns of all the said shipments as part of the assets of the said bankrupts." [*1035

The defendants forwarded this notice to the plaintiff with the following letter, of the 28th of December, 1836:—

"Sir,—We annex copy of a notice which we have this day received from the assignees of Messrs. Coupland and Duncan, which we think it right to lay before you for the purpose of urging the necessity of a settlement between you and them, in order that the particular shipments on which they really can substantiate claims may be allowed, and then set at liberty.

"Until this point is attained we shall not be able to act so as to obviate the inconveniences attaching to the stop thus put by the assignees; while, at the same time, we shall be very unwilling parties to any measure that may be prejudicial to any of our correspondents."

On the 31st of December, 1836, the defendants addressed the following letter to the assignees in reply to their notice:—

"Gentlemen,—We acknowledge the receipt of a notice under the signature of, &c., that various shipments of goods made to our correspondents in India through J. Coupland, and Coupland and Duncan, in the names of D. Scott, Samuel Wood, J. Mallalieu, R. Baird, and Turner, Brade and Co., to whom we came under advances as the shippers, are not the property of the several persons in whose names they were shipped, but of the
*1036] bankrupts to whose estates you are the assignees. *You further give us notice not to pay over to those parties, any of the returns for any shipments made by the said nominal shippers, but to deliver them to you as the assignees, you claiming and insisting upon all the said shipments as assets of the bankrupts.

"We have had extensive transactions with the parties you have named through J. Coupland, and Coupland and Duncan, as our agents, and our advances have invariably been made in bank post bills, transmitted direct to the shippers, whose acknowledgements of the same were duly returned to us. We have reason to know, beyond all doubt, that in a great many of these transactions, no reasonable pretence can be set up that they were otherwise than *bonâ fide* dealings of the several parties on their own account. With this knowledge, it is quite repugnant to our sense of justice, and to our inclination, to lend ourselves to the sweeping measure of most serious injury which would be uselessly, for your purpose, inflicted on those who have confided in us, were we to give effect to your notice of not paying to the several shippers any part of the returns for any shipment made in their names through the agency of the bankrupts.

"We think it belongs to you, in any notice you may choose to serve on us, to particularise the several shipments on which you may consider yourselves entitled to receive the return proceeds; and we beg to observe, that in order to entitle such notice to our consideration, we expect you will accompany it with an undertaking indemnifying us for all consequences to which we may be made liable for withholding, if we should be advised to do so, property as to which we can know no other owner than the person in whose name it was shipped, who received the advance from us, and on whose account we made the necessary insurances.

*1037] "Assuming that there are pending transactions of *that character which you have assigned to all our dealings with the parties you have named—that persons were found to accept the trust reposed in them by receiving into their names and by acting as the owners of property which in reality belonged to the bankrupts to whom they were to account—we should put it to you whether the parties having so acquired a *primâ*

facie ownership, as between them and the bankrupts, by delivery and possession, are not in a situation to maintain their lien on that property in satisfaction of any debts now due to them by the bankrupts. We entertain a strong opinion that you, as assignees, must submit to such preferable claim; but it is a point on which doubt need not long exist, when the highest legal opinion can be so easily obtained.

"Referred to as we now are in the character of stakeholders, we feel ourselves at liberty to submit to you the expediency of the earliest possible adjustment of the accounts of the parties you have named to us with the bankrupt's estate, in order to bring all future questions within the smallest possible compass, by defining at once the extent of debt which these parties may set up to have liquidated from the properties which now stand directed to our hands for their use, to ascertain the sufficiency or otherwise of the expected assets, and thus to see the probable surplus as to which these parties can have no right.

"We deem it our duty to furnish a copy of this letter for the information of the several persons whose interests are intended to be affected by your notice.

(Signed) "CRAWFORD, COLVIN and Co."

Some further correspondence took place between the plaintiff and the defendants, and in a letter from the latter, dated the 31st of October, 1837, the following passage occurs:—

*"We are quite alive to the probability of unpleasant features occurring in the progress of a law suit, which we should much regret, and to avoid which it may become a question with us whether we may not think it best to relieve ourselves under the act of the interpleader." [*1038

The plaintiff having ultimately made a formal demand on the defendants, the latter, in July, 1840, through their solicitors, refused to account to the plaintiff for the proceeds of shipments made in his name by Coupland, and Coupland and Duncan, claiming a lien on such proceeds in respect of the debt due to them from the bankrupts.

At the trial, the plaintiff called Coupland, who proved the course of dealing between them. It appeared in his cross-examination that the plaintiff knew that he acted as the agent of the defendants. He stated also, that he had at various times obtained advances to a considerable amount from the plaintiff, upon the faith that the shipments of the goods in question would enable the plaintiff to reimburse himself. On his re-examination, he stated that the plaintiff knew nothing of his arrangements with the defendants, and that the debt due from him to them arose out of entirely different transactions. It also appeared from Coupland's evidence, that part of the balance claimed by the plaintiff arose from the sale of goods bought by the plaintiff himself, and part from the sale of goods purchased by Coupland, which were shipped in the name of the plaintiff.

It was contended on the part of the plaintiff, that, as between the plaintiff and the defendants, the goods were undoubtedly the property of the plaintiff, and that the defendants, having received the proceeds on his account, were not justified in withholding the amount.

For the defendants it was submitted that the goods so shipped in the name of the plaintiff, being in point of fact the property of Coupland, and Coupland and Duncan, *the plaintiff was not entitled in an action for money had and received to recover the proceeds, and that the course of dealing between him and Coupland, whom he knew to be the [*1039

agent of the defendants, amounted to a fraud upon them, which invalidated his claim, supposing it could otherwise be supported.

The Lord Chief Justice left it to the jury to say whether, as between the plaintiff and the defendants, the goods consigned to India, the proceeds of which had come to the hands of the defendants, were the property of the plaintiff; and, secondly, whether the dealings between the plaintiff and Coupland amounted to a fraud which had been productive of injury to the defendants. His lordship told them that if they were satisfied that, as between the plaintiff and the defendants, the goods were the goods of the plaintiff, and that no fraud had been practised on the defendants, by which they had sustained injury, their verdict should be for the plaintiff.(a) The jury having returned a general verdict for the plaintiff, damages 8204*l.* 3*s.*

Bompas, Serjt., in Easter term last, obtained a rule nisi for a new trial, on the ground that the verdict was against evidence.

Sir *T. Wilde*, and *Channell*, Serjts., (with whom was *Tomlinson*,) now showed cause. There is no foundation for saying that either the plaintiff or Coupland committed any fraud on the defendants. It will be argued

*1040] *that Coupland would commit a fraud on them if he consigned his own goods to India in the name of the plaintiff, as he might thereby have obtained larger advances upon them from the defendants than the invoices would warrant. But no such fraud is suggested to have been practised; neither was it shown at the trial that the defendants had sustained any loss or injury from the transactions between the plaintiff and Coupland. It may be admitted that the plaintiff knew that Coupland was the representative of the defendants at Liverpool; but it did not appear that he was acquainted with the terms of the agency. Even supposing it to be true that the plaintiff practised some concealment or deception on the defendants, it is difficult to see how that can be any answer to the action. [TINDAL, C. J. The point which the defendants seem to make is, that they have a right to say that the goods are the goods of Coupland.] It is clear that, after having treated them as the goods of the plaintiff, and received the proceeds to his use, the defendants cannot turn round and say that they belong to Coupland. *Dixon* v. *Hammond*, 2 B. & Ald. 310, shows that an agent cannot dispute the title of his principal. *Easum* v. *Cato*, 5 B. & Ald. 861, 1 D. & R. 530, is also in point. Leaving the question of fraud out of the case, it is impossible to say that, as between the plaintiff and the defendants, the goods were not the property of the plaintiff. Admitting, for the sake of argument, that fraud can be set up as an answer under the circumstances of this case, it is denied that any fraud was committed. There appears to have been nothing to prevent Coupland dealing with the plaintiff in the manner in which the consignments were made to India; and there is no ground for supposing that the plaintiff was privy to any fraud. As to the latter, the question of fraud

*1041] properly resolves itself into two points:—*first, whether he practised any deceit on the defendants; and secondly, if so, whether the defendants sustained any injury. It is clear, as already observed, that the defendants suffered no injury from the dealings between the plaintiff and Coupland. There can be no doubt that if Coupland had not failed

(a) Sir Thomas Wilde, on the part of the plaintiff, excepted to the summing up, on the ground that the question of property and fraud were both irrelevant, contending that the only question that ought to be submitted to the jury was, whether the defendants had received the proceeds of the sales upon an undertaking to account with the plaintiff. The finding of the jury rendered the exception unnecessary to be considered.

in debt to the defendants, they would never have disputed the plaintiff's right to receive this money. Nothing would be more unjust than to allow them to retain it in order that they may set off against it a debt due to them in respect of a totally distinct transaction. On the whole, it is submitted that there is nothing to show that the verdict (which negatived fraud in the plaintiff) is wrong; for the jury were fully warranted in coming to the conclusion at which they arrived.

Bompas, Serjt., (with whom was *Hugh Hill*,) in support of the rule. This is a clear case of fraud on the part of the plaintiff and Coupland, who conspired together to cause the defendants to believe that they had an agent who would properly estimate the amount of the advances to be made on the goods consigned. It is clear that the defendants never would have made any advances without ascertaining the value of the goods, either personally, or by employing some one on whose unbiassed judgment they could rely; whereas Coupland, with the knowledge and consent of the plaintiff, placed himself in a situation which deprived the defendants of his services, and exposed them to imposition. It is just the same as if the cashier of a bank was to get a third party to apply to him to make an advance on a security actually belonging to himself. Here Coupland has advised the defendants that they might safely make advances on goods which turned out to be his own. The question does not turn upon the point, whether ultimately there is any loss. It is a *clear principle of law that where a man undertakes a duty, it is a fraud on [*1042] his employers for him to place himself in a situation which prevents him from discharging such duty. The action for money had and received is an equitable one, in which the plaintiff must clearly make out that it is against good conscience for the defendant to withhold the money. It is said that the plaintiff's name was always used; but that is the fraud charged,—that he lent his name to conceal the fact that the goods belonged to Coupland; and if that be so, the plaintiff cannot set up the circumstance of the goods passing in his name as entitling him to recover. [MAULE, J. Suppose the defendants have, by some fraud of the plaintiff and Coupland, been induced to receive the money to the plaintiff's use. Although so induced, yet, having received it, does not a promise arise to pay it over?] It is submitted that they would have a right to hold the money for the true owner. [MAULE, J. Here if the defendants had chosen to pay the money to the plaintiff, Coupland could not have objected to their so doing.] *Hardman* v. *Willcock*, 9 Bingh. 382, n, is very analogous to this case. It was there held that the jury having found that the plaintiff got possession of the goods by means of a fraud, concerted between him and an insolvent, he could not stand in a better situation than the insolvent himself. So, here, the plaintiff having consigned these goods in his name by a fraud between him and Coupland, cannot stand in a better situation than the latter. [TINDAL, C. J. The plaintiff did not merely lend his name; he advanced large sums of money on the goods. MAULE, J. If Coupland, instead of owing 18,000*l.*, had merely been indebted in 1000*l.* to the defendants, could the defendants have held the balance for more than the 1000*l.*?] They were clearly entitled to hold it to the *amount of their debt. [MAULE, J. If that be so, should not the [*1043] defendants have pleaded that the money was received to the use of the plaintiff, and then have set out the circumstances under which they claimed to retain it?] It was not necessary to plead specially. The money never belonged to Scott. It is quite immaterial who was entitled to

the balance beyond the amount of the defendants' debt. Suppose there had been no debt due from Coupland to the plaintiff, and there was a debt owing by him to the defendants, could the plaintiff then, by a fraudulent use of his name, prevent a set-off between Coupland and the defendants? [MAULE, J. That would be a case of mutual credit. The defendants would have trusted Coupland, and he would have trusted them.] It is submitted that the defendants have a right to say that Coupland gave them credit, that the goods are his, and that he handed over the goods to them, and the defendants made him advances thereon. It was never left to the jury whether the plaintiff had a lien on the goods. Supposing the jury to have, in effect, found that the plaintiff did not know that Coupland was the defendants' agent, their verdict was clearly against evidence. [TINDAL, C. J. The jury may have found that, looking at the whole case, no possible injury could have resulted to the defendants from the dealings between the plaintiff and Coupland.] It is a fallacy to look only at the ultimate result. Looking at the questions left to the jury, their verdict was not warranted by the evidence.

TINDAL, C. J. I can see no reason for sending this cause down to a second investigation. The action is for money had and received; and it appeared by various documents produced at the trial, that the defendants uniformly dealt with the plaintiff as the shipper of the goods, that they treated the proceeds thereof as his, and that they stated the balance of each transaction to *be the plaintiff's money. The money in question was therefore clearly had and received to the use of the plaintiff, [*1044
unless the circumstances show that a fraud was committed by the plaintiff and Coupland, which was productive of injury to the defendants. Two questions were left to the jury. The first was, whether, as between the plaintiff and the defendants, the goods were the property of the plaintiff; and the jury have found that they were. The second question was, whether any fraud had been practised between the plaintiff and the defendants to the injury of the defendants, and the jury seem, in effect, to have found that there had not. I am not disposed to disturb the verdict, particularly as no new light can be thrown on the case, inasmuch as Coupland was examined at the trial. I am at a loss to see what bearing the alleged misconduct of Coupland and the plaintiff can have upon the case. One effect is said to be, that larger advances may be made on the consignments sent to India. Even if that were so, it is admitted that all those advances were deducted before the balance was struck for which the verdict was given. No injury resulted to the defendants. On the contrary, they reaped an advantage from the transaction by getting a larger commission than they would otherwise have done. Consequently I cannot see how the circumstance—that the plaintiff allowed Coupland's goods to pass in his name, could affect the question between the plaintiff and the defendants. It has been admitted, that if the latter had had no demand against Coupland, they could not have denied that the balance in their hands belonged to the plaintiff. But how can that balance be less money had and received by them to the plaintiff's use, because it turns out that Coupland is largely indebted to the defendants upon another account? It seems to me that justice has been done, and that we ought not to send the case to a second trial.

*COLTMAN, J. I am of the same opinion. The money in question must be assumed to have been had and received to the [*1045
use of the plaintiff, unless the dealings between the plaintiff any Coupland

amounted to a fraud upon the defendants. I agree that the conduct of these parties is not altogether correct; for I think that persons ought to let the real nature of their transactions be known, and that concealment is unfair and destructive of the confidence which should exist between merchants. The defendants, perhaps, might have had a right to repudiate the contract on discovering its real nature; but they stand in a different situation when the transaction has been completed, and they have the proceeds in their hands. In that position they may possibly be entitled to say, that although they had treated the plaintiff as the owner of the goods, and had held the proceeds on his account, yet, as that was owing to misrepresentation, they would hold such proceeds for the true owner. The question is, whether, as between these parties, the plaintiff is not the true owner. The case might have been different if the defendants had sustained any actual injury; but none has occurred; for they have been repaid their advances, and have received their commission on the consignments. It has been suggested that the debt due to the defendants from Coupland has been the consequence of the plaintiff's dealings with Coupland; but I cannot see any legal connection between such debt and the misrepresentation which was made. As between Coupland and the plaintiff, the latter is clearly entitled to this money; and, as between him and the defendants, it is money received to his use, although it might have been different if any injury had resulted to the defendants from the transaction. The jury, however, have found that no injury was sustained by them.

*ERSKINE, J. In this case the jury have found that the defendants received the money to the plaintiff's use; and the evidence [*1046 clearly showed that the defendants had treated it as money which had come to their hands on his account. But it is said that the verdict cannot be sustained because of a misrepresentation practised on the defendants with the knowledge of the plaintiff, which amounted to a fraud upon them. If it had appeared that the defendants had sustained any injury, it would have been material to consider whether such a fraud had been committed, and whether the jury had come to a right conclusion upon that point. Whether the consignments were made in the name of the plaintiff for the purpose of enabling Coupland to receive larger advances than he would otherwise have obtained, it is impossible to say; but no evidence was given that larger advances than were warranted were made on any goods, except in a few instances, which may be considered accidental. On the part of the plaintiff it has been contended, that the object of the arrangement was not that adverted to, but was, to give the plaintiff a security both for advances made by him in respect of the goods, and for a debt then due to him from Coupland. The latter swore that such was the object of the arrangement, and consequently there was evidence from which the jury might fairly come to that conclusion. There was, therefore, nothing necessarily wrong in the finding of the jury, assuming that fraud alone would have defeated the plaintiff's right of action. But it appears to me that even if the dealings of the parties had amounted to fraud, that would not have been sufficient unless the defendants could have shown that they had been injured. But, instead of being injured, they appeared to have been benefitted by the commission received by them on the larger amount of goods, which was probably purchased in consequence of the arrangement between the plaintiff *and Coupland. It is also said that Coupland owes the defendants 18,000*l*., and that, if allowed to retain this money as be- [*1047 longing to him, they might set off against it a portion of their debt. I

agree, however, with the Lord Chief Justice, that this case cannot be altered by the fact that Coupland was indebted to the defendants, if they actually received the money to the use of the plaintiff, and incurred no injury from the arrangement between the plaintiff and Coupland. On the whole, I can see no ground for disturbing the verdict.

MAULE, J. I also think that this was money had and received to the use of the plaintiff; and as all the facts were clearly brought out at the trial, that the verdict ought not to be disturbed. The object of Coupland in entering into the arrangement with the plaintiff was probably to obtain larger advances from the defendants than he could otherwise have done. When, however, the plaintiff, having received advances from the defendants, made further advances to Coupland, he became the purchaser of an interest in the goods. The plaintiff, therefore, having an actual interest in the goods, and being the party actually contracting with the defendants, Coupland could not interfere between the plaintiff and the defendants, and dispute the right of the former to receive the proceeds. The defendants had the benefit of the contract with them, making advances which were for the benefit of the plaintiff, and afterwards reaping the benefit of that part of the contract which was for their advantage, namely, the payment of those advances and their commission out of the proceeds of the consignments. Having done so, they clearly held the balance to the use of the plaintiff, unless the alleged fraud is an answer to his claim. Assuming that there was a fraudulent representation, by which larger advances were made than
*1048] would otherwise have been *obtained, or whereby advances were made which would not have been made at all, would such a fraud prevent the plaintiff from recovering? Cases have been cited to show that a party, on discovering fraud, may rescind a contract into which he has entered. But he cannot take the benefit of part of a contract, and repudiate the rest. Here, the defendants would not have contested the matter with the plaintiff at all if Coupland had not happened to be indebted to them. The defendants do not seek to put an end to the whole of the transactions with the plaintiff. They have applied part of the proceeds to the payment of their own advances and charges, and they cannot withhold the balance from the plaintiff. When a person has received money as an agent for another under a misrepresentation, he is bound to pay it over, and if he sustains any injury, he may bring an action against the party guilty of such misrepresentation. Here, these defendants, having received the money under a contract with the plaintiff, cannot now say that Coupland was the real party to the transaction. The plaintiff was not a mere agent of Coupland, but entered into a contract with the defendants, in which contract the plaintiff had an interest. I think that the jury came to a right conclusion; that this was money had and received to the plaintiff's use.

Rule discharged.

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*1049] *JOHN INMAN TUCKER, WILLIAM TUCKER, and JOHN JAMES *v.* WILLIAM SOUTHCOTE INMAN and ANNA VICTORIA LITTLE.

In prohibition the declaration objected to the jurisdiction of the ecclesiastical courts to grant probate of a testamentary paper made by S. I., a *feme covert*, under a power purporting to be contained in a deed, to which her husband was not a party. The plea stated the title of the defendants under the will of S. I., and that they were about to file a bill in Chancery enforcing their equitable right, upon the ground that according to the rules of equity the husband must be taken, by his conduct, to have assented to the deed; and that by the course

and practice of that court, in order to obtain the adjudication thereof upon the validity in equity of the said appointment so made (under the will) by S. I., it was necessary that letters of administration with the will annexed, should be granted, limited so far as concerned the right of S. I. to the sum of money which she, by virtue of the deed, had a right to dispose of, and had, by the said will, disposed of accordingly; to the end that such administrator with the will annexed, might be made a party to the suit in Chancery. The replication traversed the allegation of the existence of any such rule and practice of the court of Chancery.

At the trial it was proved that in the case of a will made by a married woman, either with the assent of her husband or under a power, a limited administration is granted by the ecclesiastical court, and that such administration or a general administration, is required by the court of Chancery, before it will allow any party to claim any interest under such will: *Held*, that upon this evidence, the defendants were entitled to the verdict.

Held also, upon motion for judgment *non obstante veredicto*, that the plea contained an answer to the action, as alleging that the defendants would be able to prove in the court of Chancery facts which either amounted to an election on the part of the husband to take under the provisions of the deed, whereby the power was conferred on the wife to make a will, or to an assent by him of the exercise of such power by the wife.

PROHIBITION.(a) The declaration stated that whereas, previously to the marriage of one George Inman, clerk, since deceased, with one Joan Darch, spinster, to wit, on the 19th of January, 1760, certain hereditaments situate at Blagdon, in the county of Somerset, were legally conveyed and assured to certain trustees, their heirs and assigns, to the use of the said George Inman in fee until the said marriage, and then *to the use of the said George Inman for life, with remainder to the use of Joan his intended wife for her life, with remainder to the use of trustees, to preserve contingent remainders; and after the death of the survivor of them, the said George Inman and Joan his intended wife, to the use of such child or children of the said marriage in such shares and proportions, and for such estate or estates, as the said George Inman should, by any deed or writing under his hand and seal executed in the presence of two witnesses, or by his last will and testament in writing duly executed and attested, limit, appoint or devise; and in default thereof, to the use of the first son of the said George Inman and Joan, and the heirs of the body of such first son lawfully issuing; that afterwards, to wit, on the day and year last aforesaid, the said marriage was duly solemnized; that afterwards, to wit, on the day and year last aforesaid, there was issue of the said marriage, one other George Inman, one Henry Inman, one John Inman, and one Sarah Inman, who afterwards, to wit, on the day and year aforesaid, intermarried and took to husband one other John Inman; that afterwards, to wit, on the 1st of January, 1795, by an indenture under the hand and seal of the said George Inman, clerk, and made between the said George Inman, clerk, of the first part, and the last mentioned John Inman and one John Whitley of the other part, which indenture was executed by the said George Inman, clerk, in the presence of two witnesses, the said George Inman, clerk, in exercise of the power so given or reserved to him in and by his marriage settlement, appointed the said hereditaments to the said John Inman and John Whitley, their heirs and assigns for ever, upon trust, to receive the rents and profits thereof, and apply the same and so much thereof as should be necessary in the maintenance of the said George Inman the son for his life, and after his decease then, as to one moiety of the said hereditaments, *to the use of such person and persons and for such estate and estates as the said Henry Inman should in manner therein mentioned appoint, and in default thereof to the use of the said Henry Inman, his

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(a) See the proceedings upon the rule *Ex parte Tucker*, antè, vol. i. p. 5191, Scott, N. R. 379, post 1079.

heirs and assigns; and as to the remaining moiety of the said hereditaments to the use of such person or persons, and for such estate and estates as the said Sarah Inman should in manner therein mentioned appoint, and in default thereof to the use of the said George Inman, clerk, his heirs and assigns for ever; and in which indenture was contained a power for the said last mentioned trustees, in case the rents and profits of the said hereditaments should be more than sufficient, with certain other provisions therein mentioned, for the support and maintenance of the said George Inman the son, to pay over the surplusage thereof from time to time unto the said Henry Inman and Sarah Inman, their executors, administrators and assigns in equal shares; and wherein was also contained a declaration, that in case the said last mentioned trustees, during their joint lives, should think it was beneficial to sell the said hereditaments, it should be lawful for them to do so, and place out the net produce on government or other good security, and to apply the interest money arising therefrom towards the maintenance of the said George Inman (the son) for his life, in the same manner as the rents were thereinbefore directed to be applied, together with the surplusage, and at his decease to pay all such moneys, together with all interest money or dividends as should be then due and in the hands of the said John Inman and John Whitley, or of the survivor of them, his heirs or assigns, unto the said Henry Inman and Sarah Inman, their heirs, executors, administrators and assigns, equally between them absolutely; that neither the share of the said Henry Inman nor that of the said Sarah Inman in the moneys which might arise by any such sale as
*1052] aforesaid was by the said *indenture subjected to any power of appointment whatsoever; that afterwards, to wit, on the day and year last aforesaid, the said George Inman, clerk, died; that afterwards, to wit, on the 5th and 6th of November, 1795, by certain indentures of lease and release, the release being made between the said George Inman, the son, of the first part, the said Henry Inman and Katherine his wife, the said John Inman and Sarah his wife, and John Whitley, of the second part, Robert Blake, of the third part, and Peter Cox of the fourth part, and by a common recovery afterwards, to wit, on the day and year last aforesaid, duly suffered in pursuance thereof, the same hereditaments were conveyed, limited and assured to the use of the said John Inman and John Whitley, their heirs and assigns, upon trust, to sell the same and invest the net produce in some of the public stocks, or on government or real security, by way of mortgage, and to apply the dividends towards the maintenance of the said George Inman, the son, for his life, and to apply the rents and profits in the mean time until the sale, in the like manner; and after the decease of the said George Inman, the son, then to stand possessed of the said trust moneys and the future interest or dividends thereof, upon trust, for the said Henry Inman and Sarah Inman, in equal shares, or in trust for their respective executors, administrators or assigns, in case they or either of them should die in the life time of the said George Inman, (the son,) and to pay and transfer the same accordingly; that afterwards, to wit, on the day and year last aforesaid, the said hereditaments were sold; that afterwards, to wit, on the 24th of February, 1802, a certain indenture expressed to be made between the said George Inman (the son) of the one part, and the said John Inman and John Whitley of the other part, was executed by the said George Inman, (the son,) and which indenture never was executed
*1053] by the said John *Inman and John Whitley, or either of them, and to which indenture neither the said Henry Inman nor the said Sa-

ah Inman was made or was named as party; by which indenture, after reciting the said hereinbefore recited indenture of the 1st of January, 1795, so far as related to the appointment thereby made of the hereditaments aforesaid, and the uses thereby declared thereof, but wholly omitting the particular trusts thereby declared with respect to the application of the moneys arising from any sale of the said hereditaments; and after reciting that the said hereditaments had been sold, and that the said George Inman (the son) was desirous and willing that the moneys arising from the sale aforesaid, amounting to the sum of 1050*l.*, should be vested in the said John Inman and John Whitley, for the uses thereinafter mentioned, agreeably to the intention of the said George Inman, clerk, it was witnessed, that for the purpose of carrying such intention into effect, and in consideration of 1*s.* to the said George Inman (the son) therein stated to be paid by the said John Inman and John Whitley, the said George Inman (the son) did direct and declare that the said sum of 1050*l.* should from thenceforth be vested in the said John Inman and John Whitley, their executors, administrators and assigns, upon trust, that they and the survivor of them, and the executors, administrators and assigns of such survivor, should apply the interest, dividends or produce of the said sum of 1050*l.*, or so much thereof as should be necessary, in the maintenance of the said George Inman (the son) during his life, and after the decease of the said George Inman (the son) upon trust, as to one moiety of such principal sum of 1050*l.* to the use of such person or persons as the said Henry Inman should in manner therein mentioned appoint, and in default thereof to the use of the said Henry Inman, his executors, administrators and assigns, and as to the *remaining moiety or half part of the hereditaments and premises thereby limited and appointed to the effect following, that is to [*1054 say, to the use of such person or persons, for such estate and estates, either absolutely or conditionally, and with or without power of appointment, and in such sort, manner and form, and subject to such powers, provisoes, conditions and agreements as the said Sarah Inman, by herself alone, and whether sole or covert, should, from time to time, by any deed or deeds, writing or writings to be by her signed, sealed and delivered in the presence of two or more credible witnesses, or by her last will and testament, *which last will and testament, it was thereby expressed that the said* Sarah Inman *should have power to make, as to her should seem meet*, to be by her signed and published in the presence of three or more credible witnesses, direct, limit and appoint; and in default thereof, to the use of the said George Inman, (the son;) and by the last mentioned indenture it was provided that in case the interest and dividends of the said 1050*l.* should be more than sufficient, with a certain other provision in that indenture mentioned, for the support and maintenance of the said George Inman (the son) it should be lawful for the said John Inman and John Whitley, and the survivor of them, his executors and administrators, to pay over such surplusage from time to time, or any interest or dividends then in their hands, unto the said Henry Inman and Sarah Inman, their executors, administrators and assigns, in equal shares and proportions; that afterwards, to wit, on the 3d of September, 1807, the said Sarah Inman died, leaving her husband John Inman her surviving, having previously to her death executed an instrument, purporting to be a testamentary appointment, dated the 3d of September, 1807, and purporting to be made in pursuance of the power so expressed to be given to her in and by the said indenture of the 24th of February,

*1055] 1802, *in which instrument it was expressed that the said Sarah Inman had appointed the interest, produce or dividends arising from all such money or principal sum of money over which she had a disposing power, unto the said John Inman for his life, with remainder to her nephew John Inman, of Minehead, in which instrument it was also expressed that she, the said Sarah Inman, appointed her said husband executor of her said will; that afterwards, to wit, on the 27th of January, 1813, the said John Inman (the husband) died, leaving the said John Whitley him surviving, having previously duly made and published his last will and testament in writing, bearing date the 11th of April, 1812, and thereby appointed James Tucker and the said John Whitley executors of the said will, and who duly proved the same in the Prerogative Court of Canterbury; afterwards, to wit, on the 6th of December, 1831, the said John Whitley died, leaving the said James Tucker him surviving; that afterwards, to wit, on the 5th of April, 1834, the said James Tucker died, having first duly made and published his last will and testament in writing, and also a codicil thereto, and thereby appointed the said John Inman Tucker, William Tucker and John James, (the plaintiffs,) executors thereof, who, afterwards, to wit, on the 3d of June, 1834, duly proved the same in the Consistorial Episcopal Court of Wells; that afterwards, to wit, on the 1st of August, 1838, the said George Inman (the son) died; and that afterwards, to wit, on the day and year last aforesaid, the said William Tucker, as one of the personal representatives of the last-mentioned John Inman, as aforesaid, applied for and obtained a commission out of the said Prerogative Court of the Archbishop of Canterbury, for the purpose of being duly sworn to administer the goods and chattels of the said Sarah Inman deceased, in order to ob-
*1056] tain letters of administration to be granted to him of the *goods and chattels of the said Sarah Inman deceased, for the purpose of administering the same to and amongst the residuary legatees under the said last will and testament of the said John Inman deceased; that before the said commission so obtained by the said William Tucker was executed, to wit, on the 28th of December, 1839, the defendants caused a citation to issue out of the said Prerogative Court, requiring the plaintiffs to appear in the said Prerogative Court by a day therein named, and leave in the registry of the said court the original will of the said Sarah Inman deceased, (thereby meaning the said instrument so signed by the said Sarah Inman as aforesaid,) and to show cause why letters of administration, with the said will annexed, of the said goods, chattels and credits of the said Sarah Inman, should not be granted to William Southcote Inman and Anna Victoria Little (the defendants,) they alleging that in or about the month of April, 1819, they had purchased from the said John Inman (the nephew) the reversionary interest in the said trust fund so bequeathed to the said last named John Inman, in and by the said pretended will of the said Sarah Inman, and claiming to be entitled to such letters of administration, with the said will or testamentary writing annexed; whereupon, inasmuch as, by the laws of this realm, a feme covert cannot make any will or testament, or do any act or make any appointment by an instrument in the nature of a last will and testament, without having authority from her husband for that purpose; and inasmuch as the said Sarah Inman had no such authority, and inasmuch as the determining whether a feme covert has such authority is not matter of ecclesiastical cognisance, but belongs to the cognisance of Her Majesty's courts of common law, the plaintiffs prayed that Her Majesty's writ of prohibition might issue out of this honourable court, directed

to the proper judge of the said Prerogative Court, to prohibit that *court from proceeding to require the plaintiffs to show cause why letters of administration, with the said will or testamentary writing annexed, of the goods and chattels of the said Sarah Inman should not be granted to the defendants; and of this the plaintiffs brought suit, &c. [*1057

Plea. That Her Majesty's writ of prohibition ought not to issue out of this honourable court as by the said declaration prayed; because, after the making of the indenture in the declaration fourthly mentioned and therein alleged to be expressed to be made between the said George Inman (the son) of the one part, and the said John Inman (the husband) and John Whitley of the other part, to wit, on the 3d of September, 1807, in the county aforesaid, the said Sarah Inman did make and publish such last will and testament as in the same indenture is mentioned, bearing date, &c., and signed and published by the said Sarah Inman, in the presence of, and attested by, three credible witnesses; and which instrument being in the custody of the plaintiffs, the defendants could not bring the same into court;(a) and the said Sarah Inman thereby, by virtue of the powers and authorities in that behalf her enabling, gave, limited and appointed the interest, produce and dividends arising from all such money or principal sums belonging to her, or over which she had a disposing power as aforesaid, unto the said John Inman (the husband) for and during his natural life; and after his decease she gave all such money or principal sum to her nephew, John Inman of Minehead, with a certain limitation over, as in the said last-mentioned instrument mentioned, in the event of the said nephew of the said Sarah Inman dying in the life-time of her said husband; and the said Sarah Inman thereby appointed her said husband to be the executor of her said will; that afterwards, and in the lifetime of *her said husband, to wit, on the 1st of January, 1812, to wit, in the county aforesaid, the said Sarah Inman died, without having revoked or altered her said will, leaving her said husband, and also her said nephew, her surviving; and that afterwards and after the death of the said Sarah Inman, to wit, on the 1st January, 1813, the said John Inman (the husband) died, leaving the said John Inman (the nephew) him surviving; and that afterwards and after the death of the said John Inman (the husband) to wit, on the 15th April, 1819, by a certain indenture then duly made between the said John Inman (the nephew) of the one part, and the defendants therein particularly described of the other part; (*profert*,) for the considerations therein mentioned, the said John Inman, party thereto, assigned unto the defendants as therein mentioned all the right, title and interest of him the said last-mentioned John Inman, of, in and to the moiety of the said principal sum of 1050*l.*, and of the securities whereupon the same might be laid out or invested, so appointed to him as aforesaid by the said Sarah Inman, as by the said last-mentioned indenture reference being thereto had will more fully appear; that afterwards, to wit, on the 1st of August, 1838, the said George Inman (the son) died; whereupon and whereby, according to the rules in equity in that behalf,(b) the defendants then and there had good and valid grounds for exhibiting their bill of complaint in Her Majesty's High Court of Chancery, wherein they would have stated and alleged the several premises aforesaid, and also to the effect that according to the rules of equity in that behalf the said John Inman (the husband) must be deemed and taken by reason of his conduct in respect of the premises to [*1058

(a) No profert of a will being necessary, no excuse of profert was necessary.
(b) Vide post, 1065. 1072

have assented to the said indenture in this plea first mentioned, and that *1059] by and *according to the said rules of equity it was open to the said John Inman (the husband) to elect either to take the benefit given to him by the last-mentioned indenture, and to permit and allow the said Sarah Inman, his wife, during her coverture, to make an appointment by will or otherwise, according to the power contained in the last-mentioned indenture in that behalf, or to reject the benefits given to him by the last-mentioned indenture, and to retain his contingent right to the said moiety of the said sum of 1050*l.* in the event of his surviving the said Sarah Inman; and the defendants would also have stated and alleged in the said bill to the effect that the said last-mentioned John Inman had so conducted himself in the premises that by and according to the rules of equity he must be deemed and taken to have elected to give effect to the said indenture in this plea first mentioned, and to have sanctioned the said testamentary appointment so made by the said Sarah Inman as aforesaid; and the defendants would thereby also have prayed the said court of Chancery for relief in that behalf; that the plaintiffs claiming to be the personal representatives of the said last-mentioned John Inman, as in the declaration mentioned, and having obtained possession of the said will of the said Sarah Inman, then and there refused to admit or acknowledge the said equitable right of the defendants to the said moiety of the said principal sum of 1050*l.* after the death of the said George Inman (the son); wherefore, after the said death of the last-mentioned George Inman, the defendants being otherwise unable to obtain payment of the said moiety of the said principal sum of 1050*l.*, it then became and was necessary, for the purpose of enforcing the said equitable right thereto, that the defendants should institute a suit in Her Majesty's High Court of Chancery, according to the course and practice of the same court; that according to the course and practice *1060] of the said High Court of Chancery, and *the rules of equity in that behalf, in order to obtain the adjudication of the said court in due form upon the validity in equity of the said appointment, so made by the said Sarah Inman to pass the equitable right and interest of and in one moiety of the said sum of 1050*l.*, according to the tenor and effect of the said last-mentioned appointment, it was and is necessary that letters of administration, with the said will annexed, should be granted to some person or persons, limited so far only as concerns all the right, title and interest of her the said Sarah Inman in and to the said moiety of 1050*l.*, and all interest due and to grow due thereon, which she the said Sarah Inman, by virtue of the said indenture in this plea first-mentioned, had a right to dispose of, and had by the said will disposed of accordingly, but no further or otherwise, to the end that such administrator or administrators, with the said last will and testament annexed, but limited as aforesaid, might be made a party or parties to the said suit in chancery; that by reason of the premises, and because the plaintiffs, although then in that behalf requested so to do, refused to propound the said will in the ecclesiastical court, and to take out or suffer any other person or persons to take out letters of administration with the said last will and testament annexed, and limited as aforesaid or otherwise, and the plaintiffs then fraudulently intended and contrived to hinder and prevent the defendants from proceeding to enforce their said equitable right, and to obtain an adjudication in the said court of Chancery upon the validity in equity of the said appointment; that the defendants, to wit, on the day and year in the declaration in that behalf mentioned, caused a citation to issue out of the said Prerogative Court, in the

declaration mentioned, requiring the plaintiffs to appear in the said Prerogative Court by a day therein named, and leave in the registry of the *said court the said will of the said Sarah Inman deceased, and to show cause why letters of administration, with the will annexed, of [*1061 the goods, chattels and credits of the said Sarah Inman, but limited, as before is mentioned in that behalf, should not be granted to the defendants, as they lawfully might, for the cause aforesaid; which was the citation in the declaration mentioned; and this the defendants were ready to verify, &c., wherefore they prayed judgment, and that the said writ of prohibition might not issue in manner and form as prayed by the said declaration.

Replication. That according to the course and practice of the said High Court of Chancery, and the rules of equity in that behalf, in order to obtain the adjudication of the said court in due form upon the validity in equity of the appointment in the said plea, alleged to have been made by the said Sarah Inman, to pass the alleged equitable right and interest of and in one moiety of the said sum of 1050*l*., according to the tenor and effect of the said supposed appointment, it was not nor is necessary that letters of administration, with the said supposed will annexed, should be granted to some person or persons, limited so far only as concerns all the right, title and interest of the said Sarah Inman in and to the said moiety of 1050*l*., and all interest due and to grow due thereon, which the said Sarah Inman, by virtue of the said indenture in the said plea first mentioned had a right to dispose of, and had by the said alleged will disposed of accordingly, but no further or otherwise, to the end that such administrator or administrators, with the said alleged last will annexed, but limited as aforesaid, might be made a party or parties to the said suit in Chancery, provided that there was a sufficient legal personal representative of the said Sarah Inman before the said Court of Chancery; that before the issuing of the said citation, to wit, on the day and year in the *declaration of the plaintiffs in [*1062 that behalf above mentioned, the said William Tucker, as one of the personal representatives of the said John Inman, the husband of the said Sarah Inman, applied for and obtained a commission out of the said Prerogative Court, for the purpose of being duly sworn to administer the goods and chattels of the said Sarah Inman, in order to obtain letters of administration, to be granted to him the said William Tucker, of the goods and chattels of the said Sarah Inman, for the purpose of administering the same to and amongst the residuary legatees, under the said last will and testament of the said last-mentioned John Inman; that from the time of the issuing of the said commission hitherto the said William Tucker had been and still was ready and willing to be duly sworn to administer the goods and chattels of the said Sarah Inman, and to obtain and accept letters of administration, to be granted to him the said William Tucker, of the goods and chattels of the said Sarah Inman, and thereby to constitute himself and become the legal personal representative of the said Sarah Inman; without this, that according to the course and practice of the said High Court of Chancery, and the rules of equity in that behalf, in order to obtain the adjudication of the court in due form upon the validity in equity of the said appointment so made by the Sarah Inman, to pass the equitable right and interest of and in one moiety of the said sum of 1050*l*., according to the tenor and effect of the said last-mentioned appointment, it was or is necessary that letters of administration, with the said will annexed, should be granted to some person or persons, limited so far only as concerns all the right, title and interest of the said Sarah Inman in and to the said

moiety of 1050*l.*, and all interest due and to grow due thereon, which the said Sarah Inman, by virtue of the said indenture in the said plea first
*1063] mentioned, had a right to *dispose of, and had by the said will disposed of accordingly, but no further or otherwise, to the end that such administrator or administrators, with the said last will and testament annexed, but limited as aforesaid, might be made a party or parties to the said suit in Chancery *modo et formâ;* concluding to the country.—*Similiter inde.*

At the trial of the cause before TINDAL, C. J., at the sittings for Westminster after last Michaelmas term,(*a*) evidence was given, in the first instance, on the part of the defendants to the following effect:—

Mr. Chapman and Mr. Ellison, two gentlemen practising at the Chancery bar, stated that, according to the practice of that court, in order to obtain an adjudication on the validity of the testamentary appointment of a married woman, as in this case, it was necessary that letters of administration of her effects, limited to the property appointed, should be obtained from the ecclesiastical court; that such letters of administration, with the will annexed, should be granted in order to establish the testamentary character of the papers, and that such a limited administration, if granted, would be sufficient. But on cross-examination they stated that there would be no objection in the Court of Chancery if a general administration was granted, and that when executors were named in the will of a married woman it would be sufficient for them to obtain probate. On re-examination they stated that a general administration was not required, and that nothing was necessary beyond a limited one; but that the Court of Chancery would be satisfied with such administration as the Prerogative Court would grant.

Dr. Curteis, an advocate in the ecclesiastical court, stated, that where a
*1064] married woman makes a will under *a power of appointment enabling her to appoint a particular fund, and appoints an executor, and he dies, the court will grant letters of administration, with the will annexed, limited to that fund over which her power extends; and that when the interest under the will is sold, the purchaser of that interest is entitled to call for the limited administration, omitting the parties primarily entitled. On cross-examination he stated that the husband or his representatives could not have letters of administration without proof that the wife died intestate; that after the grant of limited administration to another party he or his representatives might have letters of administration cæterorum, but that both could not be granted by the same instrument. On re-examination he stated, that when another party was entitled to the beneficial interest, that party would have a right to the limited administration; that in the present case the defendants would be entitled thereto, and that it was necessary that limited administration, with the will annexed, should be granted to some party. On a resumed cross-examination he stated, that if the executors of the executor of the testatrix in this case were willing to take out general letters of administration, with the will annexed, this might be done, but that as general administrators they would not be entitled to the fund in question, and that the party beneficially interested under the will would be the party entitled to the limited administration; and where the personal representatives of the husband denied the equitable right of the latter, letters of administration, with the will annexed, would be granted to such parties.

(*a*) See 1 Carr. & Marshm. 82.

No witnesses were called on behalf of the plaintiffs, but it was insisted on their part that the issue in the case was on the general question, whether it was necessary, by the practice of the Court of Chancery, that a limited administration should be granted under the *circumstances stated, and that the affirmative of such issue had been disproved. [*1065

TINDAL, C. J., after stating that he considered it was not an issue as to the general practice of the Court of Chancery to *require* a limited administration, but an issue to try whether, according to the practice of the court, a limited administration would be *sufficient* in this particular case, and that upon the evidence the defendants had established their plea, directed a verdict to be found for them; but the learned judge reserved leave to the plaintiffs to move to set it aside and enter a verdict for themselves.

Manning, Serjt., in last Hilary term, obtained a rule *nisi* for a new trial, on the ground that the evidence did not support the plea, or for judgment *non obstante veredicto*, on the ground that the plea alleged, not that the defendants were entitled to administration, but that they wished to have an opportunity of raising that point in some other court.

Channell, Serjt., (with whom was *H. Hill*,) in last Easter term,(a) showed cause. The plaintiffs here contend that they in effect represent John Inman, the husband of the party whose will is in question, as being the executors of his surviving executor. The defendants, on the other hand, claim under the appointment made in the will of Sarah, the wife. The prohibition was originally moved for on the ground that the Ecclesiastical Court could not decide the question whether a feme covert had the power to make a will. But the question raised upon these pleadings is, whether, according to the practice of the Court of Chancery, it is not necessary that *some* probate should be granted of the will in question, in order to enable that court to *determine whether the power to make such will existed; and if it did exist, whether it had been properly pursued. [*1066 That court is clearly the proper tribunal to decide the question whether the husband so acted as to make the deed of appointment operate against him, and also the question whether the power of the wife has been properly executed. And it was clearly established by the evidence that the Court of Chancery will not act in the case unless there be some person before it representing Sarah Inman. The defendants do not set up the right of the Ecclesiastical Court to decide the question as to the validity of the will, but merely its right to grant the probate *valeat quantum*. The defendants have alleged that the Court of Chancery would not act without a limited administration. The substance of this issue is that there must be some one to represent the wife in Chancery, at least to the extent of the estate to be there dealt with; and the defendants having proved the affirmative, are entitled to the verdict, although it was shown that the Court of Chancery would also act upon a general administration *cum testamento annexo*. The defendants proposed to state the *minimum* of duty to be performed by the Ecclesiastical Court in order to satisfy the Court of Chancery—namely, that at least there must be a limited administration: and that was proved—though it was also proved that if more were obtained from the Ecclesiastical Court, that would form no objection in the Court of Chancery, the lesser being contained in the greater.

If the defendants are entitled to the verdict, the next question is whether the plaintiffs can have judgment *non obstante veredicto*. The proceedings in this case originate in the stat. 1 W. 4, c. 21, s. 1, under which the only

(a) Cor. Tindal, C. J., Coltman, Erskine and Cresswell, JJ.

judgment that the court can give is, either that the writ of prohibition do or do not go, as justice may require. Now, justice does not require the writ to issue in this case. If it had been shown that the decision of
*1067] *the Ecclesiastical Court would have been binding in a matter over which the temporal courts have jurisdiction, then the writ should have issued; but it is shown that the decision of that court will leave the question to the ultimate decision of the Court of Chancery, which must decide upon the validity of the appointment by the wife. The only ground upon which prohibition can issue to the Ecclesiastical Court is that it is going to *decide* a point, and to decide it against the temporal law.(a)

Unless the Ecclesiastical Court first grants a probate, the Court of Chancery will not entertain the question as to the validity of the appointment. The result of the authorities upon this point is thus stated in Williams on Executors, p. 45, 3d edit.:(b) "It often occurs that the will of a married woman is made in pursuance of an agreement before marriage, or of an agreement made after marriage for consideration. Wills of married women made under such circumstances fall under the same rules as those made by femes covert by virtue of a power. Although a different rule formerly prevailed, a testamentary appointment of such a nature by a wife cannot now be made available, either at law or equity, without probate. The Ecclesiastical Courts, however, will allow such appointment to be proved without the husband's consent, (the probate being limited to the property comprised in the power,) although their former practice was to require the husband's concurrence before they would admit the instrument to probate. Formerly the Ecclesiastical Courts did not take upon themselves to enter with any great minuteness into the construction of the powers under which wills of this kind were executed, or as to the due compliance with their conditions. But it is now established that the court of probate is bound to
*1068] decide in the *first instance whether the power has been duly executed before it gives the instrument the sanction of its seal. Yet, if the court feel any real doubt on the point, it seems the safer course to admit the paper to probate: inasmuch as the production of such a probate will not alone be sufficient to induce a court of equity to act upon it; for, with respect to other special circumstances which may be required to give the instrument effect as a valid appointment, viz. attestation, sealing, &c., the temporal courts have never been contented with the judgment of the spiritual court: whilst, on the other hand, if the court of probate should reject the paper, its decision would be final; as the court of construction will not proceed to the consideration of the effect of any testamentary paper till it has been proved in the proper ecclesiastical court." That statement is fully borne out by what is said by Lord ELDON, C., in *Rich* v. *Cockell*, 9 Ves. 376; by Lord MANSFIELD, C. J., in *Stone* v. *Forsyth*, 2 Dougl. 707; and by the case of *Ross* v. *Ewer*, Sugd. on Pow. 6th edit. p. 287, cit. 3 Atk. 156, referred to by Lord MANSFIELD, C. J., in *Jenkin* v. *Whitehouse*, 1 Russ. 431. These authorities show that, although the decision of the Ecclesiastical Court established the *fact* of there having been a will, it is worth nothing unless there has been an appointment properly made in pursuance of the power; and upon that fact the Court of Chancery will determine. The defendants will be concluded if the writ issues; the plaintiffs, on the other hand, will not be, if it is refused.

(a) See *Burder* v. *Veley*, 12 A. & E. 233, 4 P. & D. 452.
(b) And see A. 3 E. 3, Itin. Nott. Fitz. Abr. tit. *Devise*, pl. 12.

The learned serjeant then proceeded to argue that the second branch of the rule must fail upon another ground, namely, that the plaintiffs could only claim a right to the consideration of the question upon the ground that they were the legal representatives of John Inman, the husband; it appeared, however, that *his* executors had taken out a *prerogative* probate, but that *the plaintiffs, as the executors of his surviving executor, had only taken out a *diocesan* probate; and that therefore the chain of representation was incomplete. He cited 1 Williams' Executors, 3d edit. p. 231; *Fowler* v. *Richards*, 5 Russ. 39; *Jernegan* v. *Baxter*, 5 Sim. 568; *In the goods of Powell*, 3 Hagg. 195; and *Twyford* v. *Traill*, 7 Sim. 92. But upon this point the court gave no opinion. [*1069

Manning, Serjt., in support of the rule, contended upon the last point, that the defendants ought to show by distinct allegations that the probate was wrong. *Omnia præsumuntur ritè esse acta.* The *prerogative* probate would operate as a *diocesan* probate until repealed, or *bona notabilia* out of the diocese may have been reduced into possession between the two probates. But unless the defendants' title to the interference of the Ecclesiastical Court be made out, they have no right to compel even a tortious holder to bring the document into the Ecclesiastical Court.

As to the general question, it is true that if the parties have any equity, the Court of Chancery will administer it, and the parties must be before the court to enable it to do so. But the first stage is to show that the Ecclesiastical Court has jurisdiction to entertain the case and admit the will to proof; and that question will depend upon the due creation of the power to Mrs. Inman to make a will. This point is to be determined by the temporal courts generally, and not exclusively or primarily by courts of equity. The question whether the assent of the husband was given, is for the temporal courts. [COLTMAN, J. Can a married woman make a will merely with the assent of her husband?] It is submitted that she can. [TINDAL, C. J. Can she do so at common law? In Com. Dig. tit. *Devise*, (G.,) which is headed *Who may devise*, a *married woman is not mentioned.(*a*)] A married woman might always make a bequest of chattels with the consent of her husband.(*b*) [COLTMAN, J. It is certainly laid down in Blackstone's Commentaries that a married woman, by her husband's license, may make a testament.(*c*)] [*1070

The fallacy upon which the whole of the argument on the other side turns is this, that because the grant of a probate is necessary, in order to give the Court of Chancery jurisdiction to examine into the rights of the parties, therefore the Ecclesiastical Court must be allowed to inquire whether the power to make a will has been well executed or not. The grant of probate is not a mere form to enable a party to try his right in equity. The question in the case is, whether the instrument of 1802, giving the power to Mrs. Inman to make a will, was properly executed, it not having

(*a*) *Sed vide Ibid.* Devise (H.) headed, *Who not*, tit. (H. 3,) *Feme covert*; where it is said, "If an husband covenants or agrees before marriage, that his wife shall make a will, though it be a void will, the disposition by it shall be good. R. Cro. Car. 219, 376, 597, R. Cro. El. 27." And again, "So if a wife devises by will, and the husband assents to it after her death, it will be good. Semb. 1 Rol. 608, l. 23, R. 1 Mod. 211." But the last of these authorities has no reference to an assent of the husband after the wife's death.

(*b*) See the authorities on this subject collected in 1 Wms. Executors, 43, *et seq.* 3d. ed.

(*c*) 2 Bl. Com 498, citing Dr. & St. dial. 1, c. 7. But there does not appear to be anything in the chapter cited to authorise that position. The learned commentator adds, "but such license is more properly his assent; for unless it be given to the particular will in question, it will not be a complete testament, even though the husband beforehand hath given her permission to make a will." (Citing Bro. Abr. tit. *Devise*, 34, 2 Stra. 891.)

been executed by her husband; and that question is clearly one for the common law courts. If any other circumstances existed which gave such a power to the wife, such as the assent of the husband, those facts should have been alleged by the defendants, and this court would then have decided upon their validity. But they have alleged nothing to oust this court
*1071] of its jurisdiction to issue a prohibition. *[COLTMAN, J. But what has the Ecclesiastical Court done as yet in excess of their jurisdiction? They have merely issued a citation. If Mrs. Inman had the assent of her husband, she might make the will, and they may then grant the probate.] But if the power to make the will is contested, they cannot decide on the validity of the power. [COLTMAN, J. How is the assent to be tried? Cannot they inquire into that?] The cases cited on the former argument(*a*) show that they cannot, and that the question is one exclusively for the common law courts. [COLTMAN, J. But the common law courts cannot grant the probate.] Two steps are required; the first is to inquire if the married woman had the power to make a will. Then, if that power be established, either by the assent of the interested parties in not contesting the will, or by the decision of the common law courts in refusing a prohibition, or in granting a consultation, the Ecclesiastical Court may proceed to grant probate. [ERSKINE, J. Although the deed of 1802 was not executed by the husband, the defendants contend that his conduct was equivalent to an execution by him.] Then that fact ought to have been so pleaded that the plaintiffs might have traversed it, the assent or non-assent of the husband being a question of fact. They might have pleaded that, though John Inman did not execute the deed, he acted upon the provision enabling him to dispose of the surplus rents, and thereby assented to the power contained in the deed for his wife to make a will. [ERSKINE, J. Would not that have been pleading evidence?] Perhaps it might; but the plaintiffs might have demurred generally, and have thus raised the question. Or the defendants might have pleaded the husband's assent broadly, and the plaintiffs might have traversed the allegation. [*Channell*,
*1072] Serjt. The defendants *contend, not that there was an assent by the husband, which would render the power to make a will good *at law*, but that there were circumstances sufficient to make it a good power *in equity* against the husband. It would have been of no use therefore to plead that of which this court could take no useful notice. The defendants say that, according to the rules of equity, they were entitled to relief; and the plaintiffs have admitted this allegation by not traversing it.] The plea states that "the defendants had good grounds for exhibiting their bill of complaint," not that they were *entitled to relief*. [ERSKINE, J., referred to *Rex* v. *Bettesworth*, 2 Stra. 891, 1111, 1118.] But supposing John Inman the husband to have assented to the making of a will, yet as there was no assent by him *as executor* to the bequest to the nephew, the interest would pass to Tucker and Whitley, the personal representatives of both husband and wife. *Cur. adv. vult.*

TINDAL, C. J., now delivered the judgment of the court.

The plaintiffs in case declared in prohibition, and the declaration stated a marriage settlement, in which certain hereditaments were conveyed by one George Inman, clerk, the settlor, to trustees in fee, upon the trusts therein mentioned, with a power of appointment by deed to the husband, (the settlor,) amongst the children of the marriage; and also stated a sub-

(*a*) Anon. 1 Mod. 211; *Brook* v. *Turner*, 2 Mod. 170; *Jenkin* v. *Whitehouse*, 1 Burr 431; *Scammell* v. *Wilkinson*, 2 East, 552. Vide antè, vol. i. p. 527, 528.

sequent deed made in exercise of such power of appointment, whereby the husband appointed (amongst other things) one moiety of the settled premises to the use of such person or persons as Sarah Inman (one of the children of the marriage, and at that time the wife of John Inman) should by deed or will appoint; and in which deed of appointment was contained a power of sale of the settled hereditaments, and a direction to the trustees(a) to lay out the *nett proceeds of such sale in government or other good security, and to pay the proceeds thereof into the hands of [*1073
Henry Inman and Sarah Inman, equally between them absolutely, but not giving any power of appointment of the proceeds to Sarah; and the declaration further proceeded to state the sale of the said hereditaments and the placing of the money obtained thereby in the names of the said trustees, and to set out a deed bearing date the 24th of February, 1802, expressed to be made between one George Inman, the eldest son of the marriage, of the one part, and other trustees (the said John Inman, and one John Whitley) of the other part, but which was not executed by the last-mentioned trustees, by which George Inman, the son, in order to carry into effect the intention of the settlor, as expressed in his deed of appointment, directed and declared that the trustees should stand possessed of the said proceeds of the sale, (amounting to 1050*l*.,) as to one moiety thereof, to the use of such person or persons as Sarah Inman, the wife, should by deed or will appoint, and in default of appointment to George Inman, the son; and the declaration then stated that Sarah Inman died in the lifetime of her husband John Inman, having, before her death, executed an instrument purporting to be a testamentary appointment of her said moiety, whereby she bequeathed the interest to her husband for his life, and, after his death, the principal to her nephew John Inman; and the declaration lastly proceeded to allege that William Tucker, one of the plaintiffs, as one of the next of kin of John Inman, the husband,(b) had applied to the Prerogative Court of Canterbury for letters of administration to the goods and chattels of Sarah Inman, for the purpose of administering the same amongst the residuary legatees under the will of John Inman, her husband; and that thereupon the defendants cited the plaintiffs unto the *Prerogative Court, requiring them to bring into court the original will of the said Sarah Inman, and to show cause [*1074
why letters of administration, with the will annexed, of the goods of the said Sarah Inman, deceased, should not be granted to them, the defendants, as purchasers of the interest given by such will of the said Sarah to her nephew John Inman; and the plaintiffs then suggesting in their declaration that, by the laws of this realm, a feme covert cannot make any will or testament, or any instrument in the nature of a will or testament, without having authority from her husband for that purpose, which it is alleged the said Sarah Inman had not; and that the determining whether such feme covert had such authority is not matter of ecclesiastical cognizance, but belongs to the courts of common law, the plaintiffs pray Her Majesty's writ of prohibition from this court, directed to the proper judge of the Prerogative Court, to prohibit that court from proceeding therein.

To this declaration the defendants put in a plea stating their title to the sum bequeathed by the will of the said Sarah Inman by their purchase of the same, and that they were about to file a bill in Chancery for the pur-

(a) *i. e.* to Inman and Whitley, trustees in the now reciting deed of 1795, not the trustees of the settlement of 1760.

(b) As one of the executors of the surviving executor of that John Inman, suprà, 1055, 1065; infrà 2078 (b).

pose of enforcing their equitable right thereto; "and that by the course and practice of the said court, in order to obtain the adjudication of the said court upon the validity in equity of the said appointment so made by the said Sarah Inman, it was and is necessary that letters of administration with the will annexed should be granted to some person or persons limited so far only as it concerns all the right, title and interest of her the said Sarah Inman in and to the sum of money which she, by virtue of the indenture in the plea first mentioned, had a right to dispose of, and had, by the said will, disposed of accordingly; but no further or otherwise, to the end
*1075] that such administrator, with the said *will annexed, but limited as aforesaid, might be made a party to the said suit in Chancery;" and the plea then alleged the refusal of the plaintiffs to propound the will for the purpose of such limited administration in order to prevent the defendants from proceeding to enforce their rights.

To this plea the plaintiffs put in a replication, concluding with a formal traverse of the rule and practice of the Court of Chancery, as above set forth in the plea, on which traverse the issue was joined.

At the trial before me the jury found a verdict for the defendants; and as to that part of the plaintiffs' motion which seeks to enter the verdict for the plaintiffs, upon looking at the form of the traverse, and comparing it with the evidence at the trial, we are satisfied that the verdict was properly found in favour of the defendants. There was very strong evidence to show that, in the case of a will made by a married woman, either with the assent of her husband or under a power, an administration limited to the subject-matter of the bequest contained in such will, is the usual and proper form of administration; and that such administration is required by the practice of the Court of Chancery before they will allow any party to claim any interest under such will. It appeared undoubtedly that if the spiritual court were to grant a larger and more general administration, the Court of Chancery would not be dissatisfied therewith, nor, on that account, refuse to entertain the suit; but at the same time that such court would require, at the very least, the limited administration, and would not allow the suit to proceed without it. But the real meaning of the plea, when construed with reference to the subject-matter of inquiry, is, that it is necessary, *at the very least*, that a restricted administration should be taken out, and that an administration with *less* extended power would not
*1076] be sufficient. And that *proposition was fully borne out by the evidence at the trial.

With respect to the motion for judgment *non obstante veredicto*, such prayer can only be granted where the plea, though admitted to be true in fact, discloses no legal answer to the declaration. The question, therefore, in this case is, whether the plea has disclosed such matters of fact as will bring the case within the principle of those decided cases in which the spiritual court has for a very long period of time been permitted to grant, and has been in the habit of granting, a limited administration to the will of a married woman.

The general rule undoubtedly is, that the spiritual court has no jurisdiction to grant administration in the case of the testament of a married woman, unless such testament is made with the license or consent of her husband. And this rule is so well known and admitted in the courts themselves that a will of a married woman, made without the license of the husband, would, by the practice of those courts, be considered as a mere nullity, and would not be admitted to probate; *Bransby* v. *Haines*, Sir

George Lee's Reports, 120. But the rule that the spiritual court shall not exercise jurisdiction in the case of a married woman's will is admitted in practice to be subject to many exceptions. First, as already stated, the rule does not apply where the will is made with the assent of the husband, in which case the spiritual court is allowed to entertain the question whether made with his assent or not. Another exception is, where the wife takes in character of executrix, and her will is confined to matters and things which she takes in that character, in which case she may make the testament without the husband's assent, and the ecclesiastical court may grant administration. A third class of exceptions is, where *the will of a married woman is made in pursuance of an agreement [*1077 with the husband before marriage, or an agreement with consideration after marriage. These are acknowledged exceptions, as to which the ecclesiastical courts have been accustomed for a very long period to inquire into the facts of each case, whether there was an assent of the husband, whether the will is made in conformity with the power, whether there exists such agreement, and the like; and, when satisfied, to grant a limited administration, upon the ground that those questions could not be entertained or litigated in a court of law or equity, without administration having been first obtained in a spiritual court: see the authorities collected in Williams' Law of Executors, vol. i. p. 43, *et seq.* 3d edit.

The question therefore is, whether the ground upon which the defendants rest their claim to a limited administration in their plea, does not fall substantially within the principle of some of those acknowledged exceptions; and we think there is reasonable ground for holding that it falls within such principle. The defendants rest their claim to the right of administration with the will annexed of Sarah Inman limited as before mentioned, upon the ground that they shall be able to prove that her husband, who survived her, so acted and conducted himself in her lifetime, and, after her death, with respect to the provisions of an indenture of the 24th of February, 1802, that a court of equity would deem him to have elected to take under the provision of that deed. And we think, that whether the facts are to be taken as amounting to an election strictly and properly so considered, or as amounting to an implied assent on the part of the husband to his wife's making her will, in either case it is within the spirit and meaning of that exception to *the general rule, which holds that a will made with the husband's assent, is provable in [*1078 the spiritual courts. And we think further, that when it is alleged upon the pleadings, and is found by the verdict, that the defendants could not in any way set up or litigate their claim before the Court of Chancery, without a limited administration, if we were to grant the present prohibition, it would, in effect, amount to a denial of justice.(a)

After all, the allowing this limited administration to issue is a matter of little real consequence to the interests of the parties. The money being

(a) *Quære* whether, supposing the defendants to have had any right, they might not have pleaded that right as an answer at common law to the declaration in prohibition. This point, upon which the rule nisi for arresting the judgment was obtained, suprà, 1065, and was attempted to be supported, suprà, 1071, 1072, does not appear to be adverted to directly or indirectly in the judgment.

The object of the motion for a prohibition was, to secure to the parties the benefit of a cheap and speedy decision in a court of law, of the common law question as to the existence of assent on the part of the husband,—whether that assent was to be evidenced by writing, or by acts done,—instead of their embarking in a chancery suit. This object the defendants succeeded in defeating.

vested in the names of trustees, whether the plaintiffs, as next of kin(a) of the husband, take administration of the wife's assets, or the defendants take limited administration, with the will annexed, to the wife; in either case the money cannot be reached without the intervention of the Court of Chancery; and the question, whether the assent of the husband has been given, or whether the husband has made his election to take under the deed, and has thereby waived his right to object to his wife's power to make a testament, may and will be as thoroughly contested and investigated before that court as if the administration had not been granted.

For the reasons which we have given, we think this rule must be discharged.

Rule discharged.

*1079] *Ex parte TUCKER, in the Matter of INMAN.

The party in whose favour judgment is given in an action of prohibition is entitled to th costs of the application for a writ of prohibition without obtaining a rule for such costs.

Channell, Serjt., applied for a rule nisi that the original rule herein, for a writ of prohibition, which had been obtained in Easter term, 1840, and which had been enlarged in Trinity term following,(b) should be discharged with costs. He referred to the statute, 1 W. 4, c. 21, s. 1.(c)

*1080] **Manning*, Serjt., contrà, submitted that if the defendants were entitled to costs under the statute, the court need not interfere.

The court, however, granted the rule nisi; but the matter was ultimately referred to a judge at chambers. And the parties attended before COLTMAN, J., on the 7th of December, when the learned judge made an order (which was afterwards made a rule of court) discharging the rule of Easter term, 1840. The defendant's costs of all the proceedings were afterwards taxed and allowed under the statute without a rule.

DODSON *v.* WENTWORTH, Esquire.

Bales of flax sold by A. in London to B. residing at Mickley Mill, are addressed to "B. Mickley," and are shipped for Hull under a bill of lading making them deliverable "at the port of Boroughbridge for B., Mickley Mill." The bales are forwarded from Hull to Boroughbridge by water-carriage, and are deposited there in the warehouse of C., a party uncon-

(a) Suprà, 1073(a).

(b) Antè, vol. i. p. 519.

(c) By which, after reciting "that the filing a suggestion of record on application for a writ of prohibition was productive of unnecessary expense, and the allegation of contempt in a declaration in prohibition filed before writ issued, was an unnecessary form, and that it was expedient to make some better provision for payments of costs in cases of prohibition;" it is enacted, that "it shall not be necessary to file a suggestion on any application for a writ of prohibition; but such application may be made on affidavits only; and in case the party applying shall be directed to declare in prohibition before writ issued, such declaration shall be expressed to be on behalf of such party only, and not, as heretofore, on behalf of the party and His Majesty, and shall contain and set forth, in a concise manner, so much only of the proceedings in the court below as may be necessary to show the ground of the application, without alleging the delivery of a writ or any contempt, and shall conclude by praying that a writ of prohibition may issue; to which declaration the party defendant may demur, or plead such matters by way of traverse or otherwise, as may be proper to show that the writ ought not to issue, and conclude by praying that such writ may not issue; and judgment shall be given that the writ of prohibition do or do not issue, as justice may require; and the party in whose favour judgment shall be given, whether on non-suit, verdict, demurrer or otherwise, shall be entitled to the costs attending the application and subsequent proceedings, and have judgment to recover the same; and in case a verdict shall be given for the party plaintiff in such declaration, it shall be lawful for the jury to assess damages, for which judgment shall also be given; but such assessment shall not be necessary to entitle the plaintiff to costs."

the greatest importance to the decision of the question whether or not the transit is at an end. In this case the goods, when warehoused at Boroughbridge, were in an ambiguous situation; the character of which would be determined by a very slight act on the part of the vendee. They are addressed to him at Mickley Mill, thirteen miles from Boroughbridge. [MAULE, J. By the bill of lading they are to be delivered "at the port of Boroughbridge unto Mr. Thomas Wetherald, Mickley Mill." That must mean of Mickley Mill. It is mere description.] When the goods arrive at Boroughbridge, the vendee gives no direction respecting them; he is not liable for warehouse rent or wharfage dues; and he does not exercise any act of dominion over them. Under these circumstances the goods cannot be said to have come even to his constructive possession. The Ouse Navigation Company cannot be considered as his agents, so as to bring the case within the principle of *Dixon* v. *Baldwen*, 5 East, 175; *Tucker* v. *Humfrey*, 4 Bingh. 516, 1 M. & P. 378, is in point. In that case *the shippers, acting for one G., purchased and paid for with their [*1085] own money, flour at Stockton, which was sent by a vessel to London, and the invoice forwarded to G. A manifest of the flour was also forwarded by the shippers to a wharfinger in London, whose practice it was to deliver goods to the consignee named in the manifest, upon application, and, till application, to keep it on board the vessel; if not applied for before the vessel returned, he landed it, and kept it in his warehouse, to the order of the shipper; if the goods were to be delivered to order, he delivered them to persons producing either bills of lading or the shipper's invoice. G. was in the habit of having flour consigned to him at the wharf, and sometimes sold it on board, sometimes when it was landed, and kept for him in the wharfinger's warehouses. The flour in question arrived at the wharf on the 12th April, but was not landed till the 22d; on the 17th, before any application by G., who had become bankrupt, the flour was claimed under an order from the shippers; and it was held that the flour not having been landed, nor any application having been made by G., the shippers might stop *in transitu*. [TINDAL, C. J. The great distinction between that case and the present is, that there, if the vendee did not apply for the goods, the wharfinger held them to the order of the shippers; but here the warehouseman held them, and would have delivered them, to the order of Weatherald, and not of the plaintiff.] There was nothing here to show any command or control by Weatherald over the goods; the warehouse, in which they were housed, was not his, either actually or constructively, as he was not to pay any rent. [ERSKINE, J. It does not appear that the mere fact of rent being paid would have made any difference; *Hammond* v. *Anderson*, 1 N. R. 69. *James* v. *Griffin* shows that *a mere delivery of goods to a wharfinger, though by the [*1086] directions of the consignee, if the latter does not intend to take possession of them, will not take away the right of stoppage *in transitu*. [MAULE, J. The question is upon whose account the warehousemen held the goods in this case,—it is clear they did not hold them for the Fly-boat Company, as that company were not consulted about the delivery.] The warehousemen are not to be considered as the agents of Weatherald to receive goods on all occasions, because in some former cases goods had been left for him at their warehouse.

TINDAL, C. J. It appears to me that this case falls within the principle laid down in *Dixon* v. *Baldwen*, and that the *transitus* was at an end when the goods were lodged, under the circumstances stated in evidence in the

warehouse of the Ouse Navigation Company at Boroughbridge. The goods, which were shipped in London, on board the Laurel, were, by the terms of the bill of lading, to be delivered at Boroughbridge to Thomas Weatherald, Mickley Mill, near Ripon. The goods were brought in the Laurel to York, and there, in the usual course, transhipped and put on board of boats belonging to the Fly-boat Company, who carry goods from York to Ripon. In passing Boroughbridge, the goods were landed there, and placed in a warehouse belonging to the Ouse Navigation Company, who are totally distinct from the Fly-boat Company. Now it is not immaterial to observe that the warehouse in which the goods were lodged was not the warehouse of the carrier; as some of the cases turn upon the point that the *transitus* is not at an end while the goods remain in the possession of the carrier, not only in the actual course of the journey or voyage, but even while they are in a place of deposit connected with their transmission.
*1087] But the place of deposit here, is the warehouse of a third *party— the Ouse Navigation Company; and then the question comes to this, whether that company are to be considered as the agents of the carriers or of the consignee. Now what is the evidence upon that point? It appears that the Fly-boat Company had been in the habit, for some time past, of receiving and carrying goods addressed to Weatherald, and of landing them at Boroughbridge, where they were put into the warehouse in question, unless Weatherald's carts were there ready to receive them. So that it seems that, *quoad* the *transitus*, the goods were as much delivered to Weatherald, when placed in that warehouse as if they had been at once loaded in his waggons. It further appears that the Ouse Navigation Company did not hold the goods on account, or subject to the control, of the Fly-boat Company, inasmuch as the Ouse Navigation Company delivered them over without any communication from the Boat Company, and according to directions received from Weatherald. This state of facts very closely resembles that in *Dixon* v. *Baldwen*, where it was laid down that the delivery of goods to the appointed agents of the vendee, from whom the agents were to receive orders as to the ultimate destination of the goods, put an end to the right of stoppage *in transitu*. I cannot distinguish that case from the present. In this case it is true no wharfage or warehouse charges were paid by Weatherald to the Ouse Navigation Company; but, though the fact of such a payment is often a material circumstance, it is by no means conclusive. It might be an object with the Ouse Navigation Company to provide such accommodation for parties without charge, as an inducement to them to send goods by the canal, the company considering themselves sufficiently remunerated by the tolls. *Allan* v. *Gripper* is also very analogous to the present case. Goods there were conveyed by a carrier by water, and deposited in *his* warehouse, for the con-
*1088] venience of the *vendee, to be delivered out as he should want them; and the *transitus* was held to be at an end, although it appeared that the carrier claimed to have a lien on the goods. That is much stronger than the present case. For these reasons I think the verdict for the defendant ought to stand.

COLTMAN, J. I am of the same opinion. By the bill of lading the goods are to be delivered at Boroughbridge; and the words "Mickley Mill, Ripon," after the name of the consignee, do not point out the place of destination where the *transitus* is to end: they are merely a designation of the party to whom the goods are consigned. Boroughbridge is clearly the place at which the carriage of the goods is to terminate, and at which

their delivery is to take place. This appears from the bill of lading; and the evidence in the case is consistent with this; as it appears that when the goods arrived at Boroughbridge, they were landed and placed in a warehouse where goods had been in the course of being left for Weatherald. *James* v. *Griffin* was relied upon by the plaintiff, to show that it was competent to Weatherald to refuse to receive them. Possibly that may be; but there is, at any rate, no evidence of any such refusal on his part. In point of honour, he may have been called upon to decline receiving them, knowing the state of his own affairs; but, in point of fact, he did not do so. No question, therefore, can arise as to the effect of any refusal. It seems to me to be the same thing as if the goods had been delivered at the consignee's own premises, without his knowledge, after his insolvency.

ERSKINE, J. The question really is, whether, under the circumstances of this case, the warehouse of the Ouse Navigation Company was to be considered as the warehouse of Weatherald or not. It does not appear *that either the plaintiff or the carriers, the Fly-boat Company, had any thing to do with the warehouse; but it does appear that Weatherald had been previously in the habit of using that warehouse as a place of deposit for goods which were consigned to him. Therefore, according to all the cases, and especially according to *Allan* v. *Gripper*, which is a much stronger case than the present, the *transitus* was at an end, and the consignor had lost his right of stoppage. [*1089

MAULE, J. I am of the same opinion. The goods were shipped by the vendor, and, by the terms of the bill of lading, they were to be delivered to the vendee at Boroughbridge. The duty of the carriers was at an end when they had brought the goods to Boroughbridge, and had delivered them there to the vendee or to some person on his behalf. It appears from the evidence that the vendee had, in effect, appointed the Ouse Navigation Company his agents to receive goods on his behalf. The carriers, therefore, completed their duty by delivering the goods to the Ouse Navigation Company, who were to receive and hold them—not on behalf of the carriers, for the purpose of forwarding them to the vendee,—but on the behalf of the vendee and subject to his order. I think it quite clear that, under all the circumstances, upon the delivery at the warehouse of the Ouse Navigation Company, the right of the consignor to stop these goods was at an end.

Rule discharged.

*EDSALL v. RUSSELL. [*1090

A count in slander, after an inducement that the plaintiff was an apothecary and had attended the defendant's child, stated the words to be, "he killed my child; it was the saline injection, that did it;" *innuendo*, that the plaintiff had been guilty of *feloniously* killing the child by improperly and with gross ignorance, and with gross and culpable want of caution, administering the injection. Plea, that the plaintiff had professed to be an apothecary, and the defendant, upon the faith of his being qualified as such, suffered him to attend the child; and that the plaintiff did *injudiciously*, *indiscreetly* and *improperly*, and contrary to his duty in that behalf, administer a saline injection to the child, who thereupon shortly afterwards died; and that the death was caused or accelerated by the injection:

Held, that the words, as laid, contained a charge of manslaughter, and that the plea, which must be taken to have confessed the words in the sense imputed to them in the count, contained no justification of the words, so understood.

A second count was upon the following words:—"He made up the medicines wrong through jealousy, because I would not allow him to use his own judgment;" *innuendo*, that the plaintiff had intentionally, and from jealously and improper motives, made up the medicines which he had administered to the child in a wrong and improper manner; and that such

medicines were, to the plaintiff's knowledge, unfit and improper to be administered to the child:

Held, that the count was bad, as the words—which were not charged to have been spoken of the plaintiff in his profession,—did not impute any indictable offence.

A third count was upon the following words;—"Mr. P. told me that he (the plaintiff) had given my child too much mercury, and poisoned it; otherwise it would have got well." The plea justified so much only of the words as imputed the giving too much mercury.

Held, bad, inasmuch as the words attempted to be justified were not slanderous.

Case for slander. The first count of the declaration, after the usual inducement as to the plaintiff's good name, &c., stated that, before the committing, &c., the plaintiff had, at the request of the defendant, attended a certain child of the defendant, which child was then ill, sick and disordered, with the view of curing and healing such illness, sickness and disorder; and, that the plaintiff, with the view and intention aforesaid, and with the consent and permission of the defendant, made up and administered to the said child, in a proper and careful manner, and to the best of the plaintiff's
*1091] *knowledge in that behalf, certain medicines, and amongst others, a certain saline injection; that afterwards, and before the committing of the grievances thereinafter mentioned, the said child died of the sickness, illness and disorder aforesaid; that, before and *at the time of the happening of the special damage* to the plaintiff as thereinafter mentioned, *the plaintiff was an apothecary*, and the business of an apothecary then carried on with skill and attention. Yet the defendant, contriving, &c., theretofore, to wit, on, &c., in a certain discourse, &c., falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning the said administering by the plaintiff of the said saline injection to the said child of the defendant, the false, scandalous, malicious and defamatory words following, that is to say, "he (meaning the plaintiff) killed my (meaning the defendant's) child; it was the saline injection that did it," (thereby meaning the said saline injection; and that the plaintiff had been and was guilty of feloniously killing the said child by improperly and with gross ignorance, and with gross and culpable want of caution, and without due regard to the safety of the said child, administering to it the said saline injection.)

Second count—that the defendant, further intending, &c., afterwards, to wit, on, &c., spoke and published the false, &c., words following of and concerning the plaintiff, and of and concerning the said making up and administering by the plaintiff of the said medicines to the said child of the defendant, that is to say, "he (meaning the plaintiff) made up the medicines (meaning the said medicines so made up and administered by the plaintiff to the said child as aforesaid) wrong, through jealousy, because I (meaning the defendant) would not allow him (meaning the plaintiff) to use his own judgment," (thereby meaning that the plaintiff had intentionally, and from jealousy and improper motives, made up the medicines
*1092] *which he had administered to the said child, in a wrong and improper manner, and that such medicines were thereby, to the knowledge of the plaintiff, unfit and improper to be administered to the said child.) By means of the committing of which said grievances thereinbefore respectively mentioned, one Joseph Brookbank, afterwards, and after the plaintiff had become and was an apothecary, and whilst the plaintiff used and carried on the profession and business of an apothecary as aforesaid, and before the commencement of the suit, to wit, on, &c., refused to employ the said plaintiff in his said profession and business of an

apothecary, as he otherwise would have done; whereby the plaintiff had necessarily lost and been deprived of divers great gains, &c.

Third count—that the plaintiff, before and at the time, &c., was an apothecary, and the profession and business of an apothecary used and carried on with skill and integrity. Yet the defendant, further contriving as aforesaid, to wit, on, &c., in a certain other discourse, &c., falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning him *as such apothecary* as aforesaid, the false, &c., words following, that is to say, "Mr. Pilcher told me (meaning the defendant) that he (meaning the plaintiff) had given my child (meaning the said child of the defendant) too much mercury, and poisoned it, (meaning the said child,) otherwise it (meaning the said child) would have got well," (meaning thereby that the plaintiff had, either from ignorance or inattention and want of caution, administered to the said child of the defendant thereinbefore mentioned, such an excessive quantity of mercury that the said mercury acted as a poison, and caused the death of the said child.) By means, &c., concluding with an averment of general damage.

Pleas: fifthly, as to the speaking and publishing the following words in the first count mentioned, that is to *say, "he killed my child. it was the saline injection that did it," *actio. non;* because before the [*1093] speaking and publishing of the several words in the introductory part of that plea referred to, to wit, on, &c., he, the plaintiff, professed himself to be an apothecary, duly entitled and qualified to act as such, and the defendant, on the faith of his, the plaintiff's, being so duly entitled and qualified, and knowing nothing to the contrary, did suffer and permit the plaintiff to attend the said child of the defendant, who was then sick and disordered, for the purpose of administering to the said child such medicines as might, under the circumstances, be proper, and the plaintiff did then *injudiciously, indiscreetly and improperly, and contrary to his duty in that behalf,* administer a certain saline injection to the child of the defendant; and the said child thereupon, and immediately after the aforesaid injection had been administered as aforesaid, was thrown into violent convulsions, and then lost and was deprived of his speech, sight and hearing, and effusion upon the brain and locked jaw then also supervened, so that the aforesaid child shortly after died; and that the death of the said child was then caused and occasioned, or greatly accelerated, by the aforesaid saline injection so administered to him by the plaintiff as aforesaid; wherefore the defendant did afterwards, to wit, on the day and year in the first count mentioned, speak and publish the said words of and concerning the plaintiff in the introductory part of that plea referred to, as he lawfully might for the cause aforesaid. Verification.

Sixth, as to the speaking and publishing so much of the words in the second count mentioned as imputes to the plaintiff the having administered to the child of the defendant improper medicines, *actio. non;* because before the speaking and publishing, &c., he, the plaintiff, professed himself to be an apothecary, &c., (as *in the fifth plea;) and the plaintiff did [*1094] then improperly, and contrary to his duty in that behalf, administer to the aforesaid child of the defendant, divers large quantities of medicine, the same being then of an injurious nature and unfit for the complaint under which the said child then suffered, as in the said second count mentioned; wherefore the defendant did afterwards, to wit, on, &c., speak and publish, &c. Verification.

Seventhly, as to the speaking and publishing of so much of the words in

the last count mentioned, as imputes to the defendant the having given to the aforesaid child too much mercury, *actio. non;* because before the speaking and publishing, &c., the plaintiff professed, &c., (as in the fifth plea;) and the plaintiff did then wrongfully, &c., administer to the said child of the defendant divers large quantities of mercury, to wit, fifty grains, the same being an excessive quantity thereof, having reference to the then state, condition and disorder of the said child; wherefore the defendant did afterwards, to wit, on, &c., speak and publish, &c. Verification.

Demurrer to the fifth plea, assigning for causes—that the said fifth plea was no answer to the first count, or to the speaking and publishing of the words therein mentioned, in the sense and meaning therein and thereby imputed; but that the said fifth plea assumed to answer the words to which it was pleaded in a different sense from that in which in the first count they were alleged to have been spoken; that the defendant could not, by the rules of pleading, sever and disjoin the sense and meaning imputed in and by the *innuendo* therein contained from the words themselves, to which that *innuendo* was annexed; that the first count charged the defendant with having imputed to the plaintiff the crime of manslaughter by administering certain medicines with gross ignorance and gross want of caution; whereas
*1095] the *said fifth plea did not justify such charge, but set up as answer only the alleged circumstance of the said medicines having accelerated the death of the child therein mentioned, &c.

Demurrer to the sixth plea, assigning for causes, that it was not pleaded to, nor did it assume to justify, the words mentioned in the second count in the sense and meaning in which they were therein alleged to have been spoken; that the charge in the said second count mentioned was not divisible, and the defendant could not, by the rules of pleading, assume to answer a part thereof only; that the said sixth plea did not in any way justify the speaking of the words in the said second count mentioned, or the complaint of the plaintiff therein contained; and that such complaint could not be split and severed in the mode attempted in and by the said sixth plea, &c.

There was a similar demurrer to the seventh plea, assigning also for causes, that the complaint of the plaintiff in the said last count was, not that the defendant spoke and published that the plaintiff had given to the child of the defendant too much mercury, but that the defendant falsely spoke and published that the plaintiff gave to the said child of the defendant so much mercury that the said child was poisoned; that the said last plea did not confess that the words mentioned in the introductory part of it were spoken of and concerning the plaintiff as such apothecary as therein mentioned, &c.

Joinder in demurrer.

Channell, Serjt., for the plaintiff. It is perhaps intended to be urged as an objection to the first count, that it is not stated therein that the plaintiff was an apothecary at the time he administered the saline injection to the defendant's child; but such an averment was not necessary, as the words
*1096] impute a distinct charge *of manslaughter. [*Talfourd*, Serjt., for the defendant, intimated that he should not raise any objection to the first count.] Then the fifth plea contains no answer to that count. It justifies using the words in a sense different from that attributed to them by the *innuendo*. If the words were not used in the sense imputed by the plaintiff, the defence would be open to the defendant under the general issue; *Mounteney* v. *Watton*, 2 B. & Ad. 673.

The sixth plea to the second count attempts to justify only a portion of the words which does not charge the plaintiff with any crime punishable by law. It may be argued indeed that the whole of the words in the second count do not charge any such crime; that the words therefore are not actionable *per se*, and that there is no special damage of which the court can take notice. But it is submitted that it does charge an offence of which the law will take cognizance; for it states in substance that the plaintiff knowingly and wilfully made up and administered to the child wrong medicines. It is true it is not stated in that count that the child died in consequence. [TINDAL, C. J. It is not even said that the child got worse. MAULE, J. For anything that appears, it may have got better. The administering a wrong medicine even with a wrong intention, may have done no harm; for the child's condition may have altered, and the medicine may have done good. There is no distinct charge, indeed, of any administering in the second count; it speaks only of a making up of the medicine.] It is submitted that, taking the *innuendo* and the introductory averments together, the second count does charge the plaintiff both with the making up a wrong medicine and administering it. [COLTMAN, J. Would that be a crime punishable at law? How could the party be indicted for it?] Perhaps technically it might be treated as an *assault, though the patient consented; *Rex* v. *Rosinski*, 1 Moo. C. C. 19. If death had ensued from a wilful, or even a negligent, administering of a wrong medicine, the plaintiff would have been indictable for manslaughter; an attempt, therefore, to commit that offence would be a misdemeanor; or even an attempt to commit a misdemeanor is a misdemeanor, *Rex* v. *Meredith*, 8 C. & P. 589. The wilful administering of a wrong medicine is therefore indictable, though death way not be the consequence. The direct consequences of an act cannot be the proper criterion of its criminality. [MAULE, J. There is no averment of any intention to do mischief. A warehouseman, who carelessly lets fall a bale of goods into the street, whereby a passer-by is killed, might be indicted for manslaughter; but would he be indictable at all, if no one was passing by, and no harm was done by the bale?] Probably not; but here, an intentional breach of duty is charged. A wrong administering is alleged, in a case where the law requires competent skill; and that amounts to the allegation of a wrong. [*1097

The seventh plea does not profess to answer the gist of the charge in the third count, which is a charge of poisoning; and it is bad, as giving the words a different sense from that laid in the *innuendo*.

Talfourd, Serjt., for the defendant. The words in the first count are sufficiently justified in the fifth plea. They amount to no more than charging the plaintiff with causing the child's death by administering the saline injection. [TINDAL, C. J. The words are "he killed my child." The word killed of itself might be of doubtful import, but as explained by the *innuendo*, it means a felonious killing. And this is admitted by the fifth plea.] A justification may be good without *reference to the sense ascribed to the words by the *innuendo*; *Cromwell's case*, 4 Co. Rep. 12,b, where it is said, "*sensus verborum ex causâ dicendi accipiendus est, et sermones semper accipiendi sunt secundunt subjectam materiam;*" and again, "although he (the defendant) varies from the plaintiff in the name and quality of the words, yet it is no cause to drive him to the general issue; as in maintenance, the plaintiff charges the defendant with unlawful maintenance, the defendant may justify by reason of a lawful [*1098

maintenance." [TINDAL, C. J. Cromwell's case was an action for *scandalum magnatum*, in which it was not necessary to allege the exact words.] If the words do impute a felony, they are justified by the plea. For it would be manslaughter to administer a medicine so indiscreetly that death was occasioned thereby; *Rex* v. *St. John Long*, 4 C. & P. 398, 423.

The second count is clearly bad, as the words there alleged do not charge any offence punishable by law. No indictment could be maintained on such a charge. If that count is considered good, it is submitted that the sixth and seventh pleas are also good, as it is not necessary to justify the whole of the slanderous matter; *Clarkson* v. *Lawson*, 6 Bingh. 266, 587, 3 M. & P. 605, 4 M. & P. 356. [MAULE, J. No cause of complaint is admitted by those pleas, unless they are considered as admitting that it is a cause of action to charge the knowingly administering of improper medicines.]

Channell, Serjt., was heard in reply.

TINDAL, C. J. The objection raised to the first count in the declaration has not been insisted on. The words alleged to have been spoken, as explained by the *innuendo*, clearly amount to a charge that the plaintiff
*1099] had been guilty of manslaughter, in causing the death of the *defendant's child by administering an injection with gross ignorance, and with culpable want of caution. Then the question is, whether the answer set up by the fifth plea is sufficient, whether it confesses and avoids the use of the words in the sense suggested by the plaintiff. I think the defendant must be taken to admit that he used the words in the sense imputed by the plaintiff, that is, as conveying a charge of manslaughter. Now to justify such a charge, it is not sufficient to show mere want of care and caution; there must be gross negligence and want of that degree of skill which every one, who undertakes the exercise of any particular art or profession, is bound to bring to each particular case. But all that the plea here charges is, that the plaintiff "injudiciously, indiscreetly, and improperly, and contrary to his duty," administered the saline injection; and "that the death of the child was caused and occasioned, or greatly accelerated, by the aforesaid saline injection." Now this is no more than a simple statement of, at most, want of judgment on the part of the plaintiff; and does not amount to the crime with which the defendant has charged him. The plea is therefore bad as confessing the use of the words in the sense imputed to them by the plaintiff, and not avoiding or justifying them in the same sense, by showing the truth of the charge.

I have had considerable doubt whether the words alleged in the second count amount to the charge of a crime, or a legal offence. Perhaps, by construing them very closely, they might be considered as approximating to a criminal charge—but that is not sufficient; for where a party makes a charge of slander, it is for him to show that the words bear a slanderous sense. Upon the whole I do not think that the words in the second count convey any charge of an indictable offence. The words are, "he made up
*1100] the medicines wrong through jealousy, *because I would not allow him to use his own judgment." There is no *innuendo* that the defendant meant to impute that the medicines occasioned any injury to the child; so that whether they were noxious or perfectly innocent is left entirely in doubt. An indictment for *mala praxis* could not be supported without showing that there had been gross and culpable negligence, or that the party knew that great mischief would be likely to result from what he

did, or from the medicines he was about to exhibit. I think, therefore, that the defendant is entitled to judgment on the second count.

As to the third count, the charge contained in it is either negligence or want of proper knowledge of medicine. No objection is made to this count. In the plea to it, (the seventh,) the defendant does not sever one distinct portion of the slander from another, and profess to answer such portion, as in *Clarkson* v. *Lawson;* but he abstracts certain words found in the third count, and only professes to answer the charge conveyed by those words, namely, the administering of an excessive quantity of mercury, but not such an excessive quantity as poisoned the child. The plea is bad, therefore, as neither confessing nor avoiding the alleged slander.

Upon the whole, therefore, the plaintiff is entitled to judgment on the demurrers to the fifth and seventh pleas, and the defendant, on the demurrer to the sixth plea, by reason of the insufficiency of the second count.

COLTMAN, J. I am of the same opinion. *Cromwell's case*, upon which it is sought to support the fifth plea, is very different from the present. In that case the court could see that the words were not used in the sense charged; but here the defendant must be taken to admit that he imputed felony to the plaintiff; and all that he alleges in his plea to justify that charge is, that *the plaintiff treated the child injudiciously. As to the second count, I cannot see that any thing was imputed which could legally subject the plaintiff to a criminal charge, and the court cannot add to the meaning of the words. [*1101

ERSKINE, J. I also am of opinion that the fifth plea is no answer to the first count, which is admitted to be good, as containing a charge of manslaughter. The plea must be taken to confess the speaking of the words in the sense attributed to them by the plaintiff; and it justifies the use of them, because the plaintiff had injudiciously, indiscreetly, and improperly, and contrary to his duty, administered a certain medicine to the defendant's child, by means whereof it died. The words impute felony; but the plea shows nothing to justify such a charge. In *Cromwell's case* it was shown that the words were not spoken in the sense imputed by the declaration. There is nothing in the plea to rebut the interpretation which the plaintiff had given to the words by his *innuendo*. I think, therefore, the plea is bad.

The second count does not show that the defendant meant to impute any intention to injure the child by administering the medicines, or that any injury resulted from administering them. To make this a good count, some fact should have been stated showing that the plaintiff was liable to an indictment.

There is no objection to the third count, and I agree that the plea to it is bad, as affecting to justify only so much of the words charged in that count as does not amount to a cause of action.

MAULE, J. I am of the same opinion. As to the first and third counts, it is not necessary to add any thing to what has already fallen from the court.

I also think the second count bad. It only states that *the defendant charged the plaintiff with making up the medicines wrong, [*1102 through jealousy; and the *innuendo* is, that the defendant thereby meant that the plaintiff had intentionally, and from jealousy and improper motives, made up the medicines which he had administered to the child in a wrong and improper manner. And I am disposed to think that the charge of

making up the medicines, coupled with the *innuendo*, may in effect amount to a charge of *administering* the medicines. But that is all. It is not said that the plaintiff did, or intended to do, any harm to the child; and if no harm was either done or intended, I do not see how it would be an offence to make up and administer medicines in a wrong and improper manner. A wrongful act, without any intention to injure, and where no injury results from it, is no offence. It has been argued that the administering of medicines improperly might be considered as an assault; but I cannot agree to that as a general position; as the administering does not necessarily imply any personal contact.

With regard to the fifth plea, how does it profess to answer the words alleged to have been spoken in the first count, amounting to a charge of felonious killing? It does not even profess to answer them in the sense in which they are used; and upon that ground it is clearly bad. Indeed, as it is pleaded, it does not set out any thing contained in the first count, which amounts to a cause of action; and it would, in my opinion, be bad upon that ground. The rule in *Cromwell's case*, it may be observed, is not very consonant to the rule of pleading in modern times. The plea there seems to be of that species which is considered to give implied colour. But the plea in this case is of a very different character. It professes to justify a charge of manslaughter by administering improper medicine. It alleges merely a want of judgment and discretion on the part of
*1103] the *plaintiff. But an injudicious and indiscreet administering of medicine will not make a man guilty of manslaughter. There must at least be gross negligence on his part; and the plea does not allege that. It is therefore, I think, clearly bad.

The seventh plea is also, I think, bad. It merely selects a part of what is charged by the words set out in the third count, namely, the giving of too much mercury, and is pleaded to that. There might be nothing in that amounting to an offence; and it appears to me that a defendant in an action for defamation cannot pick out of a slanderous sentence certain words, which have no slanderous effect, and justify them alone. It is not stated in the plea that any wrong was done in reference to the then state of the child.

I agree with the rest of the court, therefore, that judgment should be given for the plaintiff upon the demurrers to the fifth and seventh pleas, and for the defendant upon the demurrer to the sixth plea.

Judgment accordingly.(*a*)

(*a*) The judgment for the defendant though founded upon pleadings terminating in a demurrer and joinder, would be expressed to be, in respect of the insufficiency of the count and not in respect of the sufficiency of the plea as asserted by the defendant in his joinder in demurrer.

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*1104] *IN THE HOUSE OF LORDS.

(In Error.)

JONES *v.* WAITE.

A promise to pay money if the promisee will execute a deed of separation between himself and his wife, is not void for illegality of consideration.

ERROR, upon a judgment in the Exchequer Chamber, affirming a judgment of the court of Common Pleas.

The declaration stated that, on the 19th of October, 1833, Jones, the

defendant below, signed a memorandum in writing, whereby he agreed to pay Waite, the plaintiff below, 160*l.* by eight half-yearly payments, towards Horne and Gate's demand of 366*l.* 4*s.* 9*d.*, Waite taking the whole of such demand on himself; and to pay 20*l.* towards liquidating certain outstanding debts, and 220*l.* towards certain household expenses, one-half at Michaelmas day then next, and the other half at Lady-day, 1835; and by the said memorandum it was stated that Jones agreed to the above in consideration of Waite's executing a certain deed of separation between Waite and his wife, and agreeing to pay H. and G. the outstanding debts and the household expenses in full. Mutual promises. Averment: that Waite, confiding in the agreement, was induced to, and did execute the deed of separation; and agreed to pay H. and G. their said demand of 366*l.* 4*s.* 9*d.*, and the said outstanding debts and household expenses, in full, and then took upon himself the payment of the said demands, debts, and expenses; whereof Jones had notice; yet Jones neglected and refused (although often requested so to do) to make the first payment of the said sum of 220*l.*, so agreed to be paid by the defendant towards the household expenses, which first payment thereof, amounting to a certain sum of money, to wit, 110*l.* under and by virtue of the said memorandum *became due, and ought to have been paid by Jones, at Michael- [*1105
mas day last, and the same still remained wholly unpaid; and Waite, by reason thereof, was forced and obliged to pay the same out of his own moneys.

Pleas:—first, the general issue; secondly, that at the time of the signing by the defendant of the memorandum, and before and at the time of the commencing of this suit, the plaintiff was solely liable to make to H. and G. the payments, the agreement by the plaintiff to make which was by the memorandum stated to be in part the consideration for Jones's agreeing, as was alleged; and that Waite was at the time of the signing by the defendant of the said memorandum, and before and at the time of the commencing of this suit, solely liable to pay the said expenses and outstanding debts in full, the agreement by the plaintiff to pay which debts in full was by the said memorandum stated to be in part the consideration for Jones's agreeing, as was alleged. Verification.

Special demurrer to the second plea for duplicity.

The demurrer was argued in the court of Common Pleas in Easter term, 1835, before TINDAL, C. J., GASELEE, J., VAUGHAN, J., and BOSANQUET, J., when that court unanimously held that there was nothing upon the face of the record to show that any part of the consideration for Jones's promise was illegal, 1 New Cases, 656, 1 Scott, 730, Hodges, 166.

Jones having brought a writ of error in the Exchequer Chamber, the errors were argued on the 4th of February, 1836, before Lord DENMAN, C. J., Lord ABINGER, C. B., LITTLEDALE, J., ALDERSON, B., and PATTESON, J. That court, on the 11th of February, 1839, affirmed the judgment of the court of Common Pleas, *dissentientibus* Lords DENMAN and ABINGER, who were of opinion that the consideration disclosed upon the face of the declaration was illegal, 5 New Cases, 341, 7 Scott, 317.

*Jones having brought a writ of error returnable in parliament, the [*1106
case was argued on the 1st of July, 1842, in the presence of TINDAL, C. J., WILLIAMS, J., PARKE, B., and ALDERSON, B., upon the question, whether that part of the consideration for the agreement which is not answered by the plea, viz. the execution of the deed of separation, was sufficient to support the promise, or whether it was an illegal and void consideration.

T. F. Ellis, (with whom was Sir *W. Follett*, S. G.,) for the plaintiff in error, cited the cases of *Worrall* v. *Jacob*, 3 Meriv. 268; *Wilkes* v. *Wilkes*, 2 Dick. 791; *Tenant* v. *Brace*, Toth. 78; *Key* v. *Bradshaw*, 2 Vern. 102; *Lowe* v. *Peers*, 4 Burn. 2225; *Brown* v. *Peck*, Eden, C. C. 140; *Allen* v. *Hearn*, 1 T. R. 56; and *Hartley* v. *Rice*, 10 East, 22, to show that the consideration was illegal; and he relied upon *Fletcher* v. *Fletcher*, 2 Cox, 99; *Legard* v. *Johnson*, 3 Ves. 352, 361; *Lord St. John* v. *Lady St. John*, 11 Ves. 526; *Westmeath* v. *Westmeath*, 1 Jac. 126, 1 Dow & C. 547, 5 Bligh, N. S. 339; *Durant* v. *Titley*, 7 Price, 577; and *Lee* v. *Thurlow*, 2 B. & C. 547; 4 D. & R. 11, as authorities showing the argreement to be void for the want of mutuality.

R. V. Richards, (with whom was *Peacock*,) *contrâ*, cited *Hindley* v. *The Marquess of Westmeath*, 6 B. & C. 200, 9 D. & R. 351, 2 Roper on Husband and Wife (Jacob's edition,) pp. 269, *et seq.*; *Wilson* v. *Mushett*, 3 B. & Ad. 743; *Hill* v. *The Manchester and Salford Waterworks Company*, 2 B. & Ad. 544; and *Potts* v. *Sparrow*, 1 New Cases, 594, 1 Scott, 578.

The opinion of the judges was delivered by

TINDAL, C. J. We are of opinion that no illegality is disclosed upon
*1107] this record. One part of the *consideration for the promise of the defendant below was the execution by the plaintiff below of the deed of separation, which, as appears from the declaration, had been previously agreed upon and drawn up. The second part of the consideration was the discharge of Horne and Gates's demand, and the payment of the household expenses and certain debts in full. In this there is no illegality. The only question, therefore, is, whether the deed of separation which the plaintiff below agreed to execute was illegal. We are of opinion that nothing is disclosed upon this record whence we can discover that there was any illegality in that deed.

Lords BROUGHAM and CAMPBELL expressed their concurrence with the opinion of the learned judges; and the judgment of the court below was

Affirmed with costs.

PHIPPS v. AKERS.

A. being seised in fee of lands at W., devised "his real estate at W." to B., when and so soon as B. should attain his age of twenty-one years; but in case B. should die under the age of twenty-one years, then he directed "that his said estate at W. should sink into his residuary real estate," and he devised all the residue of his real estates to C., subject to various limitations and provisions. A. died seised in fee of the lands at W., leaving an infant. *Held*, that B., on the decease of A., took an estate in fee in the lands at W., subject to be divested in the event of his dying under twenty-one and without issue.

IN this case the following question was submitted by the House of Lords for the opinion of the judges:

"A. B. being seised in fee simple of certain lands and hereditaments at W. by his will duly executed, &c., gave all his real estates at W. to his godson G. H. A., when and so soon as he should attain his age of twenty-one years; but in case his said godson should die under the age of twenty-
*1108] one years, then the testator directed that his said *estate at W. should sink into and form part of his residuary real estate. And by his said will he gave all the residue of his real es'ates to J. C., subject to various limitations and provisions affecting the same.

"The testator continued seised in fee-simple of the said lands and hereditaments at W. until his death, and he died without revoking or altering his will, leaving G. H. A. an infant of the age of twelve years.

"The opinion of the judges is desired as to what estate G. H. A. took in the estate at W."

The case was argued on the 10th of May last. The judges took time to consider, and on the 30th of June their unanimous opinion was delivered by

TINDAL, C. J. In order to answer this question it is not necessary for us to say what would be the legal effect of a simple devise to A. and his heirs, when or if he shall attain twenty-one, without any concomitant provisions calculated to show whether the testator did or did not mean to treat the attaining twenty-one as a condition precedent. In such a case Mr. Fearne may be right in the opinion, found among his posthumous works, that until the devisee attains the prescribed age, he takes no interest whatever in the devised lands. But, whatever may be the true meaning of such a devise, if it should occur by itself, there is ample authority for saying that such words may, from the context, be taken not to indicate the time when the estate is to vest, but to point out an event on the happening of which an estate already vested is to be divested in favour of some other person. And the cases upon this subject appear to be resolvable into two classes; first, cases in which the courts have relied on the circumstance that the estate prior to the attainment of the age of twenty-one, has been given to some third person, either for the benefit of the devisee *himself, as in *Goodtitle dem. Hayward* v. *Whitby*, 1 Burr. 228; or for the benefit of some other persons to endure during the minority, as in *Boraston's case*, 3 Co. Rep. 16, and *Mansfield* v. *Dugard*, 1 Eq. Ca. Abr. 195; secondly, cases in which the estate is given over in the event of the devisee's dying under twenty-one, as in *Edwards* v. *Hammond*, 3 Lev. 132; *Bromfield* v. *Crowder*, 1 New Rep. 313, and *Doe dem. Hunt* v. *Moore*, 14 East, 601. [*1109

The first class of cases proceeds on the ground, that the estate given to the devisee on his attaining twenty-one, is, in fact, only a remainder taking effect in its natural order on the determination of the preceding estates, and that the attaining of the prescribed age in such a case no more imports a condition precedent than any other words indicating that a remainderman is not to take until after the determination of the particular estates.

The second class of cases goes on the principle that the subsequent gift over on the event of the devisee's dying under twenty-one, sufficiently shows the meaning of the testator to have been, that the first devisee should take whatever interest the party claiming under the devise over is not entitled to; which, of course, gives him the immediate interest, subject only to the chance of its being divested on a future contingency.

Whether the doctrine on which this second class of cases has rested was originally altogether satisfactory is a point which we need not discuss. It is sufficient to say, that it clearly has been established and recognised as a settled rule of construction, not only in the courts below, but also in your lordships' house. And that rule appears to us clearly to govern the case put to us by your lordships. In conformity with which rule, therefore, we beg leave to state that on the question put to us, we are of opinion that G H. A., on the decease of *the testator, took an estate in fee simple in the lands and hereditaments at W., subject to be divested in the event of his dying under twenty-one, and without issue. [*1110

The house, on a subsequent day (the 11th of August) gave judgment in accordance with this opinion.

Judgment affirmed.

INDEX

TO

THE PRINCIPAL MATTERS

CONTAINED IN 4 MANNING & GRANGER.

The figures refer to the English folios, which will be found in a bracket at the head of the page and in the margin of the text.

BARON AND FEME.

BILL OF SALE.

BILLS AND NOTES.

(a) Vide tamen, 861, n.

(*a*) As the plea admits the acceptance alleged in the declaration, the proper course seems to be, not to reiterate the matter of estoppel in a *replication*, but to demur.

(*a*) The plea contained no direct allegation of the truth of the facts which the defendants stated they should be able to prove.

END OF THE FOURTH VOLUME.

QUEEN'S BENCH

REPORTS.

BY

JOHN LEYCESTER ADOLPHUS, OF THE INNER TEMPLE, ESQ.,

AND

THOMAS FLOWER ELLIS, OF THE MIDDLE TEMPLE, ESQ.,

BARRISTERS AT LAW.

NEW SERIES.

VOL. III.

CONTAINING THE CASES DETERMINED IN EASTER TERM AND VACATION, TRINITY TERM AND VACATION, AND MICHAELMAS TERM AND VACATION, V. AND VI. VICTORIA.

WITH

TABLES OF THE NAMES OF CASES ARGUED, AND THE PRINCIPAL MATTERS.

PHILADELPHIA:

T. & J. W. JOHNSON & CO., LAW BOOKSELLERS,

NO. 585 CHESTNUT STREET.

1863.

JUDGES

OF

THE COURT OF QUEEN'S BENCH,

DURING THE PERIOD OF THESE REPORTS.

The Right Hon. THOMAS LORD DENMAN, C. J.
Sir JOHN PATTESON, Knt.
Sir JOHN WILLIAMS, Knt.
Sir JOHN TAYLOR COLERIDGE, Knt.
Sir WILLIAM WIGHTMAN, Knt.

ATTORNEY-GENERAL.

Sir FREDERICK POLLOCK, Knt.

SOLICITOR-GENERAL.

Sir WILLIAM WEBB FOLLETT, Knt.

A

TABLE

OF

THE NAMES OF CASES REPORTED

IN 3 ADOLPHUS & ELLIS.

The figures refer to the English folios, which will be found in a bracket at the head of the page, and in the margin of the text.

CASES

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

Easter Term and Vacation,

V. VICTORIA.

The judges who usually sat in banc during this term and vacation were,
Lord Denman, C. J. Williams, J.
Patteson, J. Wightman, J.

MERCHANT v. FRANKIS.

A defendant arrested on a ca. sa., and discharged by reason of irregularity, may be taken on a second ca. sa. upon the same judgment.

The defendant was taken on a ca. sa. at the suit of the plaintiff, directed to the sheriff of Gloucestershire, but moved for and obtained an order for his discharge out of custody on the ground of irregularity. The plaintiff on the same day sued out another ca. sa. on the same judgment, and sent it to the sheriff, who, receiving it by the same post with the order for discharge, detained the defendant.

J. Gray now moved for a rule to show cause why the defendant should
*2] not be discharged out of custody. The *defendant could not be arrested a second time under the same judgment. A similar question arose in *Towers* v. *Newton*, 1 Q. B. 319, and was considered doubtful, and not decided. *M'Cormick* v. *Melton*, 1 Cro. M. & R. 525, S. C. 5 Tyrw. 147, seems indeed an authority against this application; and the language of Parke, B., there, as reported in 3 Dowl. P. C. 215, is somewhat stronger than in the report by Crompton, Meeson and Roscoe. There does not, however, appear to be any case in which a second arrest under these circumstances has been directly held good.

Lord Denman, C. J. There is no doubt on the point. Mr. *Gray* has shown cause against his own motion.

Patteson, Williams, and Wightman, Js., concurred.

Rule refused.(a)

(a) See *Collins* v. *Beaumont*, 10 A. & E. 225.

ADAMS v. PALK.

In an action on a bill of exchange, to which there is no plea of payment, Reg. Gen. Trin., 1838, prevents the defendant from giving evidence of payment, though it be tendered only for the purpose of showing that the jury ought not to give damages in respect of interest, as no principal sum bearing interest was due in any part of the period for which interest is claimed.

ASSUMPSIT. First count on a bill of exchange for 40*l.*, made by defendant 2d March, 1840, payable to plaintiff, thirty days after date. Counts on an indebitatus for goods sold, &c., money had and received, and on an account stated. Pleas. 1: As to all except the first count, and except also, 1*s.*, parcel of the sums in the *residue of the declaration mentioned, non assumpsit. 2: (except as aforesaid) that the action did not accrue within six years. 3: (except as aforesaid) payment. 4: (except as aforesaid) a set-off. 5: as to the part excepted and not yet pleaded to, payment of 41*l.* 18*s.* into court, denying damages ultra. Replication taking issue on the first plea, and giving answers to the second, third, and fourth, on which the defendant afterwards took issue; and, to the fifth, damages ultra, on which defendant took issue. [*3

The cause was tried before GURNEY, B., at the Surrey Spring assizes, 4th April, 1842. No evidence was given on the indebitatus counts; and the first and second issues were found for the defendant, the third and fourth for the plaintiff. On the fifth it appeared that, if the sum mentioned in the bill was really due, the amount paid into court was too little by one year's interest. An additional sum sufficient to cover that had been paid into court under a judge's order, on the 30th March: but (which was not discovered until after the jury had been sworn) the plea had not been amended; and the defendant was not prepared with evidence of the additional payment into court. The defendant then tendered evidence of the bill having been paid in 1840, for the purpose of showing that the sum paid into court was sufficient to cover all the interest that was ever due. The learned judge thought that, as there was no plea of payment, the evidence was inadmissible; but he suffered the evidence to go to the jury, in order to take their opinion on the fact of payment. The jury found that the bill was paid in June, 1840; and, under the direction of the learned judge, a verdict was entered for the defendant on the first and second issues, for the plaintiff on the third and *fourth, and for the plaintiff on the fifth, damages 40*s.*; leave being reserved to move to enter a verdict for the defendant on the fifth issue, if this court should think that the evidence was admissible. [*4

Peacock now moved accordingly. The jury were not bound to give interest; *Du Belloix* v. *Lord Waterpark*, 1 D. & R. 16: the defendant was, therefore, entitled to show that the debt did not carry interest. In this latter respect the case was analogous to that of the tender in *Dent* v. *Dunn*, 3 Camp. 296. Reg. Gen. Trin. 1838, 8 A. & E. 280, that "Payment shall not in any case be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar," cannot apply to cases in which payment could not have been pleaded: the interest here is merely damages, which cannot be pleaded to: the defendant, therefore, had a right to give the payment in evidence in mitigation of damages.

Per Curiam.(a) After the defendant had paid 41*l.* 18*s.* into court on a bill for 40*l.*, the plaintiff could not expect that the defendant would attempt to prove payment of the principal. The case falls within the General Rule.

Rule refused.(b)

(a) Lord Denman, C. J., Patteson, Williams, and Wightman, Js.

(b) But, under the circumstances, the court allowed the defendant time to move for a new trial on affidavit.

5*] *CHARLOTTE FOUNTAIN v. HENRY MILFORD BOODLE and FANNY his Wife.

In an action for an alleged libel, contained in an answer to inquiries respecting the character of a servant, the plaintiff establishes a case to go to the jury, if there is any evidence, as matter of fact, that the answer complained of was untrue to the defendant's knowledge, or as to matters of opinion, that the defendant, in giving the character, did not really act on the opinion which he professes to have entertained.

Plaintiff having been employed by defendant as governess to her children for upwards of a year, during which defendant twice recommended her to other similar situations, was dismissed in an abrupt manner, without cause assigned, and lost a new engagement in consequence of defendant giving the following answer to an inquiry respecting her qualifications: "I parted with her on account of her incompetency, and not being ladylike nor good-tempered:" to which a postscript was added, "May I trouble you to tell her that this is the third time I have been referred to. I beg to decline any more applications." The plaintiff gave general evidence of her competency, ladylike manners, and good temper. The previous applications referred to in the postscript were on the occasions on which defendant had recommended plaintiff to other situations. No evidence was given for the defendant. The judge directed the jury that the communication was privileged, unless there was direct evidence that it was influenced by some malicious feeling; but that, if a prima facie case of intentional falsehood had been made out, the defendant ought to have shown, and could not, under the circumstances, have had much difficulty in showing, the assertion to have been made under a belief of its truth; and that the question was whether, looking at the whole case, there was sufficient proof that defendant had been influenced by an improper feeling.

Held, that the direction was right, and that there was evidence of malice for the jury.

CASE for libel. The declaration was in the usual form, charging special damage. Plea: Not guilty. Issue thereon. On the trial, before Lord DENMAN, C. J., at the sittings in Middlesex after last Hilary term, it appeared that the plaintiff, a young person who had been educated for a governess, was engaged by the defendant, Mrs. Boodle, in November, 1839, as daily governess to instruct young children; which employment she retained about fourteen months. During that period, Mrs. Dumergue, sister in law of the defendants, being in want of an instructress for her children, Mrs. Boodle recommended the plaintiff to her for that purpose; and, in September, 1840, a Mr. Stewart wanting a person to instruct his wife, a very young lady, in the several branches of a plain English education, Mrs. Boodle recommended the plaintiff to him for that purpose. From the 19th to the 23d of
6*] November, 1840, the plaintiff was prevented by illness from *attending at Mrs. Boodle's; and, on her return to her employment there, a letter was given to her from Mrs. Boodle, dated 19th November, informing her that her services would not be required beyond the 19th of December, but without assigning any reason. At the latter date she ceased accordingly to instruct the defendant's children. In September, 1841, plaintiff was about to be engaged by a Mrs. Norsworthy as instructress for her children; and that lady applied by letter to Mrs. Boodle respecting the plaintiff's character, in the following terms. "I shall be obliged by your informing me whether you consider her competent to undertake the instruction of little girls from nine to thirteen years of age, (with assistance in music only,) and if you were perfectly satisfied with her tuition; also for what reason you declined her attendance; and whether you consider her a person of good principles and ladylike deportment, of a mild but firm disposition. I will thank you to reply to this question at your earliest convenience; and for any other observations you may think proper to make I shall feel obliged." To this application Mrs. Boodle replied in the following letter, the alleged libel. "In answer to your inquiries respecting Miss Fountain, I beg to say she had to instruct five of my children from three to nine years old; it is

about a twelvemonth since I employed her, and she taught them as a daily governess for fourteen months, and engaged herself to teach everything but music, which she knew nothing of; and I parted with her on account of her incompetency, and not being ladylike nor good-tempered. When I engaged her she recommended a young friend of her's to teach the music, whom I was much pleased with; and discontinued *her* services when I took another governess." To this was added a postscript: *"May I trouble you to tell her that this is the third time I have been referred to. I beg to decline any more applications." Mrs. Norsworthy, in consequence, broke off her engagement with the plaintiff, which was the special damage complained of. The two applications alluded to in the postscript were those of Mrs. Dumergue and Mr. Stewart. General evidence was given of the plaintiff's competency, good temper, and manners by witnesses who were her personal friends. There was no direct evidence of the ground of dismissal. The counsel for the defendants contended that the communication was privileged: but the Lord Chief Justice refused to nonsuit the plaintiff; and, no evidence being given for the defendants, told the jury that a party in making such a statement is bound to speak the truth, but is not to be challenged to prove the truth of his statement, unless there is direct evidence that the communication was influenced by some malicious feeling; that, if there was here a primâ facie case of the statement being untrue, the defendants were, under the circumstances, called upon to show it to be what the writer thought to be true: and that the question for them was, whether, looking at the whole case, there was sufficient proof that Mrs. Boodle in writing the letter had been influenced by some improper feeling towards plaintiff, to make a false statement knowingly. Verdict for plaintiff: damages 60*l*. [*7

Kelly now moved for a rule to show cause why there should not be a new trial, on the grounds of misdirection and of the verdict being against the weight of evidence. There was no evidence for the jury that the statement was malicious. [Lord DENMAN, C. J. There is no dispute as to the law, which is as laid *down in *Child* v. *Affleck*, 9 B. & C. 403. But if the party states an untruth, is not that some evidence of malice?] To what extent is the master bound to prove the truth? He may be convinced of his servant's dishonesty, at the same time that he is unable to give evidence of it. Though there may be circumstances making it, in any particular case, a proper question for the jury, whether there was malice, it is generally a question for the court; otherwise, if on any primâ facie evidence of untruth the case is to go to the jury, the master has no protection at all. The court must say that there is proof of malice and of falsehood. [Lord DENMAN, C. J. Falsehood is evidence of malice.] There was not the least trace of any unkind act, but the contrary: the conduct which is relied on as evidence of untruth is destructive of the notion of malice. [Lord DENMAN, C. J. That was put to the jury as evidence negativing malice.] Mrs. Boodle was bound to answer Mrs. Norsworthy's letter as well as she could, or not at all: the latter course would probably have been the more prejudicial to the plaintiff. Her answer was on a matter not of fact but of opinion. [Lord DENMAN, C. J. The reason for the discharge was a matter of fact.] It was so; but there is no such thing as a privileged communication, if, where the master says he has discharged for incompetency, and there is no direct evidence of the ground, the opinion of the plaintiff's personal friends, in his favour, is sufficient proof of malice or falsehood. [Lord DENMAN, C. J. Suppose the master says in the morning [*8

that his servant is perfectly honest, dismisses him in the evening, and says next day that he turned him off for dishonesty, and that he had known it some time. You may convict a party of telling a wilful untruth, from
*9] *his own conduct. Here the plaintiff undertook to prove that the statement was false to the defendant's knowledge; and the question related, not to a simple fact like felony, of which there might have been an immediate discovery, but to general competency, which the defendant must have known all the year.] The evidence consisted of the opinions of personal friends of the plaintiff, and two recommendations by the defendant: if these constitute a case for the jury, no person can give a character which is at variance with any former expression of opinion. [PATTESON, J. On these pleadings could the defendants prove the truth?] They might, to negative malice. [Lord DENMAN, C. J. If not, the summing up was quite wrong: for the jury were told that there was no doubt that the defendants might rebut the primâ facie case by showing the truth.(*a*)] All the earlier authorities show that, to get rid of the privilege, the plaintiff must show the statement to have been both false and malicious; but, if the law be, as it was laid down to the jury here, that, if the plaintiff proves a primâ facie case of untruth, the defendant is called upon to show that the fact was as he represented, any thing is primâ facie evidence of malice. [Lord DENMAN, C. J. I should have directed the jury that there was no primâ facie evidence, had there not been evidence of the defendant's conduct being inconsistent with the opinion given.] There has been no instance in which the communication has been held not privileged, where the only statement has been in answer to an inquiry about character: there has always been some stepping out of the way. In *Child* v. *Affleck*,
*10] 9 B. & C. 403, *the circumstances were more strongly in favour of the plaintiff than here. [PATTESON, J. In that case there was no proof of falsehood: nothing but the letter itself.] Proof of falsehood is not essential: it is only a mode of proving malice. The circumstances here are very different from those of other cases in which the question was submitted to the jury; *Pattison* v. *Jones*, 8 B. & C. 578; *Rogers* v. *Clifton*, 3 B. & P. 587. In *Weatherston* v. *Hawkins*, 1 T. R. 110, it was held distinctly that there must be proof of malice as well as of falsehood: in the present case, and in some others at Nisi Prius, falsehood has been considered evidence of malice. [PATTESON, J. Falsehood in fact is no proof of malice, unless the proof involves knowledge of the truth.] At all events the verdict here is against the weight of evidence. [Lord DENMAN, C. J. (after stating the evidence.) The question put to the jury was, whether Mrs. Boodle had made a false statement knowingly. I followed the judgments of BAYLEY, J., and LITTLEDALE, J., in *Child* v. *Affleck*, 9 B. & C. 403: BAYLEY, J., said there that in *Rogers* v. *Clifton*, 3 B. & P. 587, "evidence of the falsehood of the imputations was given, which, independently of the contents of the alleged libel, raised the question whether they had been written bonâ fide." LITTLEDALE, J., said, "If, indeed, the plaintiff had distinctly proved the falsehood of the statement, the case would have assumed a different shape." We all agree in the view of the law there taken. Mere falsehood is certainly no disproof of bona fides: but there were other circumstances in the case; and the two recommendations cut both ways. They showed an absence of previous ill will; but they also showed that, when they were given, Mrs. Boodle had found nothing

(*a*) See the doubt expressed at N. P. by Lord Tenterden in *Pattison* v. *Jones*, 8 B. & C. 578 582.

wrong *in the plaintiff. I said that the character was on a matter of opinion; but that, if Mrs. Boodle had given a character which she did not believe the plaintiff to deserve, that was evidence of malice. I certainly told the jury that, if the plaintiff had made out a primâ facie case of falsehood, the defendants could not, under the circumstances, have had much difficulty in showing a foundation for the statement. The length of time during which the plaintiff had remained in the defendants' service might tend to show that the character last given was the result of malice; and there was also the additional fact, which, as I thought, deserved to be considered, of the ungracious intimation as to two former applications for a character. The main question is, whether there was any evidence of malice. PATTESON, J. If there was any evidence for the jury, there can be no doubt that it was rightly left to them. If the plaintiff makes out a primâ facie case of malice, it certainly lies on the defendant to answer it: when it is said that he must prove the truth of his statement, it is not meant in the sense of truth absolutely; but he must show that the assertion was made with an honest belief of its being the truth.] [*11

Cur. adv. vult.

Lord DENMAN, C. J., on a subsequent day of the term (April 26th) delivered judgment as follows.

The court has already refused a rule on the ground of misdirection; and we are desirous, in so important a case, of repeating our reason for doing so. It is because the law was laid down in exact conformity with the existing authorities on the subject. A character bonâ fide given to a servant of any description is a privileged communication, and in giving it bona fides is *to be presumed. Even though the statement should be untrue in fact, the master will be held justified by the occasion in making that statement, unless it can be shown to have proceeded from a malicious mind. Malice may be established by various proofs: one may be that the statement is false to the knowledge of the party making it. Up to this point the summing up was not complained of: but another part of it was brought before the court as objectionable. The misstatement here imputed was, that the defendant had discharged the plaintiff by reason of her faults enumerated in the letter. This could be *known* to nobody besides the defendant; but she might have shown the probability of that being the real motive, from remonstrances made by her, during the plaintiff's attendance, or complaints, at its being terminated. I told the jury to the effect that, if the plaintiff brought any evidence of wilful untruth, some evidence of the contrary might be reasonably expected, where the nature of the case allowed it. This is a general proposition applicable to every form of action and to evidence of all kinds. The remark is of constant occurrence. "Some proof has been laid before you; you are to consider whether, if unanswered, it is sufficient, and whether the party affected by it might have repelled it, if erroneous, by contrary evidence; now none such is adduced." [*12

The court wished for time to consider whether there was, in the present case, any evidence of wilful falsehood in the character given. In support of this imputation, the plaintiff urged that she had served Mrs. Boodle above a year in the capacity of governess, that no complaint was made on any single occasion as to her competency, temper, or manners, and that she had been twice recommended by the defendant during that year to other *persons, to a situation similar to that which she then filled. She charged no particular fact; for that might have come to her know- [*13

ledge after she had recommended her; and that knowledge might have been confined to herself, so as to preclude her from calling any witness to it. But the statement here was, that she acted on her opinion respecting the plaintiff's capacity and qualities; and of these she possessed the same means of forming an opinion when she introduced her into other families as at any later period.

The amount of deduction from these means of observation, on account of illness, was submitted to the jury among the circumstances of the case. But the question was not on the justice of the defendant's opinion; it was on the truth of her statement that she acted on that opinion in dismissing her. "I parted with her for her incompetency, bad temper, and unladylike manners." Now she parted with her after a few days' absence, caused by the plaintiff's illness, which perhaps had not been duly notified beforehand; and there was something very harsh in the manner of the dismissal. There was a sentence also in the letter containing the character, which requested the lady addressed to desire the plaintiff to make no more applications to the defendant, as she had already answered two. Here the idea was conveyed that she had already, since parting with the plaintiff, spoken of her twice in the same disparaging strain when asked for her opinion of the plaintiff; whereas the only two occasions on which she had given her any character were during the period of her attendance, and on both of these occasions she had commended her, and procured employment for her.

Here was undoubtedly some evidence of the injurious character being
*14] dictated by some indirect motive. Of *course then it must be laid before the jury. But the learned counsel contends that it is so extremely slight, that, though uncontradicted in any particular, the jury ought to have found a verdict against its sufficiency. He observes that the privilege is but illusory, if circumstances so minute can be raised into proof of malice. Much more illusory would it be to hold that there was evidence on which the jury must decide, but that they must decide one way or the verdict cannot stand.

We cannot place ourselves in their stead, and impose our own judgment upon them. They have advantages for attaining the truth which we do not possess, and are the proper tribunal for that purpose. They were bound to decide upon the weight of the evidence laid before them: and we cannot say that they have done wrong in the present instance.

Rule refused.

The QUEEN *v.* Lady EMILY PONSONBY and Others.

By permission of the crown, certain persons occupy apartments in Hampton Court Palace, which was formerly a royal residence, but in which the sovereign has ceased to reside. A housekeeper, employed by the crown, has the superintendance of other apartments, containing pictures (which the public are allowed to see) and lumber. The housekeeper resides, with her family, in the palace for this purpose, and has also the power of entering the apartments first mentioned. In other respects, the occupiers of these have exclusive possession of them: before the entry of each occupier his apartments are put into ordinary repair by the crown: but afterwards the occupiers themselves perform such repairs as are considered necessary by the crown surveyor. They reside there with their families and servants, providing their own furniture, and, in some instances (but without the sanction or privity of the crown,) have allowed others, on payment of a sum of money, to use the apartments.

Held, that the occupiers by permission of the crown are rateable to the poor in respect of the apartments so held by them.

ON appeal against a rate for the relief of the poor of the parish of Hampton, in Middlesex, on behalf of Lady Emily Ponsonby and others, assessed thereto, the sessions confirmed the rate, subject to the opinion of this court on the following case.

*Hampton Court Palace, situate in the parish of Hampton, in Middlesex, was built by Cardinal Wolsey in 1514, and was presented [*15 by him to King Henry VIII. in 1525; since which period, and up to the present time, it has constituted part of the royal demesnes appurtenant to the Crown of England.

After the decease of that monarch the palace continued to be a place of occasional residence of the sovereigns of England until some time in the tenth year of the reign of George II., who was the last sovereign who personally occupied it: from which time, and up to the present date, (embracing a period of upwards of a century,) the palace has ceased to be a place of the actual personal residence of the crown.

The palace contains a suite of rooms called the state apartments, all of which contain a collection of pictures, the property of the crown, to which the public, under certain regulations, are permitted to have access; a room called by the name of the Board of Green Cloth, and a gallery which the public are not permitted to enter, and which are used as a depository for lumber. For the last sixty years the state apartments have not been used for any other purpose; and they are not included in the present assessment.

A guard of honour is always on duty at the palace; and divine service is regularly performed therein by a chaplain appointed and paid by the crown. The palace, as well as the gardens which surround it, are maintained and kept in order by the crown; and the produce of the gardens (which gardens are not assessed) is applied to her majesty's use. Sentinels are posted at the various entrances: and those entrances are opened and closed at the pleasure of the crown.

*The housekeeper of the palace (who is the only officer of the royal [*16 establishment resident in the palace) formerly employed servants to show the pictures, and received a fee or gratuity for such view, as a perquisite of office. Upon the decease of Lady Emily Montague, the late housekeeper, the state apartments were thrown open for the gratuitous admission and view of the public, under the superintendance of persons in the dress of police constables, but appointed and paid by the crown.

There are several other apartments in the palace, which are in the occupation of private individuals. Some consist of spacious drawing rooms, dining rooms, bed rooms, servants' rooms, kitchen, and other domestic offices, suitable for the residence and accommodation of persons with considerable household establishments; and are now, and always have been, occupied by persons of rank and distinction; and others are occupied by persons of respectable station.

One of the parties included in the rate appealed against is a Mr. Grundry, the husband of the housekeeper of the palace appointed and paid by the crown; who, as such housekeeper, and for the proper performance of her duty, resides (with her husband and children) in the part of the palace set apart for her use, and in respect of which her husband is rated.

With this exception, and that of some other persons similarly situated, the several suites of apartments occupied by private individuals are not enjoyed by them as appurtenant or annexed to any office under the crown,

but are occupied by virtue of a written grant or warrant, made by the lord chamberlain of her majesty's household, in the following form.

*17] *"These are to require you to deliver, or cause to delivered, unto ——, the keys and possession of the following lodgings in his majesty's palace of Hampton Court: viz." (here follows a list of the apartments, together with a description of their situation in the palace,) "which lodgings are to be inhabited by ——, or some part of —— family, a part of every year, or they will be considered vacant, and disposed of accordingly. and, when the family are absent from Hampton Court, it is expected that one of their servants should be left in the lodgings, or that the keys thereof be left with you, or the housekeeper for the time being. And for so doing this shall be your warrant. Given under my hand and seal, this —— day of —— 18—, in the —— year of his majesty's reign.

"To ——, housekeeper of his majesty's Palace of Hampton Court.

"—— Lord Chamberlain." L. S.

In some cases the names of two or more individuals (members of the same family) have been included in one warrant.

The occupiers of these suites of apartments provide at their own expense every kind of household furniture and fixtures requisite for the furnishing and fitting up of such apartments. Previously to occupiers taking possession of the apartments, such repairs as may be considered by the officers of the crown as necessary to be done to such apartments are done at the expense of the crown: but, in some instances where the repairs desired for the accommodation of such occupiers have been of such a nature as to require a considerable outlay, such repairs have been effected at the joint

*18] expense of the crown and occupier. But all alterations or *additional works required by the occupiers are done at their own expense; and in some instances such additional works and alterations have amounted to 1000*l.* and upwards. Afterwards the occupiers themselves are bound, at their own expense, to do whatever internal works, alterations, and repairs, may be found necessary for keeping up and preserving the apartments in a proper and tenantable condition, or which they may consider essential to their greater convenience and enjoyment: but no works, alterations and repairs, are done except under the direction of the officers of her majesty's office of woods and forests; and the government contracting tradesmen are employed and paid by the occupiers of the apartments. A periodical survey is made of the apartments every second year by the officers of the crown; and a report made of the repairs necessary for placing them respectively in tenantable repair: and notices are given by the crown to the occupiers to have such repairs done, which are done by them accordingly. (The case then set out the form of a notice of an intended inspection, signed by three commissioners of the woods and forests; and also a notice from one of the commissioners, stating what repairs are required, and requesting that directions may be given for performing them.(*a*)

(*a*) The forms were as follows. "Office of woods, &c., 20th March, 1841. In pursuance of the queen's commands signified to the chief commissioner of her majesty's woods, &c., an inspection of the several apartments at Hampton Court Palace had by grace and favour of her majesty, will take place in the ensuing summer, and in the summer of every ensuing second year, of which due notice will be given to each of the several occupiers, who, after such survey and inspection, will be required to execute whatever internal works and repairs may be found necessary for keeping up and preserving the apartments in a proper and tenantable condition. ("Signed,)

DUNCANNON, A. MILNE, CHARLES GORE."

"Her majesty's office of woods." &c., "September, 1841. Referring to the notice of the 20th of March, last, addressed to you by this board, I beg to inform you that a survey has

The number of families now occupying such suits of *apartments in the palace may be taken to amount to from sixty to seventy; and the number of servants in their employment may be computed on an average at between one hundred and fifty and two hundred. [*19

Instances exists in which the holders of warrants for such apartments derive considerable pecuniary emoluments to themselves by accommodating other persons with the use of the same, in consideration of sums of money paid in gross, and also by way of yearly rent: and instances have occurred where others have derived emolument by taking in inmates or lodgers to board and lodge, or only to lodge, with them in such apartments: and others by carrying on or exercising their several trades or professions therein. But none of these acts have been done with the sanction or privity of the crown.

Many apartments occupied by private individuals communicate with the state apartments; and the doors of communication are kept locked during such *occupation. But, if, in the general care of the palace, the housekeeper finds it necessary to open those doors, she exercises the power of doing so, and of passing through the apartments which are so occupied. Some of the apartments have exclusive outward entrances, opening upon the public high road and barge walk. [*20

In the sixth year of the reign of William and Mary, the parishioners of Hampton, feeling themselves peculiarly aggrieved by the increased charges on the parish funds, arising from the relief of poor persons who followed the court, and by workmen then engaged in the alterations making at the palace, petitioned the crown for redress; when their majesties were pleased to grant to them an annual pension of 50*l.*, payable out of the receipts of exchequer, by writ of privy seal. (The case then set out a copy of the writ.(*a*)

This pension has from time to time varied in its amount, by reason of the land tax and other taxes attaching on it. For some years immediately following the time of the grant, it was received by the under housekeeper of the palace, and distributed by him at his discretion. It has, for many years last past, been received by the churchwardens, and applied by them in *aid of the funds created and established by, and with the other charitable donations given generally by the donors to the use of the poor of the said parish of Hampton. [*21

If the court should be of opinion that the appellants were rateable in respect of their several occupations of the premises, then the said rate, and the order of sessions confirming the same, were to stand confirmed; but if

been made of the present state of the interior of the apartments you occupy by the grace and favour of the sovereign in Hampton Court Palace, and the repairs, &c., (according to the statement on the other side) are reported as necessary for placing your apartments in tenantable repair.

"I am, on behalf of the commissioners of her majesty's woods," &c, "to request that you will, at your earliest convenience, give directions for executing the works enumerated, which must be done under the direction of the officers of this board. I am, your most obedient servant." (Signed) "A. MILNE."

"The apartments require a general repair, painting, whitewashing," &c., (or as the case may be, varying according to circumstances.)

(*a*) It was as follows. "(Copy.) October, 1694. Anno Regis et Reginæ Gulielmi et Mariæ Sexto. Poor of the town of Hampton. Pension.—A warrant unto the exchequer to pay out of monies (not appropriated to particular uses by act of parliament) to the churchwardens of the parish of Hampton, for the time being, a pension of 50*l.* yearly during their majesties pleasure, for the support of the poor of that town, at four quarterly payments, to commence from Michaelmas last, and to be distributed by the said churchwardens as the vicar of the said parish and the under housekeeper of their majesties' royal court of Hampton Palace shall direct. Subscribed by Sir John Nicholas, by warrant under his majesty's royal sign manual, countersigned by the Lords Commissioners of the Treasury. Dated," &c.

the court should be of a contrary opinion the rate and order of sessions were to be quashed.

Erle, *Kelly*, and *Adolphus*, in support of the order of sessions. The appellants have a beneficial occupation. Primâ facie that is so, because they dwell in the apartments. And the house is not occupied by the crown. The exemption of the sovereign from rateability is a personal privilege, which does not protect the house while in the beneficial occupation of others. That appears from *Rex* v. *Terrott*, 3 East, 506, where a military officer was rated in respect of the beneficial occupation of barracks belonging to, and occupied only during the pleasure of the crown. *Rex* v. *Hurdis*, 3 T. R. 497, is another exemplification of the principle. Lord *Bute* v. *Grindall*,(*a*) 1 T. R. 338, is a still stronger example. There the ranger of a royal park, holding office during the pleasure of the crown, was considered rateable for the profit which he derived from the produce of the land. Yet in that case the king was clearly an occupier still. The same principle is applicable to the case of a hospital; *Ayr* v. *Smallpeace*,(*b*) *22] 1 Bott's P. L. 125, pl. 154, 6th ed.; *and the decision there relied upon (on the window tax) in the case of *Greenwich Hospital*. In *Rex* v. *Mathews*, Cald. 1, it was decided that a keeper, occupying, in respect of his office, a lodge with land adjoining in Windsor Park, and holding office during the pleasure of the ranger, who himself held office during the pleasure of the crown, was rateable for such occupation. In *Rex* v. *The Chelsea Water Works Company*, 5 B. & Ad. 156, the company were rated for their occupation of the reservoir in St. James's Park; and also for their pipes, though the ranger was rated for the herbage on the land under which the pipes ran. Here it is found that the appellants, besides the enjoyment of their own occupation, can and sometimes do make a profit by demising the apartments. It is true that they occupy by the grace and favour of the crown: but that was the case in some of the instances already cited. In *Rex* v. *Munday*, 1 East, 584, the occupiers of a house and land under a charitable institution was held to be rateable: and the same decision was given in *Rex* v. *Green*, 9 B. & C. 203, where the occupants were the objects of a charity, removeable at the pleasure of the patrons. In *Governors of the Bristol Poor* v. *Wait*, 5 A. & E. 1, the governors of the poor of Bristol had, under a local act, taken a house for lodging and employing the poor, without their own district; and they were held rateable as occupiers of the house. In *Rex* v. *The Mayor*, *&c. of York*, 6 A. & E. 419, a corporation was rated as occupier of land enjoyed by the freemen. No *23] argument can be drawn from cases in *which the property has been exclusively applied to public purposes, such as *Rex* v. *Sculcoates*, 12 East, 40; and *Rex* v. *The Commissioners of Salter's Load Sluice*, 4 T. R. 730; nor from cases where the particular parties cannot be fixed with the occupation, as *Regina* v. *Justices of Worchestershire*, 11 A. & E. 57. Nor does any argument against the rate arise from the individuals rated having occupied only parts of the palace: there was no more than a partial occupation in many of the cases before cited, as in Lord *Bute* v. *Grindall*,(*c*) 1 T. R. 338, *Rex* v. *The Chelsea Water Works Company*, 5 B. & Ad. 156, *Rex* v. *Mathews*, Cald. 1. It is true that, if the occupation had been merely for purposes of service to the crown, as if the appellants had been

(*a*) Affirmed on error, in the Exchequer Chamber, *The Earl of Bute* v. *Grindall*, 2 H. Bl. 265.

(*b*) See *Rex* v. *St. Luke's Hospital*, 2 Bur. 1058, 1060.

(*c*) Affirmed on error, in the Exchequer Chamber. *The Earl of Bute* v. *Grindall*, 2 H. Bl. 265.

placed in the apartments for the exclusive purpose of taking care of them, without deriving a benefit, that might have supported the objection to the rate: but that cannot be affirmed here. One fact very commonly relied upon, as showing a beneficial occupation, is the power of the party to permit his family to join in the occupation; which fact exists here. And the case is much strengthened by the occupants performing the repairs. There may be some difficulty as to the case of the housekeeper: but the respondents do not object to the rate being amended as to that item.

Sir *F. Pollock*, Attorney General, and *Hodges*, contrà. The general law, as laid down on the other side, is not disputed: the question is almost entirely one of fact. *There is here neither tenancy nor occupation by the [*24] appellants: the sole occupier is the crown. All that the appellants have is a permission, by the occupier, to retain possession of the apartments, and that not, either in right or fact, exclusively. They are no more rateable than a visitor in a gentleman's house. In Lord *Bute* v. *Grindall*, 1 T. R. 338,(*a*) the facts found showed an actual exclusive occupation of that for which the party was rated. So in *Rex* v. *The Chelsea Water Works Company*, 5 B. & Ad. 156, the company had, by their pipes, "the exclusive use and possession" (as Denman, C. J., said) of a part of the soil in their own right. In *Rex* v. *The Aire and Calder Navigation Company*, 9 B. & C. 820, the company had, by statute, the legal estate and interest in the navigation: there was, in some sense of the words, a right to occupy and an actual occupation: but, because it was not an occupation which excluded that of other parties, it was held that the company was not, within the words of stat. 43 Eliz. c. 2, s. 1, "occupier of lands," and so was not rateable. The palace does not cease to be in the possession of the crown merely because the sovereign does not at present reside there: that was decided in the case of *Kensington Palace*, *Winter* v. *Miles*, 10 East, 578, where this court adopted the test suggested by Lord Holt in *Elderton's Case*, 3 Salk. 284, S. C. 2 Ld. Raym. 978, 6 Mod. 73; who held that there was no privilege, as for a royal palace, "where the Queen was neither present in person nor by her domestics, or any of her family." The queen is present in this palace, by one of *her domestics, the housekeeper. [*25] No distress could be executed there under the process of the ordinary law courts.(*b*) The appellants have no title which would answer to any of the common legal tests; if such a possession, for instance, were set up in a plea in an action of trespass, it could not prevent a replication de injuriâ, under the rule in *Crogate's Case*, 8 Rep. 66, b, the interest not being one which the law could recognise. The occupiers here have no control, which is necessary, according to Nolan, (1 P. L. 175, 176, 4th ed.,) as well as possession. The crown stands in the position of the appellant in *Rex* v. *St. Mary the Less*, 4 T. R. 477, where the owner of a house, which he occupied, though he permitted another person to use a part, was held rateable for the whole. If the ownership here were in a subject instead of the crown, it is clear, upon the authority of that case, that such owner would be rateable. That cannot be now, on account of the privilege of the crown: but this circumstance cannot create a liability in another party. That the appellants have, in some instances, let the apartments to others, can only operate as a sort of estoppel, to prevent them from insisting that, if they have an occupation, it is not a beneficial one. But this, in

(*a*) Affirmed on error, in the Exchequer Chamber, *The Earl of Bute* v. *Grindall*, 2 H. Bl. 265.

(*b*) See *Rex* v. *Stobbs*, 3 T. R. 735.

truth, amounts to no more than an additional indulgence by the actual occupier, the crown. Suppose the owner of a house were to go abroad, leaving his house in the care of his housekeeper, with orders that a particular friend should be allowed to use certain rooms in it; would not the owner nevertheless be the rateable party?

*26] *Lord DENMAN, C. J. The sessions have found that the appellants are rateable as occupiers: and I agree that the question is very much one of fact, although referred to us by the sessions. We may consider, either that the sessions, having found the fact, ask us whether there be any evidence which can support such a finding, or that they have referred the case altogether to us, that we may decide instead of themselves. Taking either view, I think the sessions have done right in confirming this rate. There is clearly sufficient evidence that the separate apartments are in the occupation of the persons rated: and I think that, if I were on a jury, I should find that fact affirmatively; and, on this evidence, ought to be directed so to find. It is clear that this was at one time a royal palace, and equally clear that it has ceased to be so. The case of *Lord Bute* v. *Grindall*, 1 T. R. 338,(a) was stronger than this: for there the crown did, in fact, occupy to a certain extent: yet Lord *Bute* was held rateable for the profit which he derived: whereas here the crown, for a long course of years, has had no possession. There are, indeed, pictures in the house which are exhibited to the public: but it cannot, I think, be said that this circumstance, or the placing of sentinels about the premises, shows an occupation by the crown. The crown, therefore, does not occupy, unless by the housekeeper's having the keys. But, when we look at the other circumstances of the case, we find this to be merely a condition or restriction, qualifying the privilege granted to the occupants. There is a sort of grant to hold at will, which is not inconsistent with a beneficial or a bur-

*27] thensome occupation. *These considerations appear to me to dispose of the facts which make most strongly against the rate. Then we have, on the other side, a multitude of circumstances combining to show the liability of the occupiers. There was, however, one argument urged by the attorney general which appears to require an answer. He put the supposition that a subject was placed in the position of the crown here; and he asked whether such subject would not be rateable for these premises: and Mr. *Hodges* further illustrated that, by supposing the case of an owner of premises who had gone abroad, permitting, during his absence from this country, a friend to occupy under the superintendance of the domestics of the house; and he asked whether such an owner would not be rateable. These questions we must answer in the negative. In each case the person who was allowed to occupy would be the party rateable. In the case supposed by Mr. *Hodges*, the party who was permitted to occupy would be tenant at will; and he, not the absent owner, would be rateable. Two or three cases have come very near to this: the nearest, perhaps, is *Rex* v. *St. Mary the Less*, 4 T. R. 477. But there I think the owner himself did occupy, though loosely: and the case indeed could not supply an argument against this rate, unless it was decided that the other party was not rateable. Probably that other party was poor, and it was not thought worth while to raise the question. Here it does not appear to me that any real doubt exists that the parties rated do occupy beneficially and exclusively.

(a) Affirmed on error, in the Exchequer Chamber, *The Earl of Bute* v. *Grindall*, 2 H. Bl. 265.

Patteson, J. I felt no doubt in this case till I heard the attorney general's argument as to the rateability of *a subject placed in the position in which the crown is here. But stat. 43 Eliz. c. 2, s. 1, though it uses the words "by taxation," "of every occupier of lands, houses," &c., does not confine the taxation in respect of a house to the case where the party occupies the whole house. In *Ayr* v. *Smallpeace*, 1 Bott's P. L. 125, pl. 154, 6th ed., the comptroller of Chelsea College, residing in apartments forming a part only of the hospital, was held rateable in respect of his occupation of the apartments. In *Rex* v. *St Mary the Less*, 4 T. R. 477, the appeal was on the ground that the appellant, the owner of the house, was overrated; but it was not contended that he could not be rated at all: there may therefore clearly be different parties rated for different parts of a house. During the argument I turned to *Rex* v. *Williams*, or *Hungate's case*, (14 Car. 1,) 1 Hal. Pl. Cr. 522, where it was settled that, if A. have apartments in the king's palace of Whitehall, and one break into them and steal A.'s goods, the indictment should charge a breaking of the king's mansion house and stealing the goods of A. But then the king actually resided at Whitehall; so that the whole house was, in fact, occupied by him. It was also held in *Rex* v. *Peyton*, 1 Leach's Cr. C. 324, (4th ed.,) that the Invalid Office at Chelsea could not be laid to be the dwelling house of the prosecutor, who occupied all the upper part of the building, the ground floor being used for the business of the office; and the king certainly did not reside in the office, though the government paid the rent and taxes of the whole house. But that case does not show that different parties may not be rated for separate parts of a house: *that, as far as I know, has never been disputed. The question therefore is, whether the parties here rated have exclusive occupation of the respective apartments. It is found that they do occupy: that a warrant issues to authorise them to do so: that the keys are delivered to them: that they are bound to reside for some part of the year, in default of which they are to be considered to have quitted: and that they must, when about to be absent, leave a servant in the apartments, or deliver the keys to the housekeeper. It is quite clear that this is an assignment of the apartments to the persons named in the warrant. The housekeeper has the key of the state apartments, and also can go into those of the appellants; and that raised some little doubt whether there was not still an occupation by the crown. I think, however, that this is merely a condition annexed to the grant. It is clear to me that the several appellants have exclusive occupation: and then all the cases concur to show their liability. *Lord Bute* v. *Grindall*, 1 T. R. 338,(*a*) was a stronger case than this, the crown being there, if the expression may be used, a joint occupier with the ranger; the ranger found the corn seed, but the king the seed for the rye, grass and clover; and the ground was worked by the king's servants and horses, the ranger's servants, however, partly working the arable land: the king took the greater part of the produce of the grasses; the ranger took the corn. And the ranger was held rateable in respect of his taking the corn.

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Williams, J. I am of the same opinion. No doubt could have been raised in this case except from the *peculiar nature of the occupation. For that there has been a beneficial occupation cannot be doubted. Even had the user of those apartments been exercised in a public capacity

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(*a*) Affirmed on error in the Exchequer Chamber, *The Earl of Bute* v. *Grindall*, 2 H. Bl. 265.

(which is not pretended,) *Rex* v. *Terrott*, 3 East, 506, a case never questioned, shows that the parties would have been rateable if they derived any benefit. I feel no difficulty on the question of interest. Suppose—and that is granting a great deal—that this be called a case of permissive occupation; still it must be remembered that in 1833 this court had under its consideration the case of *Rex* v. *The Chelsea Water Works Company*, 5 B. & Ad. 156, where it was argued that the company did not occupy the reservoir, since they had no more than a permission to use it: but DENMAN, C. J., 5 B. & Ad. 169, said, that "a tenant at will is, until the will be determined, an occupier of the land." Therefore, if this were merely a permissive occupation (and I think it is more,) the appellants occupied rateable property within the meaning of stat. 43 Eliz. c. 2, s. 1. The only doubt is, whether this should still be considered a royal palace; for, if it should, that would supply an objection to the rate. But the facts point the other way. The only servant left in the occupation of the palace has indeed the right of entering into the apartments. But I agree with my lord and with my brother PATTESON that this is merely a qualification of the occupation. And *Lord Bute* v. *Grindall*,(*a*) 1 T. R. 338, resembles the present case as to this point, or indeed is stronger: for there the crown was
*31] an occupier jointly with the ranger. I *think counsel acted properly here in giving up the rate on the housekeeper's husband. Still, in *Rex* v. *Field*, 5 T. R. 587, which is recognised and explained by Lord ELLENBOROUGH in *Rex* v. *Terrott*, 3 East, 511, 514, the party rated could not have brought in her family, which here the housekeeper may do and does.

WIGHTMAN, J. I was engaged as counsel in this case, and am indeed interested in the result, to a certain extent. I therefore do not propose to take part in the decision.

Rate to be amended by striking out the name of the husband of the housekeeper.(*b*)

(*a*) Affirmed on error, in the Exchequer Chamber, *The Earl of Bute* v. *Grindall*, 2 H. Bl. 265.

(*b*) See *Regina* v. *Sir M. A. Shee*, Hil. T. 1843, post.

KING *v.* SHARE.

The parish of M., in the borough of K., is divided into nine districts called wards, for and from each of which, under a local act, (48 G. 3, c. xxii.,) an overseer is appointed; and the nine are, by the act, made overseers of the parish.

Nine lists, each containing the names of the burgesses of one only of the wards, were delivered in severally by the particular overseers appointed for and from the respective wards, under stat. 5 & 6 W. 4, c. 76, s. 15. Eight of the lists were signed, each by the overseer of the particular ward; no overseer signed the list of any but his own ward; the ninth list was not signed at all.

Held, that each of the overseers of the eight wards, as well as the overseer of the ninth, was liable, in a separate action, to the penalty under sect. 48.

DEBT, on stat. 5 & 6 W. 4, c. 76, s. 48, against an overseer for not making out and signing a burgess list. The cause was tried before VAUGHAN, J., at the Norfolk Summer assizes, 1839; when a verdict(*a*) was

(*a*) The issue was joined on a plea of not guilty. The declaration commenced as follows: "Joseph King, the plaintiff in this suit, who sues as well for the treasurer of the borough of King's Lynn as for himself in this behalf, by William Drake his attorney, complains of Thomas Silver Share, the defendant in this suit, who has been summoned to answer the said plaintiff, who sues as aforesaid, by virtue of a writ issued on," &c., "in a plea of debt upon statute. For that whereas the said defendant, heretofore and before," &c., (as in the declaration in *King* v. *Burrell*, 12 A. & E. 460.) The declaration concluded as follows: "Where

*found for the plaintiff for 50*l*. damages, and costs of suit, subject to the opinion of the court upon a case, which, so far as regards the point decided by the court, was substantially as follows. [*32

The borough of King's Lynn, otherwise called Lynn Regis, is a municipal borough, within the provisions of stat. 5 & 6 W. 4, c. 76.

The parish of St. Margaret, in the said borough, is wholly comprised within the limits of the borough: and, previously to the year 1700, this parish was, and ever since has been, and still is, divided into nine divisions called wards.

By stat. 12 & 13 W. 3, c. 6, (private,) (*a*) the management of the poor within the borough of King's Lynn was vested in a corporation, to be constituted in the manner by the said act prescribed, and to be called "The Guardians of the Poor of the Borough of King's Lynn, in the county of Norfolk, and within the Liberties of the same *borough." The case then set out clauses of the statute, whereby the corporation of guardians was to consist of certain members of the corporation of the borough, and twenty other persons, elected as there prescribed: and provision was made for the election of successors. [*33

This last mentioned act was amended by stat. 48 G. 3. c. xxii. (local and personal public,(*b*) which was made part of the case.

Sect. 1, after referring to the previous act, and stating its insufficiency, enacts "that the churchwardens for the time being of the parish of St. Margaret, in the said borough, and the overseers of the poor for the time being for the several and respective wards within the said parish of St. M., to be appointed in manner herein mentioned, shall be and be deemed to be guardians of the poor of the said parish of St. M., and shall be added to the guardians of the poor of the said parish of St. M., nominated or chosen by virtue of the said recited act, and shall have the like powers and authorities in as full and ample, and beneficial a manner to all intents and purposes whatsoever, as if they respectively had been nominated or chosen such guardians by virtue of the said recited act."

Sect. 2 enacts "that on the first Monday next after the passing of this act, the overseers of the poor of the said parish of St. M. last appointed, shall cease to be such overseers, and that on such day or within ten days thereafter, it shall and may be lawful for any two of his majesty's justices of the peace for the said borough, and they are hereby authorised and required, to nominate and appoint for each of the nine wards *within the said parish of St. M. one fit and proper person, being a substantial householder within the ward for which he shall be so nominated and appointed; and *such nine persons* when so nominated and appointed shall continue to be *overseers of the poor of the said parish*, until nine other overseers shall be nominated and appointed in the manner and at the time by law directed, to succeed them; and in Easter week or within one month after Easter, in each and every year, one fit and proper person for each of the said [*34

by, and by force of the statute in such case made and provided, the said defendant forfeited for his said offence the sum of 50*l*.; and thereby, and by force of the statute in such case made and provided, an action hath accrued to the said plaintiff, who sues as aforesaid, to demand and have of and from the said defendant the said sum of 50*l*., so forfeited as aforesaid. And therefore, as well for the treasurer of the said borough as for himself in that behalf, be the said plaintiff brings his suit, and so forth."

(*a*) "To amend and enlarge the powers of an act of King William the Third, for erecting," &c.

(*b*) "For erecting hospitals and workhouses within the borough of King's Lynn in the county of Norfolk, for the better employing and maintaining the poor there."

respective wards, being a substantial householder in the ward for which he shall be nominated and appointed, shall be nominated and appointed in the manner by law directed, *to be the nine overseers of the poor of the said parish.*"

Sect. 3 enacts "that such persons so nominated and appointed overseers of the ward for the time being, shall be and they respectively are hereby declared to be invested with all and every the powers and authorities, and shall have and enjoy the same privileges, exemptions, and immunities, and shall be subject and liable to the same rules, penalties, and forfeitures (save and except as may be herein or in the said recited act excepted) as overseers of the poor by the laws made or to be made touching or concerning the relief or management or employment of the poor, or the application of any rates made for their use or maintainance, are or shall be invested with and have and enjoy and be subject and liable to; and such overseers for the time being are hereby declared within the said parish competent to do and perform all and every act and acts which overseers of the poor by law are enabled to do and perform, save and except as may be herein excepted."

*35] Under the provisions of this last mentioned act, the *overseers within the parish of St. M. have ever since been, and still continue to be appointed. The defendant was appointed in April, 1838, by writing under the hands and seals of three justices of the borough, "for the ward of Trinity Hall, in the parish of St. Margaret in the said borough," to be one of the nine overseers of the poor of the said parish of St. Margaret within the said borough," for the then present year. Similar appointments were made in the case of the eight other wards.

Rates have from time to time been made, under the provisions of the last mentioned act; and such have been general rates for the whole parish. The guardians appoint separate collectors for each ward, to continue in office till determined by a quarter of a year's notice on either side.

On 5th September, 1838, eight separate alphabetical lists of persons qualified to be enrolled in the burgess roll of the borough were delivered, at the office of the town clerk, by the overseers respectively chosen as aforesaid, for the several wards to which the lists respectively related. Each list was a list of one only of the nine wards into which the parish is divided as above mentioned, and contained only the names of the persons entitled to be on the burgess roll in respect of property within that ward. One of these eight lists (namely, the list for Sedgeford Lane ward) was not signed at all. Of the other seven, each was signed by one overseer only being the overseer appointed for that ward under stat. 48 G. 3. c. xxii. A ninth list, being for the remaining ward of the said parish (namely, Kettlewell ward,) was delivered at the office of the town clerk on 6th September, and was signed

*36] by the overseer of *the last mentioned ward, and contained the names of persons entitled to be on the burgess roll in respect of property within such last mentioned ward; which last mentioned list was received by a clerk of the town clerk, at the time of such delivery, without objection.

No other lists or list of, or purporting to be a list or lists of, persons entitled to be on the burgess roll of the borough in respect of property within the parish of St. Margaret was made out, signed or delivered under stat. 5 & 6 W. 4, c. 76, for the registration of 1838. These nine separate lists were afterwards printed, and in due time affixed to the door of the Town Hall by order of the town clerk, according to the provisions of the last mentioned act.

The said nine lists were, in due time, revised by the mayor and assessors, and signed by the mayor, and delivered by him to the town clerk, who

caused the same to be copied into a book (according to the provisions of the act) forming the burgess roll of the burgesses of the borough; and the town clerk also caused copies of the said burgess roll to be printed for sale under the provisions of the said act.

A considerable discussion took place in the revising court on an objection raised against the list for Sedgeford Lane ward, on the ground of its not having been signed: but the defendant was not then present; and the mayor and assessors agreed to, and did, revise all the aforesaid lists as before mentioned. The burgess roll was formed from these lists so revised; and the councillors, auditors, and assessors were elected by the burgesses on that roll.

The questions for the opinion of the court were:—

1. Whether, under the circumstances above stated, *the defendant was guilty of the offence charged in the declaration, and liable to the penalty imposed by stat. 5 & 6 W. 4, c. 76, s. 48. [*37

2. Whether the plaintiff is entitled to maintain actions against the said overseers separately, or whether the action ought not to have been a joint action against all the said overseers.

If the court should be of opinion that the defendant was guilty, and the plaintiff entitled to maintain an action against the defendant alone, the verdict was to be entered for the plaintiff for 50*l.*: if the court should be of a contrary opinion on either point, a nonsuit to be entered.

The case was argued in last Michaelmas term.(*a*)

O'Malley, for the plaintiff, relied upon *King* v. *Burrell*, 12 A. & E. 460.

B. Andrews, contrá, contended that the defendant had, at any rate, performed all that he had the power of performing; that under stat. 48 G. 3, c. xxii., it was doubtful whether the defendant was bound even to sign the list for his own ward; and that, at worst, he could be considered only as having signed a list in which there were several names omitted. At all events, one offence only is committed; and there cannot be a separate action against each overseer.

O'Malley was heard in reply.

Cur. adv. vult.

*Lord DENMAN, C. J., now delivered the judgment of the court. [*38

This was an action against the defendant as one of the overseers of the poor of the parish of St. Margaret in King's Lynn, in the county of Norfolk, to recover a penalty of 50*l.*, under the forty-eighth section of stat. 5 & 6 W. 4, c. 76, for having neglected to make out and sign a list of persons entitled to be enrolled in the burgess roll pursuant to the provisions of the act.

It is, by the fifteenth section of the act, required, in terms, that a list of all persons who shall be entitled to be enrolled in the burgess roll of the year in respect of property within the parish, shall be made out and signed by the overseers of the parish. In the present case no such list has been made out. Separate lists have indeed been made out for each ward, eight of which have been signed respectively by the overseer acting for each ward, and one has not been signed at all. Neither the defendant, therefore, nor any other of the overseers, has signed any list, as required by the statute, of the persons entitled to be on the burgess roll in respect of property within the parish of St. Margaret.

The present case has, in effect, been already decided in that of *King* v.

(*a*) November 16th, 1841. Before Lord Denman, C. J., Williams, Coleridge and Wightman, Js.

Burrell, 12 A. & E. 460, S. C. 4. P. & D. 207, and in principle, and almost in circumstances, is the same. Here the defendant did sign a list of the persons within his ward who were entitled; and there the defendant did not, though he delivered one; but in neither case did the defendant sign any lists of the persons entitled *within the parish*, as required by the statute. The individual case may be one of hardship; but it arises
*39] from pursuing a mode of *making out and signing the lists not warranted by the terms of the act.

It is said that only one penalty can be incurred by all the overseers: but we are of opinion that, by the express words of the statute, as well as the nature of the offence, separate penalties are incurred by each.

The words of the forty-eighth section of the statute are, that "if any overseer of any parish" "shall neglect or refuse to make out, sign, and deliver such list as aforesaid," "*every* such overseer" "for every such offence shall forfeit and pay the sum of 50*l*."

We are, therefore, of opinion that the verdict ought to be entered for the plaintiff for the penalty of 50*l*.

Verdict to be entered for the plaintiff.

GIBSON *v*. IRESON and LYONS.

Materials in the house of a manufacturer, for the purpose of his trade, are not distrainable by his landlord for rent. And, where, in trover for silk, the defendant justified taking it on the premises of C. as a distress for rent due from C., and the plaintiff replied that, before and at the time, &c., he carried on the business of a silk manufacturer, and C. carried on the business of a silk weaver on the said premises, and that plaintiff, shortly before, &c., "did, in the way of his said trade and business, employ the said C. in the way of his said business and calling as his workman, for certain wages in that behalf, to weave and manufacture into velvet," on the said premises "certain silk of the plaintiff," which silk (the subject of the action,) being on the premises for that purpose, was wrongfully distrained.

Held, on general demurrer, that the silk was sufficiently shown to have been on C.'s premises for the purpose of C.'s trade, and therefore exempt from distress: and that the words "as his workman, for certain wages," taken with the context, and did not imply that C. had the silk only as the plaintiff's servant, and for the purposes of plaintiff's trade.

Quære, whether it be necessary to the exemption of goods held for the purposes of trade, that the trade be "public;" and, if so, what constitutes a "public trade?"

TROVER for a piece of velvet.

Plea, that one Joseph Cooper held a room, parcel of a certain house, situate, &c., as tenant thereof to defendant Ireson, under and by virtue of a demise, &c., at a rent, &c., the reversion belonging to Ireson; that, on,
*40] &c., *6*l*. of the said rent was in arrear; whereupon Ireson in his own right, and Lyons as his agent and by his command, at the time when, &c., seized, took and distrained the said velvet, &c., then being in the said demised room, for a distress for the said rent, and then removed and impounded, &c.; which is the supposed grievance, &c. Verification.

Replication. That plaintiff, before and at the said time when, &c., was a silk manufacturer, and the trade and business of a silk manufacturer then carried on; and the said Joseph Cooper, before and at the said time when &c., was a silk weaver, and the business and calling of a silk weaver then carried on in the said room, of which premises the defendants then had notice: and that, shortly before the said time when, &c., plaintiff, while so carrying on the said trade and business, did, in the way of his said trade and business, employ the said Joseph Cooper in the way of his said business and calling as his workman, for certain wages in that behalf, to weave and manufacture into velvet, in the said room of the said Cooper, being the room in the said plea mentioned, certain silk of the plaintiff; and for

that purpose plaintiff, before the said time when, &c., had delivered to Cooper the said silk, in order that Cooper might, in his said room, manufacture the said silk into velvet as aforesaid for plaintiff, to be afterwards sold and disposed of by him in the way of his said trade and business, and that Cooper might, when and as soon as the said silk should be so woven and manufactured as aforesaid, return to plaintiff the said velvet: that Cooper, before the time when, &c., received from plaintiff the said silk for the purpose hereinbefore mentioned in that behalf; and that, just before and at the said time when, *&c., in pursuance of the said bailment to him, the said silk had been and was woven and manufactured by the said Cooper into velvet as aforesaid, and the said velvet, being the said velvet in the said declaration and in the said last plea mentioned, then was in the room of the said Cooper for the purpose aforesaid, and was, before and at the said time when, &c., about to be returned and delivered to plaintiff in the way of his trade and business aforesaid, and for the furtherance, advancement and maintenance of trade and commerce: and that a reasonable time for Cooper to weave and manufacture the said silk into velvet as aforesaid, and to return the same so soon as the same was woven and manufactured into velvet as aforesaid, had not elapsed before the said time when, &c., wherefore defendants of their own wrong seized, &c. Verification. [*41

General demurrer, and joinder.

Peacock for the defendants. The velvet was not protected from distress under the circumstances replied. Five heads of exemption are enumerated in *Simpson* v. *Hartopp*, Willes, 512, 514: the goods in question, if protected at all, come under the second head, of "things delivered to a person exercising a public trade to be carried, wrought, worked up, or managed in the way of his trade or employ."(a) The ground of this protection is explained by PARKE, B., in *Muspratt* v. *Gregory*, 1 M. & W. 633, 652, 653; S. C. Tyrw. & Gr. 1086.(b) "The principle of the exemption is the public good: that is, that all *men may freely, and without interruption, or danger of the loss of their goods, deal with those who carry on trades or businesses for the benefit of all indiscriminately, or buy or sell in fairs or markets, and thus supply themselves with the commodities of life. Such being the principle, it appears to me, that, in order to give it full effect, we ought to hold that not merely chattels are privileged from distress which are placed on the lands chargeable with it, in order to have something done with them by the person there carrying on his trade, but that all are exempt, which are necessarily placed there, and whilst they are there in order to enable their owner to enjoy the full benefit of the trade or business, as it is there carried on." "There appears to be no dispute but that the word 'public' is to be understood to refer to every trade or employ, carried on generally for the benefit of any persons who choose to avail themselves of it, as distinguished from a special employment by one or particular individuals: although it be not 'public' in the sense that all the king's subjects have a right to insist on the trader accepting their goods, and that an indictment or action would lie if he did not." Now, on the statement in this replication, it does not appear that the goods were in Cooper's room for the purpose of a public trade, but that Cooper had them as the plaintiff's workman and servant, to make them up for Cooper's individual use: and [*42

(a) The same words (with very trifling exception) are used by the Court of Common Pleas in *Gisbourn* v. *Hurst*, 1 Salk. 249.

(b) Affirmed on error, in Exch. Ch., *Muspratt* v. *Gregory*, 3 M. & W. 677.

a person employed by one master to manufacture goods is not within the second exemption in *Simpson* v. *Hartopp*, Willes, 514. [PATTESON, J., mentioned *Wood* v. *Clarke*, 1 Cro. & J. 484, S. C. 1 Tyrwh. 314.] The
*43] subject of the action there was a loom furnished to the *weaver by his employer, to be used in manufacturing materials for him, which were sent at the same time: and the decision applies to the loom only. [PATTESON, J. No one disputed that the materials were exempt; and Lord LYNDHURST said that the question was whether the "employer's privilege" "is confined to the materials which he supplies, or extends also to the machinery by which the working up is effected."] The replication here states that the plaintiff had employed Cooper "as his workman, for certain wages." The word "wages" points out conclusively the relation of master and servant, and was held to do so by Lord ELLENBOROUGH in *Rex* v. *Heywood*, 1 M. & S. 624, where stat. 13 G. 1, c. 23, s. 5, was held inapplicable to a dispute between a mill-owner and clothiers for whom he had worked. [PATTESON, J., cited *Hardy* v. *Ryle*, 9 B. & C. 603.] The relation between these parties, as shown by the replication, is the same which is contemplated by stat. 17 G. 3, c. 56, s. 8, where the employer is called the "master." The principle of exemption from distress established by the early decisions, and relied upon here, is not to be extended: *Joule* v. *Jackson*, 7 M. & W. 450, per Lord ABINGER, C. B., and PARKE, B. [Lord DENMAN, C. J., mentioned *Gorton* v. *Falkner*, 4 T. R. 565.] The point now taken was not fully considered in that case. [Lord DENMAN, C. J. Unless there is some peculiar meaning in the words "public trade," this case comes within the second exemption in *Simpson* v. *Hartopp*, Willes, 514, as reported in Willes. It is differently stated by BULLER, J., in *Gorton* v. *Falkner*, 4 T. R. 568; as *Simson* v. *Harcourt*, ("things delivered to persons exercising their trade, as cloth in a tailor's shop:") but
*44] *Willes's reports had not then been published.] It is no answer to the present objection that the goods were sent to Cooper for the carrying on of the plaintiff's trade. The privilege in question, though spoken of by Lord LYNDHURST in *Wood* v. *Clarke*, 1 Cro. & J. 496; 1 Tyrwh. 326, as the "employer's" privilege, is not his, but that of the trader whom he employs: it is evidently so treated by the Court of Exchequer in *Joule* v. *Jackson*, 7 M. & W. 450; and PARKE, B., says there, p. 452, 453, "The benefit of trade of the person sending the article is immaterial; it is the benefit of the trade of the person to whom it is sent, which is to be considered." "I believe *Gisbourn* v. *Hurst*, 1 Salk. 249,(*a*) will be found to be the only case where goods are said to be privileged on the ground of benefit to the trade of the person sending them."

R. V. Richards, contrà, was stopped by the court.

PATTESON, J.(*b*) The only foundation for the argument in support of this demurrer is, that Cooper appears by the pleadings to have been a servant and not a person carrying on a trade. But I find no such thing in the replication. I do not know what is meant by the phrase "public trade." It is said, in *Simpson* v. *Hartopp*, Willes, 515, that "materials sent to a weaver, or cloth to a tailor to be made up, are privileged for the sake of trade and commerce:" but the trade of a tailor is not public, any more than
*45] that of a silk weaver. If he were obliged, *as a carrier is, to receive whatever is sent to him, the case might be different: but he is under no such obligation. The present case, however, is not rested upon the na-

(*a*) See *Reed Burley*, Cro. Eliz. 596; there cited.
(*b*) Lord Denman, C. J., had left the court.

ture of trade; for it is argued that Cooper did not receive the goods as a person carrying on trade, but as a servant. The replication states that the plaintiff employed Cooper "as his workman, for certain wages:" but we must look at the context; that distinctly states that Cooper carried on the business and calling of a silk weaver; and it is then alleged that the plaintiff, carrying on the trade of a silk manufacturer, "did, in the way of his said trade and business, employ the said Joseph Cooper in the way of his said business and calling as his workman, for certain wages in that behalf, to weave and manufacture into velvet" "certain silk." Although, therefore, the plaintiff employed Cooper as his workman for wages, it was in his calling of a silk weaver, and as the plaintiff's workman on that occasion. The goods were delivered to him to be "worked up" "in the way of his trade," according to the express words of *Simpson* v. *Hartopp*, Willes, 514. It was not in terms decided, in *Wood* v. *Clarke*, 1 Cro. & J. 484, S. C. 1 Tyrwh. 314, that materials furnished by the manufacturer to the weaver were privileged, as well as the loom so furnished; but it was assumed in argument at the bar; and the proposition is adopted by the court, Lord LYNDHURST, C. B., saying: "It appears to me that it" (the privilege) "is confined to the materials, and does not include the machinery." The action there was not brought for the materials; and therefore the question as to them was not essential to the decision; but the intimation of opinion is a strong one. *In this case there is no doubt; and the plaintiff is entitled to judgment. [*46

WILLIAMS, J. *Brown* v. *Shevill*, 2 A. & E. 138, is one of the last cases on this subject. The plaintiff in that case sent a bullock to the premises of a butcher to be slaughtered; and the carcass, while there, was held exempt from a distress for rent. I am not prepared to say what we must necessarily understand as to the publicity of the trade in that case. In a certain sense the trade would be public if many cattle were slaughtered, if few, not: but to make the publicity depend upon the quantity of trade would introduce a very uncertain criterion. Here, however, the whole argument is that the goods were not sent to the party distrained upon in the course of his own trade, but that the plaintiff was the trader, and sent them as to a servant. It is true that the replication has the words "did" "employ the said Joseph Cooper" "as his workman, for certain wages;" but the earlier part shows that Cooper was a silk weaver, and explains the manner in which he was employed. I think therefore that the case is not distinguishable from *Brown* v. *Shevill*, 2 A. & E. 138, and is within the principle of other decisions in favour of exemption.

WIGHTMAN, J. The replication here does not materially differ, as to the point now before us, from the plea in bar in *Wood* v. *Clarke*, 1 Cro. & J. 484, S. C. 1 Tyrwh. 314. It is suggested that the dictum there, as to the materials, was extra-judicial; but Lord LYNDHURST, C. B., quotes Co. Litt. 47, a, where, among things exempt from distress, "the *materials in the weaver's shop for making of cloth," and "cloth or garments in a tailor's shop," are mentioned. And Mr. Peacock scarcely contends that the decisions exempting materials in such cases are not correct, but denies that the materials were on Cooper's premises for the purpose of a public trade carried on by him; suggesting that Cooper was a mere servant. But, if this be correctly put, I scarcely know how a tailor is protected in the case stated in the book. And there is nothing in the facts pleaded here which obliges us to consider Cooper in the light of a servant, properly so called: for it is expressly said that he was a silk weaver, and employed in the way [*47

of that business by the plaintiff, a silk manufacturer. Stress is laid upon the words "as *his* workman," which follow: but Cooper was the plaintiff's workman, in the language of pleading, while employed on his work. So the tailor, at the time when he is making up the clothes, is the workman of his employer. I cannot distinguish this from other cases of the same kind in which goods have been held protected.

Judgment for the plaintiff.

*48] *JACKSON, surviving Executor of HAMER *v.* MAGEE.

In assumpsit for money paid, defendant pleaded his bankruptcy and certificate; and that the money was paid for a debt of defendant, for which plaintiff was surety; that the debt was due, and plaintiff liable for it, before the bankruptcy; and that the money was paid without any request from defendant, except such as might legally arise from the premises; and that the surety had not, when he became liable, notice of any act of bankruptcy.

Replication: that, before the payment, defendant had obtained his certificate, and a final dividend had been made; and that there was not at any time any debt in respect of the payment of which plaintiff could have proved, or received a dividend.

Held, on demurrer to the replication, that the plaintiff's claim was proveable, under stat. 6 G. 4, c. 16, s. 52, and that the action was therefore barred by sect. 121.

ASSUMPSIT. The first count charged that defendant, after the death of Edmund Hamer, was indebted to plaintiff, as surviving executor, in 1000*l.*, for money paid by plaintiff, as such surviving executor, for the use of defendant, and at his request. Promise to plaintiff as such surviving executor.

Third plea. As to 684*l.* 6*s.* 6*d.*, parcel of the money in the first count, &c. The plea formally set out that defendant became bankrupt, to wit, on 2d April, 1838; that a fiat issued, to wit, on 12th April, 1838; that defendant was adjudged a bankrupt, to wit, on 17th April, 1838; with the other proceedings, down to the allowance and confirmation of a certificate, to wit, on 26th December, 1838. And defendant further says that the said sum of 684*l.* 6*s.* 6*d.*, parcel, &c., is claimed and alleged by plaintiff to be due, and is sought to be recovered in this action, as so much money due to plaintiff, as such surviving executor as aforesaid, for money paid for the use of defendant by plaintiff, as such surviving executor, in discharge of a certain debt of defendant due to certain persons united in copartnership for the purpose of carrying on the trade and business of bankers in England, and called The Northern and Central Bank of England: and that the said
*49] sum of 684*l.* 6*s.* 6*d.* is not due, nor is any part thereof due, nor *is the same or any part thereof claimed or alleged by plaintiff to be due, or sought to be recovered in this action, on any other ground or account, or in any other manner whatsoever: that the said debt, so due to the said Northern, &c. Bank as aforesaid, was a debt of defendant to and for which the said Edmund Hamer, deceased, had become and was liable in his lifetime, and before defendant became a bankrupt as aforesaid, and before the issuing of the said fiat as aforesaid, to wit, on the 1st of January, 1836; and to and for which debt E. H. remained and was liable up to the time of his death; and to and for which debt plaintiff and Luke Trotter, as executors, in the lifetime of the said L. Trotter, became and were liable, and remained and continued so liable up to the time of the death of the said L. Trotter; and to and for which debt, being a debt of the said bankrupt, plaintiff, as surviving executor of the said E. H. and by reason and in consequence only of his the said E. H. so having become and being so liable as aforesaid, became and was so liable, and remained and continued so

able, up to and at the time of the bankruptcy of defendant, and of the issuing of the said fiat against him: that plaintiff, as such surviving executor as aforesaid, so being and remaining liable to the said debt of the said bankrupt as aforesaid, after the issuing of the said fiat, to wit, on 1st January, 1841, in respect of his liabilities aforesaid, paid and discharged the same debt to the Northern and Central Bank, &c., without any request from defendant, save and except the request supposed to arise by law from the premises in this plea mentioned; which is the request in the said first count mentioned, so far as the same relates to the said sum of 684*l.* 6*s.* 6*d.*: that the said E. Hamer had not, when he *became so liable as aforesaid, [*50 notice of any act of bankruptcy by defendant committed; and that plaintiff and L. Trotter had not, nor had either of them, when they became liable as aforesaid, nor had plaintiff when he became liable as aforesaid, notice of any act of bankruptcy by defendant committed: and defendant further says that the payment so made by plaintiff to the Northern and Central Bank, &c., as aforesaid is the same payment so made by him as in the first count of the said declaration mentioned, so far as regards the said sum of 684*l.* 6*s.* 6*d.*, parcel, &c. Verification.

Replication. That, before the time of paying of the said sum of 684*l.* 6*s.* 6*d.*, parcel, &c., by plaintiff, as in the first count mentioned, the said certificate in that plea mentioned was made, signed, sealed, allowed and confirmed, as in that plea mentioned, and a final dividend had been made of the estate and effects of the defendant, as such bankrupt, under the said fiat also in that plea mentioned; and that there was not, at any time, any debt, claim, or demand in respect of the said sum of 684*l.* 6*s.* 6*d.*, parcel &c., and of the payment thereof by plaintiff, which, or in respect of which, the plaintiff could have proved or claimed against the estate of defendant as such bankrupt under the fiat in that plea mentioned, or could or might have received any dividend or dividends from or out of the said estate and effects of the bankrupt. Verification.

Demurrer; (*a*) and Joinder.

The case was now argued.(*b*)

**Crompton*, for the defendant. There are formal objections to the [*51 replication; (*c*) but it is also bad in substance: and an objection will probably be made to the plea. The plea brings the case within the words of stat. 6 G. 4, c. 16, s. 52. That section first enacts that, if the creditor has proved, the surety, on paying the creditor, shall stand in his place; or, if the creditor has not proved, (which is the case here,) the surety may prove, not disturbing former dividends. This is therefore a debt proveable: and the certificate is a bar under sect. 121. The history of the law on the subject of sureties for bankrupts exhibits a constant struggle to evade the intention of the legislature, that the bankrupt should become a new man by the certificate. The law, as it stood originally, may be seen in 1 Deacon on Bankruptcy, 290, &c.: the surety could no prove unless he had made the payment before the bankruptcy of the principal creditor; though, in some instances, equity would relieve. The replication speaks of a final dividend: but in strictness no dividend is final, because it can never be legally impossible that more assets should come in. Nor does sect. 52 of stat. 6 G. 4, c. 16, in any way refer to a final dividend. The surety has no right to delay his proof: if the creditor do not prove, the surety may do so himself. The decision on stat. 49 G. 3, c. 121, s. 8, are

(*a*) The demurrer was special; and the causes assigned were the points mentioned in the argument in the text, with other points on which the court pronounced no decision.

(*b*) Before Lord Denman, C. J., Patteson, Williams, and Wightman, Js.

(*c*) The argument as to these is omitted.

applicable, the words being to practical effect the same as in stat. 6 G. 4, c. 16, s. 52. Under that statute *Westcott* v. *Hodges*, 5 B. & Ald. 12, was decided, where the surety paid after the certificate, yet it was held that the bankrupt might plead that the cause of action accrued before the bankruptcy.

52*] In *Vansandau* v. *Corsbie*, 8 Taun. 550,(a) the same law was *applied to the case of acceptor of an accommodation bill, who sued the bankrupt for not providing funds, whereby damages accrued to the plaintiff after the commission. *Soutten* v. *Soutten* 5 B. & Ald. 852, will be cited on the other side. But there the surety did not pay the debt, but only a sum to discharge himself from personal liability as surety: and the principal creditor had proved the debt itself. The sum paid by the plaintiff could not have been proved as a debt owing from the bankrupt to any party. The case therefore was not within stat. 49 G. 3, c. 121, s. 8. The replication here seems to have been framed on the assumption, either that the bankrupt's discharge is to depend on his estate paying a dividend to the party seeking to charge him, or that such party has the power of suspending the prosecution of his claim and thereby evading the act. But each assumption is quite contrary to the spirit and letter of stat. 6 G. 4, c. 16, s. 52.

Tomlinson, contrà. This case is not within stat. 6 G. 4, c. 16, s. 52. The plaintiff could not prove. After the final dividend, the bankruptcy cannot be considered open: the estate is exhausted, and the assignees are discharged. The plea is bad for not averring, as is usual in such cases, that the creditor who has not proved may still prove and receive a dividend. Sect. 121 discharges only from debts which are due at the time of the bankruptcy, and debts which by this act are made proveable under the commission. That confines the relief against the surety entirely to cases under sect. 52. Now it is not pretended that the first branch of sect. 52

53*] applies; for there has been no proof. As to *the second branch, it applies only where the surety can "receive dividends with the other creditors." The word "claims," in sect. 121, does not carry the discharge beyond the cases in sect. 52: the word was added to "demands" in order to comprehend cases like that of covenant where the damages can be liquidated, which are not strictly demands or debts. The "final dividend" is within the contemplation of the legislature: the provisions for a final dividend are contained in sect. 109. [*Patteson* J. But that is final only unless an action or suit be depending, or part of the estate be outstanding, or some other estate or effects come in.] In practice, the affairs are never opened after the final dividend: such a possibility of benefit as that arising from effects not yet discovered cannot have been contemplated in sect. 52. The record avers a dividend absolutely final; and that is not contradicted. By stat. 49 G. 3, c. 121, s. 8, as by sect. 52, of stat. 6 G. 4, c. 16, the discharge is limited to cases where surety can "receive a dividend or dividends proportionably with the other creditors." There is no reason to suppose that the legislature contemplated the case of a surety waiting till the estate was exhausted; and, if they did, they probably thought that this would occur only where circumstances of disability prevented him from pressing his claim, and that, in such a case, it would be hard to bar the claim. Suppose a creditor refused to receive the money from the surety; the surety then could not prove, under sect. 52. Yet no provision is made for that case, the legislature not contemplating such an improbability. In

*54] *Vansandau* v. *Corsbie*, 8 Taun. 550,(a) there was the *allegation that creditors who had not proved could still receive the proportional

(a) Affirmed on error in K. B., *Van Sandau* v. *Corsbie*, 3 B. & Ald. 13.

dividend. In *M'Dougal* v. *Paton*, 8 Taun. 584, also there was a similar averment; and it was alleged that the payment was made before a final dividend. In *Wood* v. *Dodgson*, 2 M. & S. 195, there was an averment that the plaintiffs might have proved without disturbing dividends already made; probably the plea, which is not fully stated in the report, was similar in this respect to that in *M'Dougal* v. *Paton*, 8 Taun. 584. In *Clements* v. *Langley*, 5 B. & Ad. 372, where *Wood* v. *Dodgson*, 2 M. & S. 195, is referred to, the plea has the full averment. *Clements* v. *Langley*, 5 B. & Ad. 372, also furnishes another proof that the legislature has not provided for all possible cases; for there the provisions as to sureties were held not to extend to the case of a surety requiring contribution from a bankrupt co-surety. *Soutten* v. *Soutten*, 5 B. & Ald. 852, at least shows that the courts interpret the provision literally: for there the principal had been relieved and the surety damaged to the extent of the 500*l*.

Crompton, in reply. In *Filbey* v. *Lawford*, 3 M. & G. 468,(*a*) the plaintiff had accepted bills drawn by defendant upon an agreement that defendant should take up previous bills drawn by him upon, and accepted by, plaintiff, for a debt due from plaintiff to defendant. The defendant did not take up the original bills; and he became bankrupt and obtained his certificate: and it was held that the certificate barred the plaintiff from recovering from the defendant in respect of money paid on the original *bills after the bankruptcy. There TINDAL, C. J., said, "What we have to inquire is, whether, at the time of the bankruptcy, the plaintiff was surety or a person liable for a *debt* of the bankrupt." In equity the surety may compel the principal creditor to prove; *Beardmore* v. *Crittenden*, 1 Co. B. L. 211, in marg.; *Ex parte Rushforth*, 10 Ves. 409, 414, 1 Deac B. L. 291, Archbold's B. L. 134, (9th ed.:) no hardship therefore can arise to the surety. Sect. 109 of stat. 6 G. 4, c. 16, has been referred to, for the purpose of showing what is meant by a final dividend. But that section shows that a final dividend never can exist, in the sense which the argument for the plaintiff requires: for there may always be a legal possibility of fresh assets; and therefore it is always open to claimants to prove. [*55]

Cur. adv. vult.

Lord DENMAN, C. J., in the vacation after this term, (May 14th,) delivered the judgment of the court.

This was an action for money paid by the plaintiff, as executor of Hamer, to the use of the defendant. The defendant pleaded his certificate under a fiat in bankruptcy, and that the money was paid for a debt of the defendant, for whom Hamer was surety, and that the debt was due, and Hamer liable for it, before the bankruptcy, and that the plaintiff paid the money without any request from the defendant except the request supposed to arise by law from the premises. The plaintiff replied that, before the payment of the money, the defendant had obtained his certificate, and a final dividend had been made of his estate, and that there *was not any debt in respect of the payment of which the plaintiff could have proved, or for which he could have received any dividend. To this replication the defendant demurred specially. [*56]

We are clearly of opinion that the defendant is entitled to our judgment in his favour.

The debt was due before the bankruptcy: the creditor might have proved it under the fiat; and, if he had, the plaintiff would have been entitled to

(*a*) Affirmed on error, in the Exchequer Chamber, note (a) to *Filbey* v. *Lawford*, 3 M. & G. 479.

the benefit of that proof, and of any dividends which might be paid by the estate, either in reduction of the sum for which he was liable to the creditor, if that creditor received the dividends, or by receiving the dividends himself, if he paid the whole debt to the creditor. Or the plaintiff might have paid the debt at once to the creditor, and have himself proved under the fiat, long before any dividend was declared. Or, if the creditor would not take the money, the plaintiff might have compelled him to prove for his, the plaintiff's, benefit, as was clearly laid down in *Ex parte Rushforth*, 10 Ves. 409, 414, and in a case of *Philips* v. *Smith* in the Court of Exchequer, there cited, 10 Ves. 412.

The plaintiff cannot be allowed, by voluntarily delaying the payment of the debt till after a final dividend has been made, to deprive the defendant of the benefit of his certificate.

The fifty-fifth section of stat. 6 G. 4, c. 16, prohibits an annuity creditor from suing the surety till he shall have proved under the commission for his benefit, and makes the certificate of the debtor a bar against both
*57] principal, creditor and surety. The fifty-first section *provides that debts due at a future day shall be proved with a rebate of interest, and shall be barred: and, though it does not mention the surety, yet the fifty-second section provides, in effect, that in all cases the surety shall be entitled to stand in the place of the principal creditor.

If then, in the case of an annuity and a debt payable at a future day, the surety, though he may be called on long afterwards, is barred by the certificate, because the debt might be proved under the above provisions, much more shall he be barred when the debt was altogether due before the bankruptcy.

Stat. 49 G. 3, c. 121, s. 8, which was referred to by the plaintiff's counsel, makes directly against him; for it takes the distinction between sureties in commissions before and after that act. It bars sureties in cases of commissions already issued, only when they could receive a dividend equal to other creditors without disturbing former dividends; because those sureties, having hitherto been unable to prove, had not been guilty of any laches: but it bars all sureties in cases of future commissions, because they are enabled to have the benefit of dividends equally with other creditors, unless by their own laches they forego that benefit.

The case of *M'Dougal* v. *Paton*, 8 Taunt. 584, which was cited for the plaintiff, was not the case of a surety for the payment of a debt, but of a surety for the performance of covenants which were not broken at the time of the bankruptcy, and therefore does not apply. The case of *Clements* v. *Langley*, 5 B. & Ad. 372, which was also cited, was not a case of prin-
*58] cipal and surety, but of two co-sureties, to *which it was held that stat. 6 G. 4, c. 16, s. 52, did not apply.

The judgment must be for the defendant.

Judgment for the defendant.

FULLER *v.* ELIZABETH WILSON.

Defendant, being owner of a house, employed an agent to sell it. The agent described it as free from rates and taxes, and did not know it to be otherwise: but it was in fact liable to certain rates and taxes, as the defendant knew. On the faith of the agent's description, plaintiff bought the house.

Held, **that plaintiff might maintain case for deceit against defendant. Though it did not appear that defendant had instructed the agent to make any representation as to rates or taxes.**

CASE. The declaration stated that heretofore, to wit on, &c., by a certain indenture, &c.: the declaration then set out a lease by the Vintners' Company to the defendant of a messuage and premises, No. 3, Foster Lane, London, for the term of fifty-three years from 25th December, 1837, at an annual rent of 37*l.* 10*s.*, and a premium for annual insurance. That, before and at the time of the making of the indenture of assignment after mentioned, it had been and was contracted and agreed by and between plaintiff and defendant that plaintiff should absolutely purchase of defendant, and that defendant should sell to plaintiff, the leasehold premises demised by the first mentioned indenture, for the remainder of the said term, for the sum of 600*l.* That afterwards, to wit, 16th February, 1838, by a certain other indenture then made between defendant of one part and plaintiff of the other, &c.: the declaration then set out an assignment of the term by defendant to plaintiff, in pursuance of the contract, in consideration of 600*l.*, subject to payment of the rent and performance of the covenants in the first mentioned indenture. No mention appeared to be made, in the deed of assignment, of any underlease, and no allegation as to the value or liabilities of the property. The declaration *then proceeded to aver: That, before and at the several times of the making of such contract and agreement for the purchase of the said messuage, &c., and of the making and executing of the last mentioned indenture of assignment, and of the payment of the purchase money of 600*l.*, the messuage, &c., so demised by the first mentioned indenture, had been and were let to, and in the possession and occupation of, one William Mills, as tenant thereof to defendant, that is to say as tenant from year to year, so long as defendant and W. M. should respectively please, at and under a certain rent therefore paid, &c., by W. M. to defendant, to wit amounting to the yearly sum of 100*l.*, deducting thereout and therefrom certain taxes and rates charged, rated and assessed, and chargeable and rateable, yearly and in each year, upon the said messuage, &c., and upon W. M., as such occupier, in respect thereof, and amounting yearly and in each year to divers, &c., to wit amounting together to 16*l.* 9*s.*, and which taxes and rates W. Mills was to be at liberty to deduct and retain from and out of the said yearly rent of 100*l.*; and the messuage, &c., so purchased by plaintiff, did not, at the several times aforesaid, or either of them, yield a net improved rent of 62*l.* 10*s.* for a year, subject to the insurance hereinbefore mentioned: all of which premises aforesaid defendant, before and at the several times aforesaid respectively, well knew, but the same premises were not, at those times or either of them, known to plaintiff, nor was plaintiff at those times, or either of them, acquainted therewith, as defendant, at the several times aforesaid respectively, also well knew: yet that defendant, well knowing the premises, but fraudulently, wrongfully and improperly contriving and *intending to deceive, injure and defraud plaintiff, before and at the several times of the making and entering into the said contract, &c., and of the making and executing of the said assignment, and of the payment of the said purchase-money by plaintiff, and with the view and intention of obtaining a larger price or sum of money for the purchase of the same messuage, &c., than plaintiff would otherwise have given for the same, falsely, fraudulently, and improperly, deceived plaintiff, and then falsely, fraudulently, and deceitfully, represented and pretended to plaintiff, and caused and procured plaintiff to suppose and believe, and plaintiff did then suppose and believe, that the messuage, &c., were then let to and held by W. Mills, as such tenant as

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aforesaid, at a rent amounting to, and at and after the rate of, 100*l.* for a year, clear of any such taxes and rates as aforesaid, and every part thereof and that, subject to the said insurance hereinbefore mentioned and referred to, the messuage, &c., then yielding a net improved rent of 62*l.* 10*s.* a year; and then wrongfully, fraudulently and deceitfully, wholly concealed from plaintiff that the said rent, payable by W. M. as aforesaid, was subject to the deductions for the said taxes and rates as hereinbefore mentioned, or any part thereof: and that plaintiff made and entered into the said contract and agreement for purchase of the messuage, &c., as aforesaid, at and for the price aforesaid, and was induced so to make and enter into the same, and also accepted the assignment so made to him as aforesaid, and paid the said purchase-money in manner aforesaid, and was induced so to do, fully confiding in the representations and pretences and conduct of defendant in and about the premises in that behalf as aforesaid, *61] and in the full faith *and belief, and confiding, that the messuage, &c., so purchased by plaintiff were, at the several times aforesaid, let to and held by W. M., as such tenant as aforesaid, at a rent amounting to, and at and after the rate of, 100*l.* for a year, clear of any such taxes and rates which he was so at liberty to deduct as aforesaid, and every part thereof, and that, subject as aforesaid, the messuage, &c., so purchased by plaintiff, at the several times aforesaid, yielded the said net improved rent of 62*l.* 10*s.* a year as aforesaid; all which premises defendant, at the several times aforesaid, and of the committing of the grievances, &c., well knew. That defendant, by means of the premises, at the several times aforesaid, falsely and fraudulently deceived plaintiff on the said sale and in a manner aforesaid, and thereby induced and caused and procured plaintiff to purchase the messuage, &c., and to pay to defendant a much larger sum of money, to wit by the sum of 300*l.*, than he would otherwise have paid to defendant for the purchase of the messuage, &c.; and the same messuage, &c., have thereby become, and are, of much less value to plaintiff than they would otherwise have been: and plaintiff hath lost and been deprived of all the profits, &c., amounting to, &c., which he otherwise would have made, derived, and acquired from the said purchase, &c., and hath been put to trouble and expense, &c., in and about such purchase, and the completion of the same; which, but for the premises, he would not have incurred, &c. To the damage, &c.

Plea: Not guilty.

The cause was tried before Lord DENMAN, C. J., at the London sittings after Michaelmas term, 1840; when the plaintiff was nonsuited. The state of facts assumed by the Court of Queen's Bench in deciding on the *62] *rule after mentioned will appear by the following statement, which was made by the Lord Chief Justice, in giving judgment. "The facts of this case, which was tried before me at Guildhall, when divested of some unimportant particulars, stand thus. The defendant being the owner of a house in the city, employed her ttorney to put it in a course of being sold by auction. He described it to the auctioneer as being free from rates and taxes; and it was bought by the plaintiff, on that representation, for 600*l.* It was, in fact, subject to rates and taxes amounting to above 16*l.*, on a rent of 100*l.*, and would have been sold for no more than 470*l.*, if that representation had not been made. The plaintiff brought his action for this difference of price. It was an action on the case for a fraudulent misrepresentation of the value of the house. But the defendant

had made no representation at all: and her attorney, who made it, did not know it to be false."

In Hilary term, 1841, *Thesiger* obtained a rule to show cause why the nonsuit should not be set aside, and a verdict entered for the plaintiff with 130*l*. damages. In Hilary term, 1842,(*a*)

Sir *F. Pollock*, Attorney General, and *Martin*, showed cause. This case is within the principle of *Cornfoot* v. *Fowke*, 6 M. & W. 358. Fraud in fact is essential to the action here, as to the plea there. Fraud in one party and damage to the other were held together to make up a right of action in *Pasley* v. *Freeman*, 3 T. R. 51, contrary to the opinion *of GROSE, J.: but without the fraud the action does not lie; *Haycraft* v. *Creasy*, 2 East, 92. It is not alleged here that the contract of assignment contains any warranty; nothing therefore will vitiate the contract except a fraud; and the mere knowledge of a defect, without false representation, is not such a fraud; *Pickering* v. *Dowson*, 4 Taunt. 779. Generally, parties define their liabilities by the contract itself. A contract of assurance is an excepted case; there the assured is required to make a full disclosure; the authorities in note (1) to *Goram* v. *Sweeting*, 2 Wms. Saund. 200, a, illustrate the rule on this point. Here no representation is made which the party making the representation believes to be false. In *Polhill* v. *Walter*, 3 B. & Ad. 114, a party was held liable to an action for a fraud, who wrote on a bill an acceptance as by the procuration of the drawee, there being no such procuration, but the writer believing that the drawee would sanction the proceeding. [PATTESON, J. That case in truth followed up the principle of *Foster* v. *Charles*, 6 Bing. 396, 7 Bing. 105.] The defendant in *Polhill* v. *Walter* 3 B. & Ad. 114, made what he himself knew to be a false representation. In *Freeman* v. *Baker*, 5 B. & Ad. 797, it was held that an action for deceit cannot be maintained against a party making a false representation, if he does not know that it is false. In *Pilmore* v. *Hood*, 5 New Ca. 97, the defendant was held liable, because he made a representation, which he knew to be false, to a party who, with defendant's knowledge, communicated it to the plaintiff, on the faith of which the plaintiff contracted with the defendant. There TINDAL, C. J., impliedly recognised the principle for which the defendant now contends. Even assuming that the view taken by the majority of the *Barons in *Cornfoot* v. *Fowke*, 6 M. & W. 358, was wrong, and that of Lord ABINGER, C. B., correct, the defendant is still entitled to retain this nonsuit. Lord ABINGER's judgment goes merely to this extent:—that, if a principal employ an agent to contract, and such agent, in the course of the employment, make a false statement, not knowing it to be false, the principal cannot enforce the contract. He says, 6 M. & W. 381, "The principal, though not bound by the representation of his agent, cannot take advantage of a contract made under the false representation of an agent, whether that agent was authorized by him or not to make such representation." The question here is whether the principal be so bound, not whether he can take advantage of the contract; for the principal here is defendant, not plaintiff as in *Cornfoot* v. *Fowke*, 6 M. & W. 358. And Lord ABINGER says further, 6 M. & W. 386, that, if in an action for deceit, the landlord "might defend himself upon the ground of the want of authority in his agent, it by no means follows that he could insist upon enforcing the con-

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(*a*) January 12th. Before Lord Denman, C. J., Patteson, Coleridge, and Wightman, Js. Some arguments respecting the facts of the case are omitted; and those only are reported which proceed on the assumption of facts made by the court.

...o renounced it." It is true that Lord ABINGER ...n have used expressions which seem to im... anty and upon a deceit both rest upon ...d DENMAN, C. J. The report can scarcely ... Thesiger. The Lord Chief Baron appears ...g with immediate reference to *Williamson* v. ... The rule in the case of sales is *caveat emptor:* ...ne plaintiff contends would reverse the rule.

...d *Francillon*, contrà. It is not necessary to impeach the ...ornfoot v. *Fowke*, 6 M. & W. 358. The defendant here ...antive fraud will afford a ground for this action. Now either ...was guilty of a fraud personally by concealing the objection ...nt, or the agent knew of the defect, and then he, and through ...efendant, was guilty of a fraud. [COLERIDGE, J. Is not the liabili...tes and taxes as much a matter collateral to the contract as the situa... of the house in *Cornfoot* v. *Fowke*, 6 M. & W. 358?] The liability ...rectly affects the net pecuniary value of the property. It is like the amount of business in a public house, on which *Dobell* v. *Stevens*, 3 B. & C. 623, turned. There an action was held to lie for the misrepresentation, though it was not incorporated, either in the written memorandum for the bargain, or in the conveyance. That case also answers the argument suggested upon the rule of *caveat emptor*. There Lord TENTERDEN, relied on *Lysney* v. *Selby*, 2 Ld. Raym. 1118, S. C., as *Risney* v. *Selby*, 1 Salk. 211, where an action for deceit was held to lie upon a false representation, at the time of a sale of an estate, as to the amount of rents. That case is cited and relied on in 1 Sugd. V. & P. 5, 10th ed. *Schneider* v. *Heath*, 3 Campb. 506, is a still stronger case, and shows that, even though the agent be altogether ignorant as to the fact with respect to which he has made a false representation, he, and through him the principles, may be fixed with the fraud. This appears also from Lord MANSFIELD's judgment in *Pawson* v. *Watson*, 2 Cowp. 785. Lord ABINGER, referring to this last case in *Cornfoot* v. *Fowke*, 6 M. & W. 379, says, "Lord MANSFIELD lays it down,
66*] *generally, that, in a representation to induce a party to make a contract, it is equally false for a man to affirm that of which he knows nothing, as it is to affirm that to be true which he knows to be false."(a) And he adds, "This maxim is neither negatived nor qualified by the doctrine laid down in that class of cases derived from *Pasley* v. *Freeman*, 3 T. R. 51. The plaintiffs in those cases sought to charge a party with damages for stating that which he believed to be true, though he did not know it to be so, in answer to inquiries made by plaintiff respecting the credit of a third person. There the defendant had no end to gain, no interest in the event, no motive to deceive; he was not one of the dramatis personæ in the construction of any contract." The courts have generally held parties strictly bound by the acts of their agents, because it is the duty of the principal to instruct his agent properly. *Mayhew* v. *Eames*, 3 B. & C. 601, and *Willis* v. *The Bank of England*, 4 A. & E. 21, are instances.

Lord DENMAN, C. J. now delivered the judgment of the court. After stating the facts, the, (as in p. 62, antè,) his Lordship proceeded as follows.

(a) In that case there was a contract containing an express warranty: and it was held that an action lay, by reason of the warranty being false; and that proof the *scienter* was unnecessary.

(b) See *Bree* v. *Holbech*, Doug. 630, 632.

On these facts, it was assumed at the trial that the recent case of *Cornfoot* v. *Fowke*, 6 M. & W. 358, was directly in point: on which supposition I thought myself bound by the authority of the Court of Exchequer to direct a nonsuit, allowing the plaintiff to move for a verdict. It now likewise appears to the court that, in one point of view, that case is a direct authority bearing on the present; though the facts of the two are not in all respects entirely similar. For it was there holden by three of the learned Barons, in opposition to the opinion of Lord *ABINGER, that the plea of fraud was not sustained, because the plaintiff had made no representation, and the plaintiff's agent did not know his own representation to be false. If this be correct as to a plea of fraud, neither can the action for deceit lie under the same circumstances. [*67

Lord ABINGER maintained, and surely not without reason, that there was some moral fraud in the conduct of both, the principal concealing a fact which made his house utterly unfit for the purpose for which he was letting it; the agent stating a falsehood, which, of course, he could not know to be true, even if he believed it.

We do not however take this ground. We adopt the other proposition of the Chief Baron, namely, that whether there was moral fraud or not, if the purchaser was actually deceived in his bargain, the law will relieve him from it. We think the principal and his agent are for this purpose completely identified; and that the question is, not what was passing in the mind of either, but whether the purchaser was in fact deceived by them or either of them.

In the present case the agent was not indeed instructed to make any representation specifically on the subject of rates and taxes: but he could not sell the house without describing it; and he described it untruly in an essential point. He said, in effect, "I sell you an annuity of 100*l*.," when he was selling an annuity of 84*l*. only. By this false statement the plaintiff was induced to part with his money to the defendant, who cannot be allowed to retain it. The consequence is, that the rule for setting aside the nonsuit, which proceeded on the authority of that decision, must be absolute.

Rule absolute.(*a*)

(*a*) See the next case.

*IN THE EXCHEQUER CHAMBER. [*68

(Error from the Queen's Bench.)

ELIZABETH WILSON v. FULLER.

Declaration, in case for deceit, stated that defendant, being lessee of certain premises, agreed to sell them to plaintiff, and plaintiff agreed to purchase them of her, for the residue of the term, and they were assigned to plaintiff accordingly. That, at the times, &c., the premises were held by a tenant of defendant at the rent of 100*l*. a year, but charged with 16*l*. a year for rates and taxes, which the tenant paid, and was at liberty to deduct out of the rent: all which defendant knew, but plaintiff did not, as defendant also knew: that defendant, at the times, &c., deceived plaintiff and fraudulently represented to him that the premises were let at 100*l*. a year, clear of taxes and rates, and concealed from him that the rent was subject to the said deductions: that plaintiff was induced by the representations and conduct of defendant to take the assignment: and that defendant by means of the premises, &c deceived plaintiff, and induced him to purchase, &c., at a larger sum than he otherwise would have paid. Plea, Not guilty.

Special verdict stated that defendant knew of the above deductions, which were made by agreement, from the rent. That she desired W., her attorney, to instruct plaintiff, an auctioneer, to prepare particulars for sale of the premises, and referred W. for information to

person having a lien on the premises, who told W. that the rent was 100*l.* a year. That W. asked no questions about rates and taxes, assuming that the tenant paid them, as the practice was in London, where the premises were situate. That defendant did not further interfere. That W., not knowing that defendant paid the rates and taxes, instructed plaintiff that the premises were held by a tenant at 100*l.* a year, but never described them to him as clear of rates and taxes, or authorized him so to represent them. That plaintiff drew up a particular for the sale, stating the premises to be let at 100*l.* "clear of rates and taxes." That W. saw the particular, but did not correct it, because he thought it true: and that W. thought it plaintiff's duty to inquire into the outgoings when he was employed to make the particular. That the premises were put up to sale and bought in, and plaintiff then took them himself, and they were assigned to him. That neither W. nor plaintiff knew of the agreement for a deduction from the rent till after the assignment and payment of the purchase money; and that, at the time of such assignment and payment, plaintiff believed the premises to be let at 100*l.*, clear of rates and taxes.

Held, that, on this finding, it did not appear that defendant had been guilty of any actual fraudulent representation or concealment, or had authorized any: that, if W., as her agent, had been guilty of fraudulent representation and concealment, she would herself have been liable: but that no such misfeasance by W. appeared by the verdict: and therefore that defendant was entitled to judgment.

THE facts of the last case were afterwards stated in a special verdict, by consent, and leave of the court, as follows.

And the jurors, &c., say upon their oath: That, by an indenture of lease duly executed, bearing date the 25th day of December, A. D. 1837, the
*69] Master, Wardens and *Freemen and Commonalty of the Mystery of Vintners of the city of London demised to the defendant (below; plaintiff in error) the messuage and premises situate and being No. 3 Foster Lane in the city of London, to have and to hold the same to her and her executors, administrators and assigns for the period of fifty-three years from the said 25th day of December, subject to the rent of 37*l.* 10*s.* per annum, and the performance of certain covenants in the same indenture contained. And that at Christmas, A. D. 1835, the defendant demised the said messuage and premises comprised in the said lease to one William Mills, to hold as tenant from year to year on the same terms upon which one —— Burrow had before and until that time held them, the terms upon which Burrow held them being 100*l.* a year rent, the rates and taxes, amounting to 16*l.* 9*s.* per annum, being paid by the defendant, who lived in the parish in which the said messuage and premises were situate. That the said W. Mills two or three times paid rent to the defendant, and sometimes to her son for her.

That the plaintiff (below) is, and in the month of May, 1837, was, an auctioneer; and that, in the said month of May, 1837, the defendant desired one Mr. Wadeson, who then was, and is, an attorney, and whom the defendant employed as her attorney in the matter of the sale of the said messuage and premises, to instruct the plaintiff to prepare particulars and conditions of sale for the sale thereof by auction. That the defendant referred the said Mr. Wadeson for information to one Mr. Bass, who had a lien upon the said premises, and who told the said Mr. Wadeson that the rent of the said messuage and premises was 100*l.* a year. That the said
*70] Mr. Wadeson asked no questions about the tenant *paying rates and taxes, assuming that the tenant did so, such being always the practice in London. That the defendant did not in any way further interfere in the matter.

That the said Mr. Wadeson gave the following instructions in writing to the plaintiff as to the said premises. "No. 3," (meaning the said messuage and premises, No. 3 Foster Lane) "is in the occupation of a yearly tenant, Mr. Mills, at 100*l.* a year." That the said Mr. Wadeson did not know that the defendant paid the rates and taxes. That the said Mr. Wadeson

never described the said premises to the plaintiff otherwise than as aforesaid, and never described them as clear of taxes, or gave him any authority to put any statement to that effect into the particulars. That the plaintiff prepared a particular of the said messuage and premises for sale thereof by auction, which particular was as follows.

	£	s.	d.
"No. 3, Foster Lane; let to Mr. Mills as tenant from year to year, clear of taxes and rates, at per annum,	100	0	0
At the rent besides an insurance of 800*l.* per annum,	37	10	0
Net improved rent,	62	10	0

That the said particular was seen by the said Mr. Wadeson, who did not correct it because he thought it true. That the said Mr. Wadeson considered it the plaintiff's duty, when he was employed to make out the particulars, to go and survey the premises and inquire of the outgoings.

That the said messuage and premises were, in May, 1837, offered for sale by auction, and were then bought *in, but were put up again for sale by auction in November, A. D. 1837, when the sum of 600*l.* was offered for them, and the plaintiff bid 610*l.* to raise the biddings, and they were bought in at 610*l.*: and, as the plaintiff had prevented the sale at 600*l.*, he considered himself bound to take them himself at that price, and did so. That an assignment from the defendant to the plaintiff of the said messuage and premises was prepared by the attorney for the Vintners' Company, and the plaintiff paid 600*l.* to the defendant for the purchase of the said messuage and premises. That the said assignment was a certain indenture bearing date the 16th day of February, 1838, between the said defendant of the one part and the said plaintiff of the other part, and duly signed, sealed and delivered by the defendant. The assignment is endorsed upon the said indenture, and is in the following words. (The verdict then set forth the assignment, which was, in substance, as stated in the declaration; see p. 58, antè.) [*71

That, from the time of the aforesaid demise of the said messuage and premises by the said defendant to the said W. Mills, and until the time of the aforesaid assignment of the same to the said plaintiff, the said W. Mills continued and was yearly tenant of the said messuage and premises at the said yearly rent of 100*l.*, the defendant paying the said rates and taxes pursuant to her said agreement in that behalf; and that, at the time the said messuage and premises were sold and assigned as aforesaid to the said plaintiff, the same were still occupied by the said W. Mills by virtue of the said demise, and upon the terms aforesaid. That neither the plaintiff nor the said Mr. Wadeson, until after the assignment of the said messuage and premises to the plaintiff, and the *payment by him to the defendant of the said sum of 600*l.*, knew that it had ever been agreed to between the said defendant and the said W. Mills that the said rates and taxes were to be paid by the said defendant, or that the said W. Mills was entitled to have the same paid by the said defendant: and that, at the time of the said assignment and of the payment of the said sum of 600*l.* as aforesaid, the plaintiff believed that the said messuage and premises were let to the said W. Mills for 100*l.* a year clear of rates and taxes. That in May the reserved bidding was 900*l.*, and in November 600*l.* [*72

But whether, &c.: conclusion in the usual form.

Judgment was entered, without further argument, for the plaintiff below.

The defendant below brought error, assigning the error in the common form. The case was argued in Hilary vacation, (February 1st, 1843.(a)

Martin for the plaintiff in error (the defendant below.) The special verdict shows no ground for holding Mrs. Wilson liable. [CRESSWELL, J. The facts, as now stated, differ from those on which the judgment below proceeded. Lord ABINGER, C. B. Wadeson appears to have told Fuller that the premises were occupied by a tenant at 100*l*. a year, which was true: and it is found that Wadeson considered it Fuller's duty to inquire into the outgoings, when drawing up the particulars. Fuller was the purchaser; but he was also the agent, as much as Wadeson. If it was his duty to inquire, he is himself to blame for the misrepresentation. PARKE, B. If fraud might be imputed to Wadeson, it might, on the same grounds, to
*73] Fuller. Wadeson *represents that the premises are let at 100*l*. a year: all that tends to affect him, beyond that, is only matter from which a jury might have inferred that Wadeson, after looking at the particular, had made the statement his own. ALDERSON, B. He thought it Fuller's duty to inquire, and, after inquiry made (as he supposed) by Fuller, believed his report.] These observations decide the case upon the facts. But further, in *Cornfoot* v. *Fowke*, 6 M. & W. 358, the action was to enforce a contract; and there Lord ABINGER, C. B., though he held the contract vitiated by the agent's misrepresentation, expressly declined to say whether or not the misrepresentation, if made without authority, would expose the principal to an action of deceit. [ALDERSON, B. The only real difference there between Lord ABINGER, C. B., and the rest of the court was, whether the particular representation was so far part of the contract as to vitiate it.] The judgment of the Court of Queen's Bench proceeds on a mistake as to that of Lord ABINGER. [ALDERSON, B. The action would clearly not have lain in *Cornfoot* v. *Fowke*, 6 M. & W. 358, if the facts had been like those found here. Lord ABINGER, C. B. In this case it may in fact have been Fuller's duty to make the requisite inquiries, he being agent as much as Wadeson. If it was not his duty, the verdict should have stated that. The general question, therefore, is not open to us. TINDAL, C. J. We must hear how the defendant's counsel answers that.] *Martin* was then stopped by the court.

Francillon, contrà. Wadeson was guilty of a false representation, and a
*74] concealment of facts, by which *Mrs. Wilson is bound. [TINDAL, C. J. Must not you show that he knew the fact, before you can say that he fraudulently concealed it?] Mrs. Wilson knew and suppressed it. [ALDERSON, B. She made no representation.] If she had not concealed the material fact, Wadeson would not have made an unqualified statement as to the rent. [PARKE, B. If she kept back any thing, that fact should have been found.] She referred to Bass; but it does not appear that he had any knowledge except such as he derived from her. She received the rent. Bass had only a lien. [TINDAL, C. J. Why did she refer to Bass, if she knew the facts? ALDERSON, B. It does not appear that she knew what Bass told Fuller. Lord ABINGER, C. B. The verdict ought to have shown that Bass did not know the fact, if that was so. CRESSWELL, J. And, if he did not, that Mrs. Fuller was aware of that.] If there was negligence in her, it was legal fraud. [ALDERSON, B. It might be that the bargain could not be enforced; but who could say she was guilty of fraud? TINDAL, C. J. A court of equity would perhaps relieve the purchaser: but if fraud is charged it must be distinctly proved. PARKE,

(a) Before Tindal, C. J., Lord Abinger, C. B., Parke, B., Alderson, B., Erskine, J., Rolfe, B., and Cresswell, J.

B. It ought to have been found that the defendant below, knowing a material fact, kept it back. ERSKINE, J. The concealment alleged in the declaration is a wilful suppression.] Negligence would be equivalent to fraud. [TINDAL, C. J., cited *Haycraft* v. *Creasy*, 2 East, 92.] Here the neglect is to the party's own advantage as well as to the injury of another. *Gladstone* v. *King*, 1 M. & S. 35, shows that facts which would not convict a party of actual fraud may amount to legal fraud. The knowledge of the principal here *was constructively the knowledge of the agent; [*75 *Willis* v. *The Bank of England*, 4 A. & E. 21, *Mayhew* v. *Eames*, 3 B. & C. 601. In *Kennedy* v. *Green*, 3 Mylne & K. 699, 719, Lord BROUGHAM, C., commenting on the doctrine of constructive notice, said: "Policy, and the safety of the public, forbids a person to deny knowledge while he is so dealing as to keep himself ignorant, or so as that he may keep himself ignorant, and yet all the while let his agent know, and himself, perhaps, profit by that knowledge. In such a case it would be most iniquitous and most dangerous, and give shelter and encouragement to all kinds of fraud, were the law not to consider the knowledge of one as common to both, whether it be so in fact or not." If Mrs. Wilson, in this case, concealed an important fact from her agent, and thereby enabled him to commit a fraud, she is liable to an action. [PARKE, B. If she had knowingly referred to an ignorant agent, that would have been fraud. ALDERSON, B. Clearly. ERSKINE, B. But Bass's ignorance is not stated.] Wadeson saw the particular representing the net improved rent to be 62*l*. 10*s*.: he adopted it by his silence. [ALDERSON, B. He only gave credit to what Fuller stated. All the misrepresentation lies in the addition made by Fuller.] Wadeson was the agent selected by Mrs. Wilson, and held out to the world by her as knowing what she knew; the case is like *Hern* v. *Nichols*, 1 Salk. 289. [ALDERSON, B. Fuller also was an agent, and, on your reasoning, knew what Wadeson knew.] His relation of agent had ceased when he made the purchase. [Lord ABINGER, C. B. That makes no difference. ALDERSON, B. It does not wipe out his knowledge. Lord ABINGER, C. B. Supposing Wadeson *to have made a representation, he did not make it on contracting with Fuller, but on employing him as agent; and the jury may have thought that it was Fuller's duty, as auctioneer, to ascertain the fact before selling, and that he would do so to protect himself from liability. The verdict ought to have shown how these facts were.] Fuller, when he became purchaser, had a right to treat Wadeson as the vendor's agent. [Lord ABINGER, C. B. He should have told him that he considered him so. The judgment of the Court of Queen's Bench on the motion to enter a verdict was not given upon the facts now before us. We shall not reverse that if we give judgment now for the plaintiff in error. PARKE, B. If the defendant below is to be affected by a fraudulent representation on Wadeson's part, there should be a venire de novo, because that representation is imperfectly found. ERSKINE, J. The verdict does not say that Fuller was deceived by the additional statement in that particular. ALDERSON, B. Or that Wadeson saw it before Fuller purchased.] Fuller, as purchaser, had a right to suppose that Wadeson had all the information which was important for a vendor: *Lysney* v. *Selby*.(*a*) [TINDAL, C. J. There it did not appear that the plaintiff had means of knowing what the facts were; he relied on the defendant's information. Here the additional statement was Fuller's own.] *Schneider* v. *Heath*, 3 Camp. 506; *Foster* v. *Charles*, 6 Bing. 396, 7 Bing. [*76]

(*a*) 2 Ld. Ray. 1118, S. C., as *Risney* v. *Selby*, 1 Salk. 211.

105, and *Polhill* v. *Walter*, 3 B. & Ad. 114,(a) show what degree of moral fraud is sufficient for a case of legal fraud. [TINDAL, C. J. In *Polhill* v. *Walter*, 3 B. & Ad. 144,(a) the defendant knew that he had not the authority
*77] which he pretended to have. CRESSWELL, J. *The court considered his conduct as an actual fraud. PARKE, B. There was moral guilt in it, though venial.]

The court said that they would not hear *Martin* further unless, on consideration, it should appear necessary. *Cur. adv. vult.*

TINDAL, C. J., now delivered the judgment of the court.

We think the judgment of the court below cannot be supported by application of the special verdict to the declaration. The declaration alleges, first, a false representation that the house yielded a net improved rent of 62*l.* 10*s.*; secondly, a fraudulent concealment of the fact that the rent payable by the tenant was subject to certain deductions for rates and taxes. As to the first charge, no representation by Mrs. Wilson herself is stated on the verdict. It appears only that she referred to Bass, who had a lien on the premises: and the jury find that she did not in any way further interfere. This is all that appears as to the part taken personally by Mrs. Wilson. As to the representation made by Wadeson, which, if fraudulent, it may be admitted, would bind her, it consisted of nothing more than the information he had received from Bass: and that was true. Secondly, as to the concealment. So far as Mrs. Wilson herself is concerned, there is nothing to affect her. She did not know what Wadeson had represented. She had referred him to Bass: there is nothing to show that Bass was not competent to give all the requisite information, and, for any thing she knew, had done so. Then was there a fraudulent concealment by Wadeson? which, it must be admitted, would bind Mrs. Wilson if proved. It is urged that,
*78] when Fuller had prepared the particular with the *erroneous statement added thereto, Wadeson stood by, and did not set him right. But the jury find "that the said Mr. Wadeson did not know that the defendant," Mrs. Wilson, "paid the rates and taxes:" and that Wadeson did not correct the statement in the particular, "because he thought it true." Therefore actual concealment by Wadeson is negatived. Then it is said that Mrs. Wilson knew the material fact; that Wadeson being her agent, her knowledge is his; and therefore there was, in point of law, a concealment on her part, and a fraud. But the statement in the verdict is, that neither the plaintiff nor Wadeson, until after the assignment of the messuage to the plaintiff, and payment by him of the 600*l.*, knew of the agreement between Mrs. Wilson and Mills that the rates and taxes were to be paid by her; and that, at the times of the assignment and payment, Fuller believed that the messuage and premises were let to W. Mills for 100*l.* a year, clear of rates and taxes: and it appears that, in acting on this belief, Fuller did not act upon any representation or tacit assent by Wadeson, but grounded himself upon a supposed knowledge of the usual course of practice in such transactions. The immediate cause of the injury seems to have been Fuller's own misapprehension. Therefore, without entering into the question discussed in *Cornfoot* v. *Fowke*, 6 M. & W. 358, we think that the ground of action stated in this declaration is not supported, and that the judgment must be reversed.

Judgment reversed.(b)

(a) See also *Adamson* v. *Jarvis*, 4 Bing. 66.

(b) See *Humphrys* v. *Pratt*, 5 Bligh. N. S. 154; *Moens* v. *Heyworth*, 10 M. & W. 147 In *Evans* v. *Collins*, decided in Q. B., Trin. Vac. (June 24th.) 1843, an action on the case

was brought for a false representation, whereby the sheriffs of London were induced to detain the wrong person under process. The plaintiffs had a verdict on two issues; and defendants moved (by leave reserved) to enter a nonsuit or a verdict for them *on one issue, because it was not proved, though alleged in the declaration, that defendants knew the [*79 statement to be false. Lord Denman, C. J., said, in delivering judgment: "One of two persons has suffered by the conduct of the other. The sufferer is wholly free from blame; but the party who caused his loss, though charged neither with fraud nor with negligence, must have been guilty of some fault when he made a false representation. He was not bound to make any statement, nor justified in making any which he did not know to be true; and it is just that he, not the party he has misled, should abide the consequence of his misconduct. The allegation that the defendant kdew his representation to be false is therefore immaterial: without it the declaration discloses enough to maintain the action; and nothing that goes beyond that necessity need be proved."

The QUEEN v. The Inhabitants of NORTH BOVEY.

This case is reported, 2 Q. B., p. 500.

ATKINSON v. RALEIGH and Others.

Declaration in case for maliciously suing out a fiat in bankruptcy against plaintiff. The count averred that the fiat was untenable, &c. and that such proceedings were thereupon had, that, on, &c., it was duly ordered, to wit by the Court of Review, that the fiat should be, and the same then was, rescinded and annulled, and the proceedings on the said fiat were thereupon then wholly ended and determined. Plea, Not Guilty.

On motion, after verdict for plaintiff, to enter a nonsuit on the ground that the order annulling the fiat was proved at the trial to have been the Lord Chancellor's, and not that of the Court of Review: *Held*,

That the plea of Not Guilty, under the New Rules, did not put in issue the annulling of the fiat, and therefore that the variance, if any, was no ground of nonsuit

On motion to arrest judgment on the ground that the Court of Review had no authority, under stat. 1 & 2 W. 4, c. 56, to annul a fiat: *Held*, (assuming this to be so,)

That the statement of an order by the Court of Review, in the above count, might be rejected; and that the residue of the count was sufficient, after verdict.

Semble, that, if the objection on the face of the count would have been good on motion in arrest of judgment, the judge at nisi prius ought not to have permitted an amendment under stat. 3 & 4 W. 4, c. 42, s. 23.

Case for maliciously, and without reasonable or probable cause, suing out a fiat in bankruptcy against plaintiff. The declaration, after stating that the defendants caused the fiat to be issued, and the plaintiff *to [*80 be thereupon publicly declared bankrupt, and his goods to be thereupon seized, &c., proceeded thus, "And the plaintiff further says that the said fiat and all the proceedings thereon are wholly unjust and untenable, and that such proceedings were thereupon had that afterwards, to wit on the 6th day of August in the year aforesaid, it was duly ordered according to law and justice in that behalf, to wit by the Court of Review, then having competent power and authority in that behalf, that the said fiat should be, and the same then was, rescinded and annulled, and the proceedings on the said fiat were thereupon then wholly ended and determined." Averments of damage.

Plea, Not guilty.

On the trial, before Erskine, J., at the Exeter Spring assizes, 1841, the plaintiff, to show the determination of the proceedings in bankruptcy, put in a copy (from the office of the secretary of bankrupts) of the Lord Chancellor's order annulling the fiat. Prefixed to that order was an order of the Court of Review, dated 6th August, 1840,(a) which, after reciting the plaintiff's petition to have the fiat annulled, &c., by order of that court.

(a) The marginal commencement was: "In Bankruptcy. Court of Review."

with costs to be paid by the now defendants, proceeded as follows: "This court doth order that the said fiat awarded and issued against the said Thomas Atkinson by the name and description," &c., "and bearing date on or about the 15th day of May, 1840, be annulled if the Lord Chancellor shall think fit. And it is ordered that the costs, &c., (award of costs to be paid by defendants to plaintiff.) "By the court." Then followed these words, "17th August, 1840. Upon reading the above order, I
*81] hereby *confirm the same, and direct that the fiat be, and it is hereby, annulled accordingly. COTTENHAM, C."

The defendants' counsel objected that this evidence did not support the declaration, which alleged an order "by the Court of Review," annulling the fiat, whereas their order appeared to have been conditional ("if the Lord Chancellor shall think fit,") and the only absolute order was that of the Lord Chancellor himself. The plaintiff's counsel submitted that the declaration might, if necessary, be amended, under stat. 3 & 4 W. 4, c. 42, s. 23, by striking out the words "to wit by the Court of Review, then having competent power and authority in that behalf." The learned judge thought that, as the declaration might be held bad upon the face of it, he could not allow an amendment which would preclude the defendants from moving in arrest of judgment. He gave the defendants leave to move for a nonsuit on the alleged variance; and reserved liberty to the plaintiff, if such motion were made, to apply to this court to amend the declaration; the court to have the same power as the judge at Nisi Prius. A verdict was found for the plaintiff, damages 20*l*.

Bompas, Serjt., in Easter term, 1841, obtained a rule to show cause why a nonsuit should not be entered; or why the judgment should not be arrested, on the ground that the Court of Review had not authority under stat. 1 & 2 W. 4, c. 56, to annul the fiat.

Erle and *Barstow* now showed cause. By stat. 1 & 2 W. 4, c. 56,(*a*) s. 2, the Court of Review had power, of themselves, to annul the fiat. It
*82] is said that *sect. 19,(*b*) gives the same power to the Lord Chancellor; but it does not follow that the Court of Review has it not also. In *Ex parte Brittain*, 3 Mont. & Ayr. 325,(*c*) a petition for annulling a fiat was returned by Lord COTTENHAM, C., with an endorsement that he desired it to be presented to the Court of Review: and, on a subsequent application by counsel, his Lordship said: "I have jurisdiction to hear an original petition, to supersede or annul a fiat, but I am not obliged to hear any such original petition in bankruptcy unless I think fit." There the counsel who urged the Lord Chancellor to hear did not contend

(*a*) "An act to establish a Court in Bankruptcy." Sect. 2 enacts that the judges appointed under sect. 1, shall form a Court of Review, which "shall have superintendance and control in all matters of bankruptcy, and shall also have power, jurisdiction, and authority to hear and determine, order, and allow all such matters in bankruptcy as now usually are or lawfully may be brought, by petition or otherwise, before the Lord Chancellor, whether such matters may have arisen in the said Court of Bankruptcy or elsewhere, except as is herein otherwise provided, and also to investigate, examine, hear, and determine all such other matters within the jurisdiction of the said Court of Bankruptcy as are by this act or may be by the said rules and regulations assigned and referred to the said Court of Review."

(*b*) Sect. 19 enacts, "That it shall be lawful for the Lord Chancellor, upon the reversal of any adjudication of bankruptcy, or for such other cause as he shall think fit, to order that any fiat issued by virtue of this act shall be rescinded or annulled; and such order shall have all the force and effect of a writ of supersedeas of a commission according to the existing laws and practice in bankruptcy."

(*c*) See *Ex parte Keys*, 1 Mont. & Ayr. 226, 242. And Archbold's Law and Practice of Bankruptcy, p. 329. Book 1, c. 1, s. 16, 9th ed.

that he had more than a concurrent jurisdiction. Here the Court of Review annulled the fiat subject to the Lord Chancellor's confirmation; and he did confirm. The court, therefore, may be said to have annulled. And the declaration alleges, generally, that "it was duly ordered according to law and justice in that behalf" that the fiat should be *rescinded, &c., mentioning the Court of Review only under a videlicet. [*83 But, further, the annulling of the fiat was a matter in issue. The plea of Not guilty, in case, puts in issue nothing but the wrongful act alleged to have been committed by the defendant. It was argued, in moving, that the termination of the proceeding in bankruptcy was a matter in issue, because proof that the fiat had been annulled was a step in proving want of probable cause. But in *Drummond* v. *Pigou*, 2 New Ca. 114, S. C. 2 Scott, 228, which was an action for maliciously causing the plaintiff to be outlawed, TINDAL, C. J., and PARK and BOSANQUET, Js., intimated a strong opinion that the plea of Not guilty did not put in issue the reversal. And in *Watkins* v. *Lee*, 5 M. & W. 270, which was an action for a malicious arrest, the declaration stating that the defendant suffered the suit in which he had arrested the plaintiff to be discontinued, Lord ABINGER, C. B., and ALDERSON, B., held that the discontinuance was not put in issue by a plea of Not guilty.

The court then called upon

Bompas, Serjt., and *C. Saunders*, contrà. Stat. 1 & 2 W. 4, c. 56, s. 2, does not take away the original power of the Lord Chancellor to annul a fiat. He, and not the Court of Review, possesses it. The declaration, therefore, is bad, as stating a determination of the fiat by an illegal power. The proof varied in point of fact from the allegation; for the fiat was rescinded by the Lord Chancellor, and not by the Court of Review. [PATTESON, J. They annul, if the chancellor *shall think fit: he says that he does think fit; and the whole appears by one document. [*84 Lord DENMAN, C. J. He refers to something which they have done, with or without authority, and confirms it.] The annulling is purely his act: he issues and he supersedes the fiat. [WIGHTMAN, J. The declaration states an order by the Court of Review that the fiat should be rescinded, and alleges that it then was rescinded, and that "the proceedings on the said fiat were thereupon then wholly ended and determined." It does not say that this was done by virtue of the order made in the Court of Review.] *Whitworth* v. *Hall*, 2 B. & Ad. 695, shows that the averment as to the termination of the proceedings is a material one; and it ought to appear correctly how they terminated. [WIGHTMAN, J. Suppose the declaration had alleged merely that the fiat had been annulled, and that had not been demurred to, but a trial had upon the facts. Could judgment have been arrested? I do not see any variance in the case.] As to amendment, if any be required, it ought not to be permitted. In *Webb* v. *Hill*, 3 Car. & P. 485, S. C. Moo. & M. 253, the declaration, for a malicious arrest, stated that the defendants in that cause did not, in the former action, prosecute their suit, but therein made default, &c., and thereupon it was considered that the defendants should take nothing, &c.: and, to prove this allegation, the plaintiff put in a rule to discontinue, but did not show that any judgment had been entered. Lord TENTERDEN, after conferring with the other judges of this court, (then sitting in banc,) said that in an action of this kind it was necessary to show how the former proceeding terminated; *that, if all the words after "therein made default" were rejected, that would not appear, and yet the defendant could [*85

not have the benefit of a demurrer; that the allegation, as it stood, amounted to the description of a *nonpros;* and that the difference was one of substance, not form, and affected the whole course of evidence in the cause. And he further stated, as his opinion and that of the other judges, that he could not allow an amendment, since the mistake did not consist in the misstating of a written instrument, but in the allegation of a matter totally different from that presented in evidence. He therefore nonsuited the plaintiff. [PATTESON, J. That was under stat. 9, G. 4, c. 15: here the amendment would be under stat. 3 & 4 W. 4, c. 42, s. 23, which gives more extensive power. It could not be "material to the merits," in this case, whether the fiat was annulled by the Lord Chancellor or by the Court of Review.] The amendment would be, not to cure a variance, but to make a bad declaration good. The amendment is allowed, by stat. 3 & 4 W. 4, c. 42, s. 23, where "the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence." Here he would be prejudiced, by losing his opportunity of arresting the judgment, or bringing error.

Lord DENMAN, C. J. I think, according to the opinions expressed in the Court of Common Pleas in *Drummond* v. *Pigou*, 2 New Ca. 114, S. C. 2 Scott, 228, that the annulling of the fiat was not a matter in issue on these pleadings, and therefore there could be no nonsuit. But that does
*86] not *dispose of the case if the declaration is bad on the ground that an essential fact is imperfectly averred. The defendants have not demurred, but have gone to trial; and this question arises after verdict. The declaration alleges that the fiat was untenable, and that "such proceedings were thereupon had that afterwards, to wit," &c., "it was duly ordered," "to wit by the Court of Review, then having competent power," &c., "that the said fiat should be, and the same then was, rescinded and annulled, and the proceedings on the said fiat were thereupon then wholly ended and determined." It is contended that the Court of Review could not rescind the fiat; and, if the construction put by my brother *Bompas* on stat. 1 & 2 W. 4, c. 56, be correct, the fiat could have been annulled only by the Lord Chancellor. If so, is the averment, that "the proceedings on the said fiat were thereupon then wholly ended and determined," sufficient to bear out the case of an order made by the chancellor and not by the court of Review? It is not said after stating the order of the Court of Review, that the proceedings were "thereby" ended and determined; the allegation is an independent one; and there appears no authority for saying that a determination of the proceedings may not be sufficiently alleged in these words. Therefore it is unnecessary to inquire whether or not the amendment could have been made: otherwise I should have required time before I could have said that such a course could be allowed. I do not think it would have been conformable to the object of the statute, which was to prevent nonsuits on variances, and not to make pleadings good which are vicious in themselves.

87] PATTESON, J. The case of *Drummond* v. *Pigou*,(a) when considered, makes an end of the question of amendment. If the fact of the fiat having been annulled is admitted by the plea of Not guilty, no evidence respecting it was admissible on the issue. It seems to me that the evidence ought not to have been received at all: and, if so, it is immaterial whether it tallied with the declaration or not. Whether an amendment can be made, even in a case within stat. 3 & 4 W. 4, c. 42,

(a) 2 New Ca. 114, S. C. 2 Scott, 228.

s. 23, to deprive a party of his motion in arrest of judgment, may require consideration. The object of the statute was to prevent nonsuits. Here there could not have been a nonsuit; therefore the only effect of the amendment would have been to prevent a motion in arrest of judgment. I doubt whether an amendment could have been made for this purpose at the trial, though the judge might have made it at chambers, an hour or two before. Then, if no amendment were made, ought judgment to be arrested? The declaration states that the proceedings on the fiat were wholly ended and determined. I think that, if the count had stated nothing more, and the defendant had not demurred, it would have been good after verdict: and that, notwithstanding the previous statement which is made here, as to the Court of Review, evidence might have been given of a determination by the Lord Chancellor. I am of opinion, therefore, that the rule must be discharged.

WILLIAMS, J. The same dilemma exists here which was put, this term, in the Court of Exchequer, in *Heming* v. *Power*, 10 M. & W. 564, 567. The averment as to the manner *of annulling the fiat is either immaterial, and then it is surplusage, or material, and then it ought to have been traversed. The plea of Not guilty does not traverse it. As to the motion in arrest of judgment, the Court of Review is mentioned under a videlicit; and I think that, independently of what is so stated, there is a sufficient allegation, after verdict, of the fiat having been determined. [*88

WIGHTMAN, J. I am of the same opinion. Since the Rule of Hil. 4 W. 4,(a) the only effect of the plea of Not guilty, in such a case as this, is to put in issue the procuring a fiat without probable cause. *Drummond* v. *Pigou*(b) determines this point. Then, has any ground been laid for arresting the judgment? If the plaintiff is tied down by his averment to a rescinding of the fiat by order of the Court of Review, the declaration is bad. But I think he is not. The count states that it was duly ordered, "to wit by the Court of Review," that the fiat should be rescinded, and the proceedings were thereupon (not "thereby") wholly ended and determined. It is consistent with this latter allegation, that the fiat should have been annulled (as the proof showed it was) by an order of the Lord Chancellor in addition to that of the Court of Review. The distinction between averments which tie a party down to a particular state of facts, and those which do not, appears from *Gadd* v. *Bennett*, 5 Price, 540. There the plaintiff declared for a malicious arrest, and averred that the defendant voluntarily permitted his bill to be discontinued, and thereupon it was considered by the court that he should take nothing, &c.; as by the record *&c., appeared: whereupon and whereby the suit became and was wholly ended, &c. The plaintiff, at the trial, put in the rule to discontinue, but did not produce the record to show that the suit was actually discontinued: and on motion to enter a nonsuit, the Court of Exchequer held that he was bound, by the particularity of his averment, to prove an actual discontinuance; whereas, if it had been more general, slighter proof would have sufficed. Here the plaintiff has not bound himself by the same particularity; and therefore the declaration is good. And it appears from *Skinner* v. *Gunton*, 1 Saund. 228, that the count would have been good, after verdict, without any allegation of the fiat having determined. [*89

Rule discharged.

(a) 5 B. & Ad. ix., Pleadings in Particular Actions, IV
(b) 2 New Ca. 114. S. C. 2 Scott, 228.

WRIGHT *v.* WATTS.

To debt for 11*l.* 3*s.* 6*d.*, defendant pleaded that he had accepted a bill drawn by plaintiff for the amount, which plaintiff before the action endorsed to B., who held it till, at, and after the commencement of the action: that, at maturity, defendant paid B. 5*l.* in discharge of the bill to that extent, and that, for the residue, B. had commenced an action against defendant, which was still pending.

***Held,* bad, on special demurrer, for duplicity: for that, assuming the pendency of the action by B. not to be a good defence as to the residue, still it was set up as a defence on the plea: and therefore the plea offered two complete answers; first, that the bill was outstanding at the time of the present action; secondly, that part of it was paid, and an action pending for the residue.**

DEBT for 11*l.* 3*s.* 6*d.* for goods sold and delivered, and 11*l.* 3*s.* 6*d.*, for work done and materials for the same provided by plaintiff for defendant.

Plea. As to the sum of 11*l.* 3*s.* 6*d.*, parcel, &c., that, after the said sum, parcel, &c., became due to plaintiff as in the declaration mentioned, and before the commencement of this suit, to wit on 10th August, 1840, plaintiff, for and on account of the said sum, parcel, &c., drew a bill of
*90] exchange, and directed the same to defendant, *whereby plaintiff requested defendant to pay to the order of plaintiff the said sum of 11*l.* 3*s.* 6*d.*, four months after the date thereof, which bill defendant then accepted, and delivered to plaintiff, for and on account of the said sum of 11*l.* 3*s.* 6*d.*, parcel, &c.: and plaintiff then had and received the said bill on such account as aforesaid: that, after the delivery of the said bill to plaintiff as aforesaid, and before the commencement of this suit, to wit on, &c., plaintiff endorsed and delivered the said bill upon a good and sufficient consideration to one Charles Beswick, who, from the time of such endorsement until and at and after the time when this action was commenced, remained and was the holder of the said bill: that, when the said bill became due, to wit on 15th December, 1840, defendant paid to the said C. B., then being the holder of the said bill, and the said C. B. then received, the sum of 5*l.*, in full satisfaction and discharge of an equal sum, parcel of the amount of the said bill: and that, for recovery of the residue of the amount of the said bill, the said C. B. then commenced an action against defendant in the Court of Queen's Bench; which action is still depending in the said court. Verification.

Demurrer, assigning for causes that the plea is multifarious and double in this, to wit, that the said plea states that defendant accepted the bill, and plaintiff received the same, for and on account of the said 11*l.* 3*s.* 6*d.*; and that plaintiff endorsed and delivered the same upon a good and sufficient consideration to one Charles Beswick, who, at the time this action was commenced, was the holder of the bill: which said statements show a good and sufficient defence as to the whole of the said sum of 11*l.* 3*s.* 6*d.*;
*91] and yet the plea proceeds to state *that defendant, when the said bill of exchange became due, paid to C. B., then being holder of the bill, the sum of 5*l.*, in satisfaction of an equal sum, parcel of the amount of the bill, thereby showing a further and other good and sufficient defence as to the said sum of 5*l.*, even though, at the time of the commencement of this action, plaintiff, and not C. B., was holder of the bill. Also for that the plea proceeds to state that C. B. had commenced an action against defendant for the recovery of the residue of the amount of the bill, and which said action was still pending; which would also be a good and sufficient defence as to the residue of the said sum of 11*l.* 3*s.* 6*d.*, although, at the

time of the commencement of this suit, plaintiff, and not C. B., was holder of the bill. Also for that plaintiff is unable to take any single and sufficient issue on the plea, so far as the same relates to 5*l.*, parcel, &c.: for, if plaintiff merely denies that C. B. was holder of the bill at the commencement of this suit, he thereby admits that C. B. was holder thereof when the bill became due, and that defendant paid to C. B. the said sum of 5*l.* as in the plea mentioned: and, if plaintiff were merely to deny the last mentioned payment, he would thereby admit that the bill was in the hands of C. B., as holder for value, at the commencement of this action: either of which said facts would be a defence as to the sum of 5*l.*, parcel, &c.

Joinder in demurrer.

W. H. Watson, for the plaintiff. The plea is multifarious for the reasons assigned. The endorsement of the bill to Beswick, and its remaining in his hands at the commencement of the action, is of itself a full answer. Then, as to 5*l.*, another answer is furnished *by the payment. And a duplicity as to any part is sufficient to render the whole plea bad. And, [*92 as to the remainder, another defence is set up by the allegation that an action is pending at the suit of the holder of the bill. This would be an answer, even if the holder, after commencing such action, had, before the commencement of this action, endorsed the bill over to the plaintiff. No traverse can be taken, for the reasons mentioned in the special demurrer. [WIGHTMAN, J. You might traverse the allegation that the bill was accepted in respect of the cause of action.] But the bill may have been so accepted in fact.

Joseph Addison, contrà. A replication de injuriâ would meet the whole plea. Besides, if the plea be double, the plaintiff may reply double; *Chitty* v. *Dendy*, 3 A. & E. 319, 323.(*a*) There is therefore no practical difficulty as to a traverse. But the plea is not double. In 1 Chitt. Plead. 226 (6th edit.) the rule as to duplicity is thus described. "It precludes the parties, as well the plaintiff as the defendant, in each of their pleadings, from stating or relying upon more than one matter, constituting a sufficient ground of action, in respect of the same demand, or a sufficient defence to the same claim, or an adequate answer to the precedent pleading of the opponent." The plea here does not contain two sufficient defences to the whole claim. There are indeed two defences as to the 5*l.* But, as to the residue, the pendency of the action is not, of itself, any bar to the action. It must, where it constitutes a defence at all, be pleaded in abatement. Further, if the plaintiff, *instead of being endorser, were endorsee, the pending action [*93 would be no defence to an action by this plaintiff on the bill itself, unless it were alleged that he, when he took the bill, had notice that Beswick had commenced an action; Chitty on Bills, 224, 9th ed.(*a*) A fortiori, the endorser cannot be barred by such an action, in this suit, not having notice. For Beswick might sue both him and the present defendant; and then, if the present plaintiff took up the bill without notice, Beswick's action would be no defence. In *Tarleton* v. *Allhusen*, 2 A. & E. 32, a vendor of goods took the vendee's acceptance and endorsed it over; and the endorsee sued the vendee on the acceptance and obtained judgment: but it was held that the vendor was not paid, the endorsee not having taken out execution.

W. H. Watson in reply. Some of Lord ABINGER's remarks in *Frazer* v. *Welch*, 8 M. & W. 329, 634, apply to this plea, which is clearly pleaded with the view of forcing the plaintiff to demur. The argument urged for

(*a*) See *Reynolds* v. *Blackburn*, 7 A. & E. 161.
(*b*) See *Columbier* v. *Slim*, Chitty on Bills, 217, note (l).

the defendant now is that his own plea is unmeaning, as to the second defence. But it attempts to set up a second defence; and that is sufficient to make the plea double, whether the defence be well or ill pleaded. Nor is this objection cured by one answer being in bar, and the other in abatement.(a)

Lord DENMAN, C. J. The object of this plea clearly was to drive the plaintiff to demur. That practice has recently prevailed to an extent which
*94] is not very creditable *to the science of special pleading. It is not essential that the matter in a plea should form a good defence, in order to make a plea double which contains another defence: it is enough that the defendant appears to treat the matter pleaded as affording a defence.

PATTESON, J. That is clearly so: Mr. *Watson*, in his reply, has given the proper answer to the argument. To make a plea double it is not necessary that both defences should be sustainable, but only that two should be set up. Mr. *Addison's* argument is that this plea contains much which is mere nonsense. But, if so, why is that introduced? It might be demurrable, if it stood alone: but it does not the less hold out a second defence.

WILLIAMS, J. concurred.

WIGHTMAN, J. There are clearly two defences set up: and the defendant's counsel cites cases to show that one of these is ill pleaded. That does not save the plea from being double.

Judgment for the plaintiff.(b)

(a) See Stephen on Pleading, p. 293, (5th ed.)

(b) The Rule, as laid down in Stephen on Pleading, (p. 293, &c., 5th ed.,) is as follows. "1. A pleading will be double that contains several answers, whatever be the class or quality of the answer" "2. Matter may suffice to make a pleading double though it be ill pleaded." "On the other hand, it seems that, 3. Matter immaterial cannot operate to make a pleading double." "This doctrine, that a plea may be rendered double by matter *ill pleaded*, but not by *immaterial* matter, quite accords with the *object* of the rule against duplicity, as formerly explained. That object is the avoidance of several issues. Now whether a matter be well or ill pleaded, yet if it be sufficient in substance, so that the opposite party may go to issue upon
*95] it, if he chooses to plead over without taking *the formal objection, such matter tends to the production of a separate issue; and is on that ground held to make the pleading double. On the other hand, if the matter be immaterial, no issue can properly be taken upon it: it does not tend, therefore, to a separate issue, nor, consequently, fall within the rule against duplicity."

The Master, Wardens and Assistants of the Society of SCRIVENERS v. BROOKING.

The Scriveners of the city of London were a company from time immemorial, and were incorporated by charter, authorizing them to make by-laws, and impose penalties, and empowering the master, wardens and assistants to elect yearly a new master and wardens from among the assistants.

The company made a by-law that two dinners should be kept yearly in the common hall, one for the master, wardens, assistants and other the freemen on the day of the said election, the other for the master, wardens, assistants and livery on the day when the Lord Mayor of London should be sworn at Westminster: that two persons of the elder and better sort should be elected yearly from among the assistants and other freemen to be stewards for the provision of the said dinners: that they should be allowed towards the first dinner, 3*l.* 6*s.* 8*d.*, a-piece from the master and wardens, and 3*s.* 4*d.* from every other member of the company, and should themselves pay the rest of the expense: and that, if any person chosen steward should refuse to accept the office and perform the duties, he should forfeit 10*l.*

In an action against a freeman for the penalty, the declaration alleging that he was chosen to be steward for the provision of the dinner on the election day, and had notice, but would not accept or execute the office, or provide the dinner: *Held*, that the by-law as to the dinner was bad, the freemen having no business to do in the election, and not being obliged to at-

tend it; no other business of the company being done on the election day; and the office being for no purpose but that of giving the dinner.

DEBT, by the master, wardens and assistants of the Scriveners' company of the city of London, for penalties under a by-law. The declaration recited that the freemen of the city of London using the art or mystery of scriveners within the same city and the suburbs thereof, commonly called writers of the court letter of the city of London, from time whereof, &c., were an ancient company and fraternity of the said city: that king James I., by letters patent of the fourteenth year of his reign, granted to them to be a body corporate, &c., and that, forever and at all times thereafter, there should and might be one master and two wardens of the said society of scriveners of the city of London, to rule and govern the said society, and the men of the said society; and further that, for the better assistance and counsel of the said master and wardens of the said company for the time being, in and about the execution of *the said several offices, there [*96 might and should be twenty-seven men, the more discreet and honestest persons of the same society, to wit the master and wardens of the said society for the time being, and twenty-four other persons of the said society, who might and should be named assistants of the said society, for all matters, causes, and affairs of the said society, touching or concerning the same, and the good rule, state, and government of the said society, to be chosen and constituted in the manner and form in those letters patent specified and limited. And that such master, wardens and assistants, or the major part of them, should have power to ordain and establish and make, and cause to be executed, "for the wholesome rule and better government of the society aforesaid, statutes, rules, orders, constitutions and ordinances reasonable and agreeable to the laws and statutes of his said majesty's kingdom of England, according to their sound discretion, for the utility of the society aforesaid, and for other lawful causes," and the same statutes, &c. to change or revoke and annul: and that, if any person of the said society, or using the said mystery within the city, &c., should not fulfil all the lawful statutes, &c. by the master, &c. made or to be made, but the same or any of them should infringe, it should be lawful for the master, &c. for the time being to impose on every such person so offending all such fines, amerciaments, &c., for his or their offence and contempt in that behalf, as to the master, &c. for the time being, or the major part of them, should seem to be necessary and convenient. And that the master, wardens, and assistants, or the major part of them, might and should have power yearly, on Tuesday next after the feast of St. James the Apostle, or at any other time when it should *seem to them more necessary and expedient, to nominate and choose [*97 one fit and discreet person of the assistants to be master, and two other fit, &c., of the assistants to be wardens of the said society, and all the said men of the art and mystery aforesaid, their servants and apprentices, to rule, govern, and survey; each of whom, being sworn, &c., should exercise their several offices for one year next following, and till their successors should be elected and sworn. The declaration then stated that the charter was accepted, and that the master, wardens, and assistants, on 29th January, 16 Jac. 1, did, for the wholesome rule and better government of the society, duly make a certain rule, order, constitution and ordinance, reasonable and agreeable to the laws and statutes of the kingdom, according to their sound discretions, for the utility of the society aforesaid. The by-law was then set out, as follows:

"That there should be yearly kept, at the common hall of the said so-

ciety, or the place of meeting for the time being, two dinners, that is to say, one dinner for the master, wardens and assistants of the said society, and other the freemen of the said company, to be kept yearly on the day of the election of the new master and wardens; and the other for the master, wardens, assistants and livery of the said company, yearly, to be kept on the day when the Lord Mayor should take his oath at Westminster; and that the master, wardens and assistants of the said society, or the major part of them, in convenient time before the said election day, should choose every year from time to time, out of the livery or out of the assistants of the said company, two of the elder and better sort of the said company which should not have
*98] been master or wardens, to be stewards for the *provision of both the dinners aforesaid: and the said stewards so to be chosen to have towards the said dinner to be yearly kept on the said election day of the master and wardens for the time being the sum of 3*l.* 6*s.* 8*d.* a piece, and of every other person of the said company 3*s.* 4*d.*; and whatever should be more disbursed and laid out about the said dinner should be borne and discharged at the charge of the stewards for the time being respectively: and for the said other dinner the master and wardens to pay 40*s.* a piece, and every one of the livery only to pay 3*s.* 4*d.* a piece, and the residue of the said charge to be borne by the said stewards. And, if any person so chosen to be steward as aforesaid did or should refuse to accept the same, or deny to perform the same, then every person so chosen to be steward as aforesaid, and refusing, should forfeit and pay to the master and wardens for the time being, to be by them employed in necessary expenses of the said society as occasion should serve, 10*l.* for every such offence."

The declaration stated that the by-law was examined and approved of, in 16 Ja. 1, by Francis Lord VERULAM, Lord Chancellor, Sir JOHN MONTAGUE, Chief Justice of K. B., and Sir HENRY HOBART, Chief Justice of C. P., according to the form of the statute, &c. (*a*) And it then set forth by another by-law made in 1635, and examined and approved by Lord COVENTRY, then Lord Keeper, Sir JOHN BRAMPSON, C. J. of K. B., and Sir JOHN FINCH, C. J. of C. P., enacting that the stewards for the provision of the first mentioned dinner should be chosen "as well out of the assistants of the said company as out of the generality and commonalty and residue
*99] of the freemen of the said society," "albeit the said stewards or any *of them for the time being, to be chosen as aforesaid, be not or should not be of the assistants of the said society or of the livery or clothing of the said company" In other respects this by-law confirmed the former as to the first mentioned dinner, re-enacting the forfeiture if the party chosen should refuse to accept or execute the office, or should deny or omit to disburse the monies, or to perform the other services incident or belonging to the said office.

The declaration then alleged that, after the making of the by-laws, viz. June 19th, 1839 the defendant and another person, being two of the elder and better sort, &c. and neither of them having been a master, or wardens, &c. were chosen by the master, wardens and assistants at a court, &c., out of the generality and commonalty of the freemen, to be stewards for the provision of the dinner to be kept in that year for the master, wardens and assistants and other freemen, &c., on the day of election of master and wardens (which day was appointed at the same court:) that the defendant in convenient time, &c., had notice, and was required to execute the office, but that he refused to execute the same, and denied and omitted to disburse the monies and perform the servi-

(*a*) See stat. 19 H. 7, c. 7, 1 Bac. Abr. 803, (ed. 7,) tit. By-laws.

ces incident, &c., and refused, &c., to provide, or join with the other steward in providing, a dinner as aforesaid, contrary to the by-law: whereby he had forfeited to the master, wardens and assistants the sum of 10*l.*, and whereby an action, &c.

General demurrer: and Joinder.

Erle, for the defendant. Both the by-laws are bad, as being unreasonable. As to the first: it is a by-law for purposes of mere luxury. The second dinner is *obviously unconnected with the business of the society, its good government, or any of its permanent interests. And [*100 both came within the law laid down in *The Master and Company of Framework-Knitters* v. *Green*; 1 Ld. Ray. 113, where a by-law that the stewards of the company should, on a certain day, provide a dinner for the master, wardens and assistants, under a penalty, was held bad, on motion in arrest of judgment, in an action for the penalty, because "it is not said, that this dinner was appointed, to the end that the company should assemble, and consult of things beneficial to the corporation. For it does not appear, but that this was only for luxury. Then the by-law is unreasonable, to compel a man to make a dinner, only for the luxury of others, without any benefit to himself or the rest of the company." This decision was recognized and applied in *Carter* v. *Sanderson*, 5 Bing. 79, the latest case on this subject, although the Lord Chief Justice admitted that "a by-law to give a feast may under certain circumstances be good; it may be for the benefit of the corporation, because if they are called together for purposes of business, it is necessary they should have refreshment, and it may be proper to point out the individual who shall provide it." This may be so at a meeting where important interests of the company are to be discussed; but mere good fellowship is not a purpose for which an unwilling person can by law be burdened. The first dinner is to be given to the master, wardens, and assistants, "and other the freemen" of the company; but the freemen are no part of the electoral body. The dinner is to be provided for an indefinite number. A sum is to be allowed the stewards by payment *from the master, wardens, and others: but it is very doubtful whether the payment could be legally [*101 enforced. And the declaration does not show that any such allowance was offered to the defendant when he was called upon to act as steward.(*a*) The second by-law is merely an amendment of the first, and subject to the same objections. Besides, it imposes the duty of stewardship on the freemen generally. Now, by stat. 14 G. 3, (U. K.) c. 79, s. 13, every person who may apply for a faculty to become a public notary and practise as such, in or within three miles of London, must be admitted to the freedom of the Scriveners' Company. It is unreasonable to impose the burden in question upon a person thus compelled to take up a freedom, and especially with reference to an election in which he has no concern.

Sir *W. W. Follett*, Solicitor General, contrà. The by-laws are at all events good as to the penalty for refusing to take the office. As to the refusal to provide a dinner; in *The Master and Company of Framework Knitters* v. *Green*, 1 Ld. Ray. 113, it was not shown that any business of the corporation was to be done on the day appointed for the dinner: the court said, if the by-law "had been, to make the dinner, to the end that the company might assemble and choose officers, or any other thing for the benefit of the corporation, it had been well enough:" and they added that "in the case of old corporations by prescription a by-law to make a customary feast has been held good." It is true that *the feast here is not alleged to be customary: but the corporation is proscriptive; [*102

(*a*) See *Carter* v. *Sanderson*, 5 Bing. 88, 90, 91.

and it may be presumed that the dinners in question have been a customary mode of assembling the members. The Lord Mayor's day is one on which it may be supposed that they would usually assemble and have a dinner provided; and a by-law pointing out the mode is not in itself so unreasonable that the court should, on principle, pronounce it invalid. Still less can this be the case with a by-law for holding a dinner on one of the company's election days. The freemen, who attend one of the dinners, do not take part in the election; but all the members of the company may be expected to assemble. BEST, C. J., in *Carter* v. *Sanderson*, 5 Bing. 899, admits that a by-law for giving a feast when the corporation are called together for purposes of business may be good. The question as to tender of the allowance before requiring the defendant to give the dinner does not arise, because the complaint here is that he refused to take the office. Till he did take it, the tender could not be made. If, indeed, he had accepted the office, an omission to tender the allowance, and the impossibility of enforcing payment, might perhaps have been a defence to an action for not providing the dinner. [Lord DENMAN, C. J. The steward is appointed only for the purpose of providing the dinner. WIGHTMAN, J. In *Carter* v. *Sanderson* 5 Bing. 899, the defendant would not take the office.] The declaration only alleged that he refused to provide a dinner, or to "serve or hold his said office of steward."

Erle was not heard in reply.

*103] *Lord DENMAN C. J. The result of the cases is that a by-law to compel the giving of a dinner must show that it is for a beneficial public purpose, or that an interest of the corporation is in some way promoted by it. Here that is not so. Stewards are to be elected for the purpose of providing two dinners: one for the master, wardens, assistants and other freemen, on the day when the new master and wardens are elected; the other for the master, wardens, assistants and livery, when the Lord Mayor is sworn in at Westminster. There might be good reason for providing a dinner to refresh those who meet on the corporation business; but the by-law should show that the dinner is connected with the purposes of the meeting. On the election day, here, there is nothing to connect the freemen with the purposes of the meeting, because the election is not by them but by the master, wardens and assistants. Therefore a by-law for treating the freemen is unreasonable.

PATTESON, J. This by-law, as it regards the freemen, is clearly unreasonable. On the election day the electors are the master, wardens and assistants; and the elected are a master and wardens. The freemen have nothing to do with the election, and are not even required to be present. But the by-law requires that the stewards shall be chosen out of the assistants or out of the residue of the freemen: so that a man that is not called upon to be present may be compelled to make a dinner for the whole body. By the first by-law the stewards were not eligible from among the freemen at large; but the second extends the liability. It was contended that the penalty here is imposed for not taking the office: but that is not material; *104] the by-law is *objected to in toto and the office has no object but the giving of a dinner. If the office had been instituted for some purpose independent of that, but it had been added that the officer should provide a dinner on some occasion, the case in this respect would have been different: he might have been bound to take the office, though not to provide the dinner. But the steward is the creature of the by-law: and if the office is bad the by-law is bad.

WILLIAMS, J. The case in Lord RAYMOND shows the possibility of an obligation of this kind being connected with business of the corporation, and so valid. But here a dinner is to be provided on the election of master and wardens by a freeman, who has no right to vote, and no interest in the election, which is unreasonable, even admitting that a dinner on the particular day might be necessary, or reasonable, or convenient. The argument used by the Solicitor General, that a steward may be liable for refusing to take office, though not for refusing to provide the dinner, would apply to the case of an officer having other duties; but here the steward is not appointed for any duty but that of providing the dinner.

WIGHTMAN, J. This case comes directly within the dicta in *The Master and Company of Framework-Knitters* v. *Green*, 1 Ld. Ray. 113, and in *Carter* v. *Sanderson*, 5 Bing. 79, where it is admitted that a by-law to give a feast may be good under certain circumstances, when the corporation assemble for business. But here the only business to be done is an election on one of the days, when the master, *wardens, and assistants elect: [*105
and the feast on that day is to be given not only to them but to the freemen, who have nothing to do but to eat the dinner. In *Gee* v. *Wilden*, 2 Lutw. 1320, (cited in *Carter* v. *Sanderson*, 5 Bing. 79,) it seems that the dinner was given on a day when something was to be done by the whole corporation: and in *Wallis's Case*, Cro. Jac., 555, also cited there, the by-law was in aid of a custom. Judgment for defendant.

STANLEY v. HAYES.

Covenant by lessor with lessee for quiet enjoyment without let, &c., by the lessor or any other person lawfully claiming or to claim by, from or under him.

Entry on lessee, and seizure of goods on the premises by collector of land tax, for arrears due from lessor before the demise.

Held, no breach.

COVENANT. The declaration stated that the defendant, by indenture, "did demise and lease" to plaintiff four messuages for the term of twenty-one years, at the yearly rent of 60*l*., and did covenant, &c., to plaintiff that he, paying the rent, and keeping all the covenants, &c., on his part, "should and lawfully might peaceably and quietly have, hold, use, occupy, possess and enjoy" the demised premises for and during the term, "without any let, suit, trouble, denial, disturbance, eviction or interruption whatsoever, of or by the defendant, his heirs or assigns, or any other person or persons lawfully claiming or to claim by, from or under him, them, or any of them." Averments, that plaintiff entered, &c., and kept the covenants on his part. Breach; that defendant did not suffer or permit plaintiff, for or during the term, peaceably or quietly to have, hold, &c., or enjoy, without the let, suit, &c., according to the covenant, but, on the contrary, that, after the making of the *indenture, and during the continuance of the demise, [*106
and while plaintiff was possessed, &c., to wit on, &c., "one John Pittman, then being the collector of land tax, lawfully entered into and upon the said messuages and premises, and then seized and took certain goods and chattels, then being in and upon the said messuages and premises, as a distress for a certain sum of money, to wit the sum of 3*l*. 7*s*. 8*d*., before and at the time of the making of the said indenture, and of the commencement of the said demise, due and owing from the defendant for and in respect of certain arrears of land tax, before the making of the said indenture, and before the commencement of the said demise, rated, assessed

and charged upon the said messuages and premises." By means whereof plaintiff was injured, &c., in the occupation and possession of the premises, contrary to the covenant, &c., and certain lodgers, to wit, &c., left him.

General demurrer and joinder. The point stated in the margin of the demurrer was, that the entry of the collector upon the demised premises was not a breach of the covenant for quiet enjoyment.

Peacock for the defendant. It is true that the word "demise" contains an implied covenant for quiet enjoyment: but that general covenant is restrained by the particular one which follows, that the lessee shall enjoy without let, &c., "of or by the defendant," "or any other person or persons lawfully claiming or to claim by, from or under him;" *Nokes's Case*, 4 Rep. 80, b. S. C. (as *Nokes* v. *James*) Cro. Eliz. 674; *Gainsford* v. *Griffith*, 1 Saund. 51, 60; *Line* v. *Stephenson*, 4 New Ca. 678. The dis-
*107] tress for land tax was not an interruption by any person *claiming under the defendant; the claim was against him. [Lord DENMAN, C. J. Is there any covenant against defaults of the lessor?] There is none. The covenant against incumbrances, of which a form is given in Platt on Covenants, 330, Part 3, c. 11. s. 4, would, perhaps, have been most applicable. No express authorities have been found on the point: but on principle, the plaintiff cannot be entitled. It is as if the distress had been for ground rent. The plaintiff might have paid the sum claimed, and sued the defendant for money had and received. [Lord DENMAN, C. J. I think we have held that that could not be done.(*a*)

Byles, contrà. It does not appear that there are any direct authorities on the point. The express covenant certainly restrains the general covenant; but the words of the express covenant are very large. By sect. 17 of the Land Tax Act, stat. 38, G. 3, c. 5, the arrear in question was a charge upon the demised premises. The tax, being due from the defendant, was an incumbrance; the levy was an interruption of the quiet enjoyment, and a breach of the covenant. In *Morris* v. *Edgington*, 3 Taunt. 24, the interruption, by a lessor, of a right of way claimable under the lease was held to be ground of action on a covenant for quiet enjoyment: so was a distress for rent due from a third party, in *Dawson* v. *Dyer*, 5 B. & Ad. 584. So, if the landlord had granted a rent-charge, and the grantee had distrained, that would have been a breach of the covenant. Again, if he had suffered judgment, and the lands had been taken under an elegit, or if he had forfeited them by treason or felony, it would have been a breach. And
*108] it appears from **Broking* v. *Cham*, Cro. Jac. 425, cited in *Hayes* v. *Bickerstaff*, Vaugh. 118, 121, that an extent by process out of the Exchequer for a debt due from the landlord to the crown would also be a breach of his undertaking for quiet enjoyment. [PATTESON, J. The undertaking in *Broking* v. *Cham* was general.] In the cases of forfeiture and debt to the crown it could no more be said that the disturbing party claimed by or under the landlord than here.

Peacock in reply. In *Dawson* v. *Dyer*, 5 B. & Ad. 584, it was alleged in the declaration, and not denied, that the party distraining lawfully claimed from and under the defendant. A distress may be an interruption of the quiet enjoyment, without being a disturbance provided against by the covenant: as if it were under a rent-charge claimed by a title paramount to that of the lessor. The claim of land tax here was paramount to any right of the defendant. The plaintiff might have paid it and sued him for money had and received. An elegit would have been a demand, not under,

(*a*) See *Baber* v. *Harris*, 9 A. & E. 532.

but against the landlord, and therefore not a disturbance within the covenant.

Lord DENMAN, C. J. This distress was certainly not a proceeding within the terms of the covenant. We cannot extend the remedy provided by the indenture. Let, suit, disturbance or interruption by the defendant, or others claiming by, from, or under him, are different things from the injury here complained of, those words implying a claim by title from the lessor. Here the claim was against him.

PATTESON, WILLIAMS, and WIGHTMAN, Js., concurred.

Judgment for defendant.

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*The Master, Wardens and Commonalty of the Art or Mystery of SALTERS, LONDON v. JAY. [*109

Stat. 2 & 3 W. 4, c. 71, s. 3, enacting that, when the access of light to a dwelling house, &c shall have been enjoyed therewith for twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, extends to the custom of the city of London authorizing one neighbour to obstruct the access of light to another's messuage, &c., by building on an ancient foundation: therefore, in an action for buildi g so as to darken windows which had been enjoyed without interruption for twenty years, the custom of London is no longer a defence.

CASE. The declaration stated that before and at the time, &c., a certain messuage and warehouse with the appurtenances, situated in the city of London, were in the possession and occupation of T. A. and E. S. as tenants thereof to the plaintiffs, they being reversioners; in which said messuage, &c. there then of right were and still ought to be divers, to wit two, windows, through which the light and air during all the time aforesaid ought to enter, &c. for the convenient and wholesome use, &c. Yet defendants, well knowing, &c., but intending, &c., while T. A. and E. S. were tenants and plaintiffs reversioners, as aforesaid, wrongfully built and erected a wall and buildings near the said windows respectively, and kept and continued the said wall, &c., to wit from, &c. until, &c. By means whereof the light and air were and are prevented from entering, &c., and the messuage and warehouse have been rendered and are dark, &c., and plaintiffs have been and are injured in their reversionary estate, &c.

Plea. That in the city of London, from time whereof, &c., there hath been and still is a certain ancient and laudable custom there used and approved of, that is to say, "that, if any persons or body corporate hath or have a messuage or house in the said city, near, adjacent, or contiguous and adjoining to another ancient messuage or house, or the ancient foundations of another *ancient messuage or house, in the said city, of another person or persons, his or their neighbour or neighbours there, and the windows or lights of such messuage or house as first aforesaid are looking, fronting or situate towards, upon or over or against the said other ancient messuage or house or ancient foundations of another ancient messuage or house of such other person or persons," &c., "so being near, adjacent, contiguous or adjoining, although such messuage or house as first aforesaid, and the lights and windows thereof, be and were ancient, yet such other person or persons, his or their neighbour or neighbours, being the owner or owners of such other ancient messuage or house or ancient foundations, so being near adjacent or adjoining, by and according to the custom of the said city, in the same city for all the time aforesaid used and approved, well and lawfully may, might and hath and have used, at his and their will and pleasure, his or [*110

their said other messuage or house, so being near, adjacent or adjoining, by building to exalt or erect, or of new upon the ancient foundations of such other messuage or house so being near, adjacent or adjoining, to build and erect a new messuage or house, to such height as the said owner or owners shall please, against and opposite to the said lights and windows near or contiguous to such other messuage or house, by means thereof to obscure and darken such windows or lights, unless there be or hath been some writing, instrument or record of an agreement or restriction to the contrary thereof in that behalf." That, before the said time when, &c., to wit on, &c., W. H. Cotton, S. Cotton, E. Cotton, T. Cotton and G. V. Cotton were seised of a certain ancient messuage and house, and the foundations of a
*111] certain *messuage and house, in the city of London, near, adjacent, contiguous and adjoining to the messuage and warehouse with the appurtances in the said declaration mentioned: and, being so seised, the said W. H. Cotton, S. Cotton, E. Cotton, T. Cotton and G. V. Cotton demised their said messuage, house and foundations to Thomas Reynolds and Edward Parkins, habendum to the said T. Reynolds and E. Parkins, their executors, administrators and assigns, for a certain term of years still unexpired; by virtue of which demise the said T. Reynolds and E. Parkins afterwards, to wit on, &c., entered into and upon the premises so demised to them, and became and were possessed thereof for the said term: and that the said T. Reynolds and E. Parkins being desirous of exalting and erecting their said messuage and house, and of new upon the said ancient foundations to build and erect a new messuage and house against and opposite to the windows in the declaration mentioned, and there being and having been no writing, instrument or record of an agreement or restriction to the contrary thereof in that behalf, defendant, at the said time when, &c., as the servant of the said T. Reynolds and E. Parkins, and by their command, exalted and erected the said messuage and house of the said T. Reynolds and E. Parkins, and of new upon the said ancient foundations built and erected a new messuage and house, against and opposite to the said windows in the said declaration mentioned, and thereby a little obscured and darkened such windows: which are the same grievances, &c. Verification.

Replication. That the said access and use of light and air to and for
*112] the said messuage and warehouse in the declaration mentioned, through the windows therein *mentioned, to and for the purposes therein also mentioned, which same access and use of light and air was so obstructed and injured by the committing of the said grievances as in the declaration complained of and in the said plea attempted to be justified, had been and was actually enjoyed with the said messuage and warehouse, as of right and without interruption, by the respective occupiers of the said messuage and warehouse, for and during the full period of twenty years next before the commencement of this suit; and that the said access and use of light and air was not during the said twenty years, or any part thereof, enjoyed as aforesaid by or by reason of any consent or agreement expressly made or given for that purpose by deed in writing. Verification.

General demurrer,(a) and joinder.

Sir *W. W. Follett*, Solicitor General, for the defendant. Stat. 2 & 3 W. 4, c. 71, s. 3, does not destroy the ancient custom of the city of London.

(a) The points stated by the defendant were that the custom of London, of building on an ancient foundation, is not affected by stat. 2 & 3 W. 4, c. 71; that the replication neither traverses nor confesses and avoids the plea, and that it introduces matter irrelevant to the defence.

Sect. 2 enacts that no claim, by custom, prescription or grant, to the easements there mentioned, when they shall have been actually enjoyed by any person claiming right thereto without interruption for twenty years, shall be defeated or destroyed by showing only that such easement was first enjoyed at any prior time; but such claim may be defeated in any other way by which the same is now liable to be defeated. This regulates the proof by which rights may be established or impeached, but does [*113 *not alter the rights themselves. Sect. 3 enacts "that when the access and use of light to and for any dwelling house," &c., "shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing." The words "any local usuage or custom to the contrary notwithstanding" are meant to save the right which a party having so enjoyed may possess, but cannot abolish the right which any other person may have had by usage or custom to enjoy land of his. If there has been for twenty years such an access and use of light as that clause points out, the tenant proving that will establish his easement primâ facie, without further evidence: but his neighbour who has obstructed the light by building may prove, in answer, that he built upon an ancient foundation. If sect. 3 had been meant to deprive parties of their rights or legal defences, it would have been differently worded; that this was not designed, appears from sect. 1, which recites that the expression "time immemorial" is now by law deemed to include the whole period of time from the reign of Richard I., "whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice," and, "for remedy thereof," proceeds to enact, &c. [Lord DENMAN, C. J. If there were a local custom that nothing less than thirty years' enjoyment should establish the easement, you agree that this clause would prevent *the custom from being set up?] It [*114 would: but the party claiming by twenty years' enjoyment cannot sue another who claims to interrupt that enjoyment by an independent custom.

Kelly, contrà. The court cannot adopt the defendant's construction without striking out words from the statute. It is urged that the preamble restrains the enactment of sect. 3: but, although the preamble of an act may assist in construing ambiguous expressions, it cannot control clear ones. It is observed in 2 Dwarris on Statutes, 655, c. 11, that, "In doubtful cases, recourse may be had to the preamble, to discover the inducements the legislature had to the making of the statute; but where the terms of the enacting clause are clear and positive, the preamble cannot be resorted to:" and reference is made to the words of Lord ELLENBOROUGH and LAWRENCE, J. in *Rex* v. *Marks*, 3 East, 157, where the latter learned judge says: "It is nothing unusual in acts of parliament for the enacting part to go beyond the preamble; the remedy often extends beyond the particular act or mischief which first suggested the necessity of the law." The intention of the legislature in this statute appears clearly by comparison of sect. 2 with sect. 3. In the former clause, where the right to certain easements is rendered absolute after forty years' enjoyment, the words are merely "the right thereto shall be deemed absolute and indefeasible;" but in sect. 3 the expression, with regard to the access of light after twenty

years' enjoyment is, "the right thereto shall be deemed absolute and in-
*115] defeasible, *any local usage or custom to the *contrary notwithstanding.*" Those words must have been introduced for some purpose. The custom of London as to building on ancient foundations, and a similar one which existed at York,(*a*) must have been known to the legislature: and it cannot be presumed that the words in question were used without reference to them. The intention was to make the law uniform in this respect, and to take away a custom which has often been deemed unjust, and is not beneficial to the citizens generally, because if, in any instance, it benefits one citizen, it does so by injuring another, perhaps in the same degree. No existing custom is pointed out on the defendant's side, to which the words may allude. It is argued that the statute was not meant to take away the defence, which any party had by the law as it stood; but the act itself does not bear out that assumption. Sect. 2 expressly takes away defences. The object of the act was to end uncertainties by making rights, under particular circumstances, indefeasible, except in such cases as the act specifically pointed out.(*b*)

Sir *W. W. Follett* in reply. The preamble of a statute may be important where the following enactment is not direct, but capable of two senses. The customs of London are confirmed by statute (2 W. & M. sess. 1, c. 8, s. 3.:) it might be expected that direct words would have been used to destroy what had been so sanctioned.

*116] *Lord DENMAN, C. J. I think there is no ambiguity in sect. 3, and that the preamble cannot be brought in to prevent its operation. (His Lordship then read sect. 3.) We cannot suppose that, when these words were used, the customs in question were not contemplated: and no local usage or custom is pointed out, beside those of the city of London, to which the words might apply. It requires great ingenuity to suggest any different application.

PATTESON, J. There is no ambiguity. The words of sect. 3 are very plain. It says that, under the circumstances pointed out, the right "shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding." The custom of London would have rendered it defeasible. The enactment makes it no longer so after twenty years. The clause excluding the operation of any local custom is introduced only in that section which relates to the access of light. This points the enactment as far as could be done, without express words, to the custom of London.

WILLIAMS, J. I am of the same opinion. Sect. 3 is not sense unless read with a reference to the custom of London: for, if that remained in force, the right, in London, though declared absolute and indefeasible by the statute, would be defeasible at any moment.

WIGHTMAN, J. I think the clause as to local customs is directly pointed at that of the city of London: and, if a party there does not choose to
*117] avail himself of *the custom within twenty years, he may very well submit to the operation of this clause.

Judgment for the plaintiff.(*c*)

(*a*) See *Bland* v. *Moseley*, cited in *William Aldred's Case*, 9 Rep. 57, b, 58, a, b.

(*b*) Kelly also objected to the plea, as not showing that the defendant's house was "exalted and erected" entirely upon the ancient foundations; and he referred to Privilegia Londini, 54, &c., (ed. 1702,) and *Hughes* v. *Keme*, Yelw. 215, and *William Aldred's Case*, 57, b. there cited. See 20 Vin. Ab 9, tit. *Stopping Lights*, (C.,) pl. 1, in marg. This point was not noticed in the judgment of the court.

(*c*) See *Wynstanley* v. *Lee*, 2 Swanst., 333.

HARRISON v. ELVIN and Another.

A will made after stat. 7 W. 4, & 1 Vict. c. 26, came into operation, was attested by one witness in his own hand writing; and he also held and guided the hand of a second witness, who could not write or read; and in this way the second witnesses's name was written as attesting witness. The testator had desired the two to attest.
***Held*, a sufficient attestation under sect. 9.**

TRESPASS for breaking and entering a house, and taking goods there, &c. Plea, Not guilty, by statute (11 G. 2, c. 19, s. 21.)

On the trial, before TINDAL, C. J., at the last Norfolk assizes, the defendants claimed a right of entry, to distrain for rent on behalf of parties who had purchased the reversion from the devisees named in the will of the plaintiff's father, under whom the plaintiff held as tenant: and the only question, so far as regards the present decision, was whether the will was sufficiently attested under stat. 7 W. 4, & 1 Vict. c. 26, s. 9, it being dated after that act came into operation. The will had the names of two parties, Crofts and Galor, subscribed as witnesses. Crofts had written his own name; but Galor, who was called as a witness, said that Crofts had held his, Galor's, hand, "and wriggled it about on the paper;" and that the attestation which now appeared was what was then so written. Galor could not write or read. It appeared that the two attested at the request of the testator, and that, in all respects except the attestation, the will was properly executed. A verdict was found for the defendants, leave being reserved to enter a verdict for the plaintiff if the Court should be of opinion that the will was not well executed.

**B. Andrews*, on a former day in this term,(a) moved accordingly. [*118]
This will is not attested by Galor: the writing cannot be said to be his. [Lord DENMAN, C. J. Is there any doubt that, if a man were paralytic, and got some one to hold his hand while he wrote, that would still be his handwriting?] It has been formerly doubted whether an attestation by a marksman were sufficient:(b) but here there is not even Galor's mark. The characters are not his: and he does not know their meaning. Suppose the question had arisen after the deaths of Crofts and Galor; the handwriting of the subscribing witnesses must have been proved: but how could such proof be given as to Galor's writing? The difficulty might not arise in the case of an attestation by a marksman: for there is generally added to the mark a written declaration by another person to the effect that the marksman made the mark; and proof might perhaps be given of the writing of such other person. [WIGHTMAN, J. Galor meant that his name should be written. But he never knew whether it was written or not. [PATTESON, J. If this were at the foot of a promissory note, would it not bind Galor by estoppel?] That would be because Galor could not dispute his own act. [Lord DENMAN, C. J. Then you call such a signature his own act.] He is a party to the act: but he does not subscribe, which is what the statute requires in the case of attestation of a will. [Lord DENMAN, C. J. Could not the devisor have signed in this way?] The statute (sect. 9) says that the will shall be "signed" "by the testator, or by some other person in his presence and *by his direction:" this signature [*119]
might therefore be sufficient as to the testator: but, as to the witnesses, the statute allows no such alternative. The express allowance of the alternative in one case, and the absence of such allowance in the other,

(a) April 21st. Before Lord Denman, C. J., Patteson, Williams and Wightman, Js.
(b) See *Harrison* v. *Harrison*, 8 Ves. 185; *Addy* v. *Grix*, 8 Ves. 504.

raises a strong inference that the legislature meant to require the actual signature of each witness.

Lord DENMAN, C. J. We will confer with the Lord Chief Justice.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered judgment as follows.

The question in this case was, whether the will had been properly attested, one of the subscribing witnesses not knowing how to write, and his hand being guided by another person. It was suggested, as a difficulty, that the signature of a witness unable to write for himself could not be proved, if brought in question after his death. But this is only a kind of inconvenience which is inseparable from all modes of attestation. We must take the signature here to be that of Galor. There will therefore be no rule.

Rule refused.

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*120] *MILWARD and Others *v.* HIBBERT and Another.

In an action by the owner of a steam vessel against the underwriter upon a policy on the vessel for time, the declaration stated that certain pigs were thrown overboard for the safety of the ship, and that plaintiff was afterwards forced to contribute to the general average. Plea, that the pigs were laden on deck, by reason whereof defendants were not liable to contribute to the average. *Held* bad, (on demurrer to the replication) for not showing that such lading was improper under the circumstances.

Semble, that a plea of a custom of trade in London may be supported by proof of a custom prevailing in London and other English ports.

Semble, that, where a record states a custom that the jettison of goods stowed on deck shall not bind the ship-owner to contribution for general average, or a custom that it shall not entitle him, in case of his so contributing, to recover the amount from the underwriter on the ship, the pleading is bad, for not limiting the custom to cases where the party discharged is ignorant of the mode of stowage.

Where issue is joined on the question whether a party had notice that goods would be stowed according to such alleged custom, proof of the usage of trade, though strong evidence of knowledge, is not sufficient to induce the court to assume the fact of notice, contrary to a finding of the jury negativing such notice.

DEBT. The first count stated that heretofore, to wit, 20th November, 1837, by a deed poll or policy of assurance, then made and sealed, &c.; the declaration then set out the policy, which recited that plaintiffs had represented to defendants, directors of, and acting for, The Indemnity and Mutual Marine Assurance Company, that they were interested in, or authorized as owners or agents to make, the assurance, and had covenanted, &c., to pay the premium mentioned; and it was witnessed that, in consideration, &c., defendants covenanted and agreed with plaintiffs that the capital stock and funds of the company should be subject and liable, and be applied, to pay and make good all such losses and damages thereinafter expressed as might happen to the subject matter of the said policy, and might attach to the said policy, in respect of the sum of 3600*l*., thereby assured. Which assurance was thereby declared to be upon hull and stores, valued at 10,000*l*., machinery valued at 10,000*l*., in all 20,000*l*., average payable at such valuation, of the ship or vessel called the Kilkenny steamer, whereof, &c., was then master, lost or not lost, "at and from the 28th day
*121] of November, 1837, at *noon, in port and at sea, at all times, on all occasions and services, until the 28th day of November, in the year of our Lord 1838, at noon, with liberty to tow and be towed; to return 9*s*. per cent. per month while laid up; at 10*s*. per cent. for every uncommenced month, when cancelled; and defendants did covenant and agree that the assurance aforesaid should commence upon the said ship,

at and from or as aforesaid, until she had moored at anchor four and twenty hours in good safety, at as aforesaid; and that it should be lawful for the said ship or vessel to proceed and sail to, and touch and stay at, any ports or places whatsoever, in the course of her said voyage, for all necessary purposes, without prejudice to that assurance. And, touching the adventures and perils which the capital stock and funds of the said company were made liable unto, or were intended to be made liable unto, by this insurance, they were of the seas, men of war," &c., (in the usual form,) "and for all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the aforesaid subject matter of the said assurance." There were the usual exceptions as to corn, fish, &c., and clauses providing that sugar, tobacco, &c., should be warranted free from average under five per cent., and all other goods and the ship and freight free from average under three per cent., unless general, or the ship should be stranded. Averment, that the plaintiffs were interested in the hull, stores and machinery of the ship, to the amount of all the money insured: that the ship, after the making of the policy, and during the continuance of the risk, and while plaintiffs were so interested in the hull, stores and machinery, to wit, 13th February, 1838, "departed and set sail on a *certain voyage from Waterford to London; and that, after the commencement of the said voyage, and during the continuance thereof [*122 and of the said risk in the said policy of assurance mentioned, and whilst the said plaintiffs were so interested in the said hull, stores and machinery of the said ship or vessel in the said policy of assurance mentioned, divers wares, goods and merchandise, to wit, 1000 pigs, of great value, to wit, of the value of 2000*l*., were shipped and loaded at Waterford aforesaid, in and on board the said ship or vessel in the said policy of assurance mentioned, to be carried and conveyed on freight, on board the said vessel, from Waterford aforesaid to London aforesaid:" "that the said ship, whilst she was proceeding on her said voyage with the said pigs on board, and during the continuance of the said risk, and whilst the plaintiffs were so interested as last aforesaid, to wit, on the day and year last aforesaid, by the perils and dangers of the seas, and by stormy and tempestuous weather, and the violence of the wind and waves, became and was leaky, and greatly strained, damaged, broken and distressed; insomuch that, by means thereof, it then and there became expedient and necessary, for the preservation of the said vessel and cargo, and for the benefit of all concerned in the said vessel and cargo, to lighten the said vessel, and to cast and throw part of her cargo overboard:" "that, for the preservation of the said ship and cargo, and for the benefit of all concerned and interested in the said ship and cargo, and in order to lighten the said vessel, the master of the said vessel did then and there cast and throw overboard the said pigs, so being of great value, to wit," &c., "and leave them in the sea; whereby they were lost: by reason whereof the plaintiffs, in respect *of their interest in the hull and stores and machinery of the said ship, then [*123 became liable to bear, and did actually pay, a proportionable part of the value of the said pigs so lost as aforesaid, and thereby sustained a general average loss, to wit, an average loss of 1000*l*., upon the hull and stores and machinery of the said vessel so assured and valued as aforesaid: and, in consequence thereof, the said defendants became liable to pay to the said plaintiffs a certain sum of money, to wit, the sum of 450*l*., being the said defendants' proportion of the said average loss for and in respect of

the said sum of 3600*l.* by them assured as aforesaid. Of all which said premises," &c. (notice to defendants.) "By reason whereof an action," &c.

There was a second count for money paid: and a third on an account stated.

Pleas. 1. To the first count, that the m ster did not cast and throw overboard the said pigs, in manner and form &c.: conclusion to the country. Issue thereon.

2. To the first count. That the said pigs, therein alleged to have been cast and thrown overboard, before and up to the time of their having been so cast and thrown overboard had been, and were, laden and placed in and upon the deck of said vessel; by reason whereof the defendants were not, nor are liable to pay or contribute to any average loss sustained by the said jettison of the said pigs: verification. Replication. "That, at the said time when the said pigs were laden and placed in and upon the deck of the said vessel of the plaintiffs, as in the said second plea alleged, the said vessel of the plaintiffs was proceeding and prosecuting a certain voyage from Waterford to London:" "that, before and at the time of such loading and placing
*124] of *the said pigs in and upon the deck of the said vessel of the plaintiffs, there had been, and was, and still is a certain known and approved usage and custom of trade touching and concerning the loading of pigs in and on board of vessels trading between Waterford and London, and employed in carrying pigs from Waterford to London aforesaid, that is to say, that the owners of such vessels have had, and have been used and accustomed to have, and of right ought to have had, and still of right ought to have, for themselves and their servants, the liberty and privilege of loading and placing in and upon the deck of such vessels a reasonable number of such pigs as they from time to time respectively are employed to bring from Waterford to London:" "that the said pigs, in the first count of the declaration and in the second plea above mentioned, were, before and up to and at the time of their being so cast and thrown overboard as aforesaid, laden and placed in and upon the deck of the said vessel of the plaintiffs, in pursuance of and according to the custom and usage of trade; and the same were a reasonable number in that behalf:" verification. Demurrer, assigning, for causes that it is not stated in the replication that the said defendants had any notice of the said custom therein stated and set forth, or that the said defendants had any notice that the said vessel would be employed in carrying pigs as in that replication mentioned. Joinder in demurrer.

3. To the first count. That the said company, before and at the time of the making the policy, were a company of persons united in copartnership, carrying on the business of granting or subscribing policies of marine insurance at London; that the said policy was made at London; and that, before and
*125] at the time of *the making it, "there had been and was at London a known and approved usage and custom of trade, touching and concerning goods and chattels stowed or placed on the deck of a ship or vessel, that is to say, that, if any goods or chattels so stowed or placed in or upon the deck of any ship or vessel should have been necessarily cast or thrown overboard for the preservation of the said last mentioned ship or vessel, then the owner of the said last mentioned goods or chattels so cast or thrown overboard should not have or receive any payment, contribution or allowances, as or by way of general average, for or in respect of the said jettison;" and that the said pigs, alleged to have been cast and thrown overboard, before and up to the time of their being so cast and thrown overboard had

been, and were, laden and placed in and upon the deck: verification. Replication. That "there was not, nor is there, any such usage and custom of trade at London, touching and concerning goods or chattels stowed or placed on the deck of a ship or vessel, in manner and form as the defendants," &c.: conclusion to the country. Issue thereon.

4. To the first count. Commencement as in the third plea; but stating a custom of trade at London, in the case of goods and chattels so stowed, &c., to be, that "if any goods or chattels stowed or placed in or upon the deck of any ship or vessel should have been necessarily cast or thrown overboard for the preservation of the said last mentioned ship or vessel, then any person or persons, having granted or subscribed any policy or policies of insurance upon the said last mentioned ship or vessel, or upon the stores thereof, or upon any matter or thing belonging to the same or concerning or relating thereunto, should not pay, or be bound or liable to pay, *to the assured any loss by way of general average, for and in respect of the said jettison:" averment that the pigs, &c., (as in the third plea:) verification. Replication, traversing the custom, as in the replication to the third plea: conclusion to the country. Issue thereon. [*126

5. To the first count, that the said pigs, "before and up to the time of their having been so cast and thrown overboard, had been and were laden and placed in and upon the deck of the said vessel in the said first count mentioned; and by reason thereof the management of the said last mentioned vessel had been and was obstructed, and the risk and peril of the said last mentioned vessel, and also of the said last mentioned pigs, had been and was greatly increased:" and that, at the time of the making of the policy, defendants "had not any notice or knowledge that the said last mentioned vessel would be engaged or employed during the said risk in the said last mentioned policy mentioned in the carriage or conveyance of any goods or chattels which would be loaded or placed on the deck of the said last mentioned vessel:" verification. Replication. That, though true it is that the pigs "were laden and placed in and upon the deck of the said vessel as in the said fifth plea alleged, nevertheless" "the management of the said vessel was not obstructed, nor was the risk and peril of the said vessel, or of the said pigs, increased by reason thereof, in manner and form as the defendants," &c.: and "that, before and at the time of the making of the said policy, the defendants had due notice that the said vessel would be engaged and employed, during the continuance of the said risk in the said policy mentioned, in the carriage and conveyance of goods and chattels which would be loaded or placed on the deck of the said vessel:" conclusion to the country. Issue thereon.

*6. To the second and third counts, Nunquam indebitatus: conclusion to the country. Issue thereon. [*127

The demurrer to the replication to the second plea was argued in last Michaelmas term.(a)

Cresswell for the defendants. This is an action by the owner of the ship, not of the cargo, against the insurer in respect of payments made by the owner for general average. The owner of a deck cargo could not recover against the owners of the remaining cargo the value of goods thrown overboard, because the principle of general average, which is that there shall be equal contribution where the risk is equal, could not apply. The cargo stowed on deck is not only placed in a more dangerous situation than

(a) November 9th, 1841. Before Lord Denman, C. J., Williams, Coleridge and Wightman, Js.

the other cargo, but it also increases the danger to the other cargo, and ship, by impeding the management of the ship. The subject is discussed in Sergeant Shee's edition (6th) of Abbott on Shipping, p. 428, (part IV. c. 9, s. 4.) It is there shown from the Consolato del Mare, the French Ordinance, and Valin's Commentary on the latter, that a deck cargo is to be excluded from the benefit of general average. The same doctrine is affirmed in the twenty-ninth section of the ordinances of Königsberg, 2 Magens, Ins. 206, c. 8, the eighth section of the ordinances of Hamburg, 2 Mag. Ins. 240, tit. 22, and the twenty-ninth section of the ordinance of Bilbao, 2 Mag. Ins. 402,(*a*) "of ordinary averages." Then the liability of the insurer on goods does not arise where they have been stowed
*128] on deck. This appears from *Da* **Costa* v. *Edmunds*, 4 Campb. 142, where Lord ELLENBOROUGH told the jury that, if there were no usage to carry goods on deck, the underwriters were not liable to make good the loss. The same principle must apply to making good the loss on a general average. The replication indeed here alleges a custom so to carry the pigs: but that will not make these underwriters liable unless they had notice.(*b*) The underwriter of a ship upon a time policy cannot be bound to take notice of the custom in every possible voyage, whatever might be the case if the insurance were for the particular voyage. In *Todd* v. *Reid*, 4 B. & Ald. 210, it was decided that a custom for the underwriter to set off the balance due to him from the broker of the assured, in settling the loss, was illegal: afterwards it was held, in *Bartlett* v. *Pentland*, 10 B. & C. 760, and *Scott* v. *Irving*, 1 B. & Ad. 605, in the case of a custom similar to that set up in *Todd* v. *Reid*, 4 B. & Ald. 210, that the custom could not affect parties who had not notice. In *Gould* v. *Oliver*, 4 New Ca. 134,(*c*) an action was brought against the shipowner, for contribution to general average, by the owner of goods stowed on deck, the declaration alleging a custom in the particular voyage to stow a reasonable quantity on deck, and that the quantity stowed was reasonable; the plea alleged that there was no custom for contribution in such case: which plea was held bad on demurrer. But there the court appeared to think the case distinguishable from that of the underwriter on the goods;
*129] and it would be so, a fortiori, from that of the *underwriter on the ship. The principle of the decision in *Gould* v. *Oliver*, 4 New Ca. 134, seems to have been that there was an understanding, or a kind of implied contract, between the shipowner and the owner of the goods. But that ground fails in the case of an insurer upon the ship for time.

Sir *W. W. Follett*, Solicitor General, contrà. The plea is bad, or is answered by the replication. An insurer is bound to take notice of all the customary perils of the adventure; *Pelly* v. *The Royal Exchange Assurance Company*, 1 Bur. 341; *Noble* v. *Kennoway*, 2 Doug. 510; *Vallance* v. *Dewar*, 1 Campb. 503; *Ougier* v. *Jennings*, Note (a) to 1 Campb. 505; *Kingston* v. *Knibbs*, Note to 1 Campb. 508. The notice in question must therefore be assumed upon this replication. An express averment is not necessary; for no evidence of the fact need be given. The party who insures a ship for time undertakes the risk upon all voyages: his contract is the same as it would be if all the voyages which can be performed in the

(*a*) See ib. p. 96, Ordinances of Rotterdam, sect. 91. The French Ordinance of 1681 is also given in the same volume, p. 157, &c. See p. 182.

(*b*) See *Dacosta* v. *Edmunds*, in banc, 2 Chitt. Rep. 227. The insurance there was on the voyage from London to Lisbon, as appears by the Nisi Prius report, 4 Campb. 142.

(*c*) See also *Gould* v. *Oliver*, 2 Man. & G. 208.

time were expressly mentioned in the policy. The owner of the pigs has already recovered against the present plaintiffs, in an action of assumpsit for general average, after argument in banc in the Court of Exchequer in Ireland.(*a*) There can be no distinction between the liabilities of the insurer on the ship and the shipowner: whatever legitimately increases the risk of one increases that of the other. Thus, if, by the usuage of a particular port,(*b*) ships are compelled to take in their cargoes on the outside of the harbour, that will probably increase the shipowner's risk; but *it cannot be contended that the insurer on the ship is not liable for this risk. [*130 The principle of contribution to general average is, not that all the goods are exposed to the same risk, (which very often is not the fact,) but that all are equally benefited. Thus, if the mast be cut away to save the ship, all contribute, though the peril to the mast is probably greater than the peril to the goods. The passage cited from Abbott on Shipping proves only that, primâ facie, the stowage of goods on deck is improper, as obstructing the management of the vessel; for which reason (which is the only one given in the editions published in Lord Tenterden's life(*c*) there is, in the common case of sailing vessels, no contribution in respect of such goods, unless there be either an usage, or consent. But in the case of a steam vessel the stowage on deck is the stowage most convenient for the navigation. At all events, it cannot be taken as an universal rule that stowage on deck in every case obstructs the navigation. The plea therefore is bad for not showing that here the navigation was obstructed. In *Du Costa* v. *Edmunds*, 4 Campb. 142, it was held that the policy was not avoided by stowage on deck, because the particular article was commonly stowed there. *Gould* v. *Oliver*, 4 New Ca. 134,(*d*) where the question arose between the shipowner and the owner of the goods thrown overboard, confirms this decision.

Cresswell in reply. Whether the principle of general contribution rest upon the risk being equal or the benefit being equal is not material: the risk is greater, the higher the value of what is at hazard, and so is the *benefit. The contribution therefore is in proportion to the value. But, [*131 if goods be laden unsafely, their value on board is diminished by the risk. The principle, however viewed, is equality. It is suggested that the deck stowage is the more convenient stowage for a steam vessel; but it should seem that such stowage will increase the rolling of the vessel more than a stowage in the hold. It is true, as argued on the other side, that the underwriter assumes all risks of the adventure which he may be presumed to know. But the underwriter on the ship in a time policy does not know the voyage, and therefore does not know the usage: knowledge of the voyage indeed would bind, because it introduces a peculiar element into the contract. But here it is only the contract between the owner of the goods and the shipowner which has been so qualified.

Cur. adv. vult.

Lord DENMAN, C. J., in the last term (January 21st, 1842,) delivered the judgment of the court. After stating the substance of the declaration and second plea, his lordship proceeded as follows.

A replication was pleaded and demurred to: but the plaintiff excepted to the plea; and we must see whether it makes out a good defence in law. The plea assumes that in no case whatever can the shipowner recover from

(*a*) *Horley* v. *Milward*, 1 Jones & Carey, Exch. Rep. (Ireland) 224.
(*b*) See *Kingston* v. *Knibbs*, note to 1 Campb. 508.
(*c*) See Ed. 5, p. 355.
(*d*) See *Gould* v. *Oliver*, 2 Man. & G. 208.

the underwriter the value of goods loaded on deck. The authority cited for this doctrine is a passage at p. 428, of Serjeant Shee's recent edition (6th ed.) of Lord Tenterden's treatise on Shipping. "Consolato del Mare, and and the French ordinance, exclude from the benefit of general average, goods stowed upon the deck of the ship, and Valin, in his commentary
*132] upon the *latter,(a) gives two reasons for the exception." He adds, "in the first place they ought not to be there, and can only be, because the vessel is full without them, or because the master has neglected to stow them elsewhere, in either of which cases, he and his owners are responsible to the shipper, unless the goods were placed there with his consent. Secondly, because there is every reason to presume, that being in the way, they will be thrown overboard, before the necessity for jettison has occured, on account of the obstruction they create. But he tells us that this does not apply to boats or other small vessels going from port to port, or to trades in which that mode of stowage is sanctioned by custom. The same rule prevails in this country and in America; the exceptions to it were recognized by Lord ELLENBOROUGH, in a case between the owner of goods and the underwriter, and more recently, the reasoning of Valin has been adopted by the Court of Common Pleas,(b) in an action against the owner of a ship, to recover contribution to a loss by jettison of goods stowed on deck." The corresponding paragraph in the text of the fifth edition of Lord Tenterden's treatise on Shipping, p. 355, (the last published during his life,) runs thus. "The French ordinance in express terms excludes from the benefit of general average goods stowed upon the deck of the ship: and the same rule prevails in practice in this country. Goods so stowed may in many cases obstruct the management of the vessel, and except in cases where usage may have sanctioned the practice, the master ought not to stow them there
*133] without the *consent of the merchant." Upon this passage we may remark that it contains no statement of the exception as a part of either the general law merchant or the law of England. It is said to prevail in practice in this country; the note adding, "So proved in the causes of *Myer and Others* v. *Vander Deyl*, *Guildhall* Sit. before Lord ELLENBOROUGH, Ch. J., Dec. 1803, and of *Backhouse & another* v. *Ripley*, before CHAMBRE, J., a short time before." No particulars of these cases being preserved, we cannot know in what manner the question was brought on. In *Ross* v. *Thwaite*, reported at p. 23, of 1 Park on Insurance, C. 1, s. 3, 8th (F. Hildyard's) edition, and tried before Lord MANSFIELD, at Guildhall, "an action was brought upon a policy of insurance of the captain's goods for six months certain. The loss proved was chiefly for goods lashed on deck, and the captain's clothes, and the ship's provisions. It was proved by an underwriter and a broker, that none of these things are within a general policy on goods: for the risk was greater as to goods lashed on deck than other goods: and a policy on goods means only such goods as are merchantable, and a part of the cargo. They also swore, that when goods like the present are meant to be insured, they are always insured by name, and the premium is greater. Lord MANSFIELD, said he thought it consistent with reason, and understood the usage to be so: therefore he advised the plaintiff to withdraw a juror, the premium having been paid in court, to which he consented."

When Serjeant *Marshall* copies this report into his treatise, vol. 2, p. 736, B. 1, c. 16, s. 5, 3d ed., he appends this note. "See however *Da Costa*

(a) The Commentary on Liv. 3, tit. 8, s. 13, contains the passages referred to.

(b) *Da Costa* v. *Edmunds*, 4 Campb. 142, and *Gould* v. *Oliver*, 4 New Ca. 134, are cited in a note.

v. *Edmunds*, 4 Campb. 142," where (p. 143) "it was *contended for the underwriters, that they were not liable, as no communication was made to them of the manner in which" the goods "were to be carried; and it is a general principle, that underwriters are not liable for goods stowed on the deck," for which were cited *Ross* v. *Thwaite*, 1 Park. Ins. 23, 8th ed., *Backhouse* v. *Ripley*, Abbott on Shipping, 429, 6th ed. But "Lord ELLENBOROUGH left it to the jury to say whether it was usual to carry vitriol on the deck, and whether these cargoes were properly stowed. If there was a usage to carry vitriol on deck, the underwriters were bound to take notice of it without any communication, and all they could require was, that these carboys should be properly stowed in the usual manner." Verdict for plaintiff: rule for a new trial refused.(a) It is very singular that Lord TENTERDEN does not cite this case; for he expressly lays down the principle on which it was determined. But, before we arrive at the exception to the rule which is here introduced, we must observe on the nature of the rule itself. In the first place it is the creation of positive regulation in the foreign law alluded to, for reasons which may possibly furnish an adequate motive for such enactment. "Goods so stowed," Lord TENTERDEN remarks, "may in many cases obstruct the management of the vessel;" a reason which is by no means universal; for in many cases it may be that particular goods will be best and most safely stowed on deck. But the most important expression of this accurate and careful writer is that which describes the rule as *prevailing in practice* in this country. For the practice appears to have been, not to lay it down as a rule of law that for goods stowed on deck *the owner of them shall be excluded from the benefit of general average, but to receive the evidence of commercial men respecting the usage of the trade and the general understanding of those engaged in it, and in insuring, which may obviously vary, and require from time to time fresh evidence and different explanations. Again, the reasons that may have produced the foreign enactment, and are cited from Valin, are by no means adopted by Lord TENTERDEN. He mentions indeed only one of them, the danger of obstructing the management of the vessel, but in extremely qualified terms, "goods so stowed may in many cases obstruct the management of the vessel;" a sufficient ground for refusing contribution under particular circumstances, but none for a sweeping forfeiture of all right to recover in respect of goods so disposed. Lastly, the rule laid down by Lord TENTERDEN includes two exceptions, where usage may have sanctioned the practice, and where the master has the owner's consent to stow them there. The usage would affect the question whoever were the parties; the owner's consent only when it happened to arise between him and the master. Plainly then the authority of Lord TENTERDEN does not warrant the large statement respecting the English law which his last learned editor promulges. Indeed this paragraph bears the mark pointed out in the preface as distinguishing his additions to the original work, though it incorporates some parts of that corresponding with it. We may further observe that the two reasons quoted from Valin are not of general application. He says that goods ought not to be stowed on deck, "and can only be, because the vessel is full without them, or because the master has neglected to stow them elsewhere, in either *of which cases, he and his owners are responsible to the shipper, unless the goods were placed there with his consent. Secondly, because there is every reason to presume, that being in the way, they will be thrown

[*134] [*135] [*136]

(a) *Da Costa* v. *Edmunds*, 2 Chitt. Rep. 227.

overboard, before the necessity of jettison has occurred, on account of the obstruction they create." Now it is obvious that there may be other and valid reasons for stowing goods on deck; indeed some goods could be stowed in no other place, such as timber, and, on some voyages, live animals; and they may certainly be there stowed with proper skill and care, so as not to be in the way of the crew in their operations. These matters of fact may vary with every different trade, or even with every single adventure. The danger of a crew being tempted to throw overboard goods on deck before the ship is in danger is quite insufficient; that danger must depend on their weight and bulk, the manner of stowage, and many other particulars; but the argument would prove too much; for it would apply to whatever goods may be nearest at hand, and consequently likely to be the soonest sacrificed. When we say that the reasoning of Valin was adopted by the Court of Common Pleas (in the late case of *Gould* v. *Oliver*, 4 New Ca. 134, we must confine ourselves to his reasoning in favour of the owner of goods stowed on deck according to the custom of a particular trade, in accordance with Lord ELLENBOROUGH's decision in *Da Costa* v. *Edmunds*, 4 Campb. 142; the lord chief justice, without laying down the rule or the mode of proving it, assuming it to prevail in practice, and only deciding that the owner may notwithstanding recover contribution from the ship-
*137] owner, where the goods were *stowed on deck according to the usage of the trade, for a loss by jettison.

We have then this exception forming part of the rule; and we have seen that Valin introduces another for which there is no very obvious reason, that of boats or other small vessels going from port to port; a description of the size and destination of vessels which may be somewhat difficult of application. But, although this rule of excluding goods stowed on deck from contribution to general average is not founded on any universal principle, it certainly prevails in practice to a great extent. Serjeant *Shee* truly states that the law is the same on this subject in England and in America; and Judge STORY, in his valuable edition of Abbott on Shipping, p. 355, ed. Boston, 1829, proves this proposition by two decisions. The books in which these are reported are not at hand: but we have already shown that the law of England has stopped very short of the doctrine that no owner of goods stowed on deck shall under any circumstances be allowed to recover contribution on general average. The question between the merchant and the ship-owner may be different from that between either of them and the underwriters, because the former may agree to stow the goods in such a manner that the latter will not be at all responsible for their loss.

But it seems to the court, for the reasons assigned, that the mere fact of stowing them on deck will not relieve the underwriter from responsibility, inasmuch as they may be placed there according to the usage of the trade, and so as not to impede the navigation or in any way increase the risk.

Judgment for the plaintiff.

*138] *The issues in fact were tried before Lord DENMAN, C. J., at the London sittings after Michaelmas term, 1840; when a verdict was found for the plaintiffs on the first issue, and for the defendants on all the others. In Hilary term, 1841, Sir *W. W. Follett*, for the plaintiffs, obtained a rule nisi for a new trial or for judgment non obstante veredicto.

At the sittings in banc after last term,(a) *Kelly*, *R. V. Richards* and *J. Greenwood* showed cause; and Sir *W. W. Follett*, Solicitor General, *Crowder* and *Butt* supported the rule.

(a) February 1st and 2d, 1842. Before Lord Denman, C. J., Patteson, and Coleridge, Js.

The points discussed, and the course of the argument, will sufficiently appear from the judgment. Several of the authorities mentioned on the argument of the demurrer were referred to; and also the following: *Cunningham* v. *Fonblanque*, 6 C. & P. 44, Bro. Abr. Customes, pl. 59; *Kennycott* v. *Bogen*, 2 Bulst. 250; *Dane* v. *Medhurst*, cited, 2 Bulst. 252, *Combes's Case*, 9 Rep. 75, a, (see 75, b,) *Case of Monopolies*, 11 Rep. 84, b, (see 85, b,) note (9) to 1 Chitty's Bl. Com. Introd. sect. 3, p. 70, [75,]; FOSTER, J., in *Edie* v. *East India Company*, 2 Bur. 1216, 1226; *Doctor and Student*, p. 34, 35, Di. I. ch. 10, Co. Lit. 110, b.

Cur. adv. vult.

Lord DENMAN, C. J., in this term, (April 28th,) delivered the judgment of the court.

This was an action against underwriters, on a time policy effected on a steamer navigating between Waterford and London, for the loss of pigs necessarily thrown overboard in a storm by the master for the safety of *his ship, and which the owner of the ship has been compelled, by the Irish Court of Exchequer, to make good to the owner of them. [*139

To a declaration for this claim several pleas were pleaded. We are required to observe on the following. First; that the pigs were stowed on deck. This plea was demurred to; and on argument we have held it bad, because there may be undoubtedly a state of facts in which the underwriters would be liable for goods stowed on deck.

But at the trial at Guildhall other defences were raised. Two pleas set forth a custom of London, that the owner of goods stowed on deck should not receive any contribution by way of general average from the shipowner in respect of the jettison of goods so stowed, and a similar custom that the underwriters on ship should not be liable to contribute by way of general average in respect of such goods. Another plea stated that the pigs were placed on deck, and, by reason thereof, the management of the vessel was obstructed and the danger of navigation increased, and that the defendants had no notice or knowledge that the vessel would be employed in the carriage of goods on deck. On all these pleas issues were joined; and the verdict was for the defendants: but the jury added, in answer to a question which I submitted to them at the instance of the learned counsel for the plaintiffs, that the goods were shipped according to the usual course of the trade.

A rule was granted for a new trial, on account of misdirection in telling the jury that there was evidence of the customs laid as customs of London, though the witnesses to prove them said that they also prevail in other English ports. This was said to establish, not a *local custom, but a general law; and the Solicitor General urged that the custom secondly stated amounted to no more than the known principle that underwriters cannot be liable for a risk concealed from them. We are not prepared to agree with the former proposition; as it rather appears to us that the custom might be properly described as a custom of trade in London, though it should also exist in other ports. Indeed the absence of averment of ignorance raises a serious objection to the validity of the customs themselves: for the stowage of goods on deck with the consent of the owner of the goods or of the underwriter could not by any reasonable custom affect his rights against either. The rule, therefore, in the second place, was to enter judgment for the plaintiffs, notwithstanding the verdict found for defendants on these two pleas, the second of which states a custom open to a further objection, that it may assume to vary the obligation created by the policy. [*140

The plaintiffs have a right to ask, and do ask, for a new trial on another ground, contending that the verdict on the last issue was not warranted by the evidence. That issue was whether the stowage on deck did in fact obstruct the navigation, and whether that mode of stowage was known to the underwriters. On the obstruction in fact there was evidence both ways: but, on the knowledge of the underwriters, it was argued as irresistibly following the notoriety of the practice in the employment of steamers in the cattle trade between Ireland and Britain. That knowledge, however, the jury expressly negatived.

In addition to this, the learned counsel for the plaintiffs insisted that the finding of the jury on the collateral question decided the case in his favour.
*141] He observed *that, but for the new rules, the judge at nisi prius would have been bound by Lord ELLENBOROUGH's ruling in *Da Costa* v. *Edmunds*, 4 Campb. 142, to tell the jury that the plaintiff was entitled, when they found that the stowage on deck was conformable to the usage of this particular trade; because the underwriters are bound to know the usages of the trade in which the vessel is employed. Therefore it was said that I ought to have told the jury that they did in fact know that such usage existed in the Irish cattle trade. But, the issue being precisely on the question whether the defendants actually knew that the vessel would be employed in carrying goods on deck, we cannot think it would be right to enter the verdict that due notice was given, however much the defendants might be bound to take such notice, when the jury found that they had it not. We are not, however, satisfied with the verdict on this point, considering the notoriety of the practice during a very considerable period.

With this doubt on the correctness of the verdict, we make the rule absolute on payment of costs.

Rule absolute on payment of costs.(*a*)

(*a*) In October, 1842, the plaintiffs took out a summons to show cause why they should not be at liberty to amend their replication; and the defendants, on the hearing, before Coleridge, J., desired leave to plead the additional plea after mentioned, if the amendment proposed on the other side were permitted. The learned judge, after taking time for consideration, refused to make any order. The plaintiffs did not renew their application for an amendment. Kelly, in Trinity term, 1843, obtained a rule to show cause why the defendants should not have leave to add the following plea.

"And, for a further plea to the first count, the defendants say that the said deed poll in that count and hereinbefore above mentioned was and is a certain common and known mercantile contract and instrument, that is to say, a policy of assurance, in the terms and words and figures as aforesaid. And the defendants say that the said pigs in the first count mentioned,
*142] and therein alleged to have been cast and thrown overboard, had *been and were shipped and loaded for the said voyage in and upon the deck of the said vessel, and, from the time of said shipment continually until and at the time of their being so cast and thrown overboard, had remained and were so laden and placed in and upon the said deck of the said vessel. And the defendants further say that the said policy of assurance, construed and interpreted according to mercantile usage and meaning touching and concerning the words and clauses therein contained respecting the losses and damages, adventures and perils, in the said policy mentioned, that is to say, of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes and people of what nation, condition or quality soever, barratry of the master and mariners, and of all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the subject matter of this assurance, or any part thereof, and also that the ship and freight shall be and are warranted free from average under 3*l.* per cent. unless general or the ship be stranded, does not extend to or include a general average loss or contribution in respect of jettison of a cargo loaded on deck as in this plea mentioned, nor does such loss attach to the said policy; but that the said words and clauses in the said policy have acquired and bear, by the usage and custom of merchants in respect of policies of assurance, a certain definite meaning well known to, and understood and acted upon by, all merchants and others becoming parties to or dealing in respect of such

mercantile contracts or instruments, to wit, policies of assurance, that is to say, amongst other things, that the underwriter or underwriters and other parties becoming insurers upon such policies shall not be liable to any general average loss or contribution in respect of jettison of any cargo loaded on the deck of any vessel so insured." Verification.

In Trinity term, 1843, June 15th, before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.)

Sir W. W. Follett and Crowder showed cause. The court, on the demurrer, has decided the general question of law against the defendants on their second plea. The attempt now is to substitute for the matter of that second plea allegations turning the question of law into a question of fact. The plea is unusual, and, if allowed, would tend to protract the litigation; for a verdict upon it could not be supported. An issue ought not to be added after the court has granted a new trial. The object of the motion is, in effect, to try a new cause.

Kelly, J. Greenwood, and J. W. Smith, contrà. There may be no precedent for the plea; but the point to be raised has not arisen since the New Rules. The proposed plea turns on a real question of fact, namely, whether certain expressions in a mercantile contract have, by usage, acquired a particular meaning; as in *Mason* v. *Skurray* (1 Park on Ins. 253, *8th ed.,) and *Donaldson* v. *Forster* (Abbott on Shipping, 259, 260, note (w), 6th ed.) It appears also from *Gould* v. *Oliver* (2 Man. & G. 208,) that where, as in [*143 this case, a custom to excuse loading upon deck is set up on one side, it may be met by evidence, on the other side, of a custom fixing the loss on the particular parties. The defence ought not to be excluded, and cannot be introduced unless put upon the record. [Coleridge, J. Has the proposed plea any other effect than that of adding something to that which was held a demurrable plea?] The effect is not merely that. [Lord Denman, C. J. We cannot grant such a rule as this without great consideration.]

Cur. adv. vult.

At the sittings in the ensuing vacation, June 23d, the court ordered that the rule should be

Discharged.

The QUEEN v. ROWLEY.

An election was held for supplying one extraordinary and three ordinary vacancies in the council of a borough. Two sets of candidates (each consisting of four) were proposed. The votes for the successful candidates were given on papers, each stating the names of the four, but not distinguishing the vacancy which any one was intended to fill. On motion for a quo warranto information against one of the four so elected,

The court held the election bad, under stat. 5 & 6 W. 4, c. 76, ss. 32, 47, and made the rule absolute.

Although statements were made in opposition to the rule, showing that no real misunderstanding existed, and imputing bad faith to the parties impeaching the election.

Held, by Lord Denman, C. J., and Patteson, J., that an election of councillors, if regular in other respects, is not bad because held to supply both ordinary vacancies and an extraordinary vacancy made some time before. And, by Patteson, J., that an elector may give votes for all the candidates on the same paper; only making the proper distinction as to the vacancies to be supplied.

A rule nisi was obtained last Hilary term for a quo warranto information against Thomas Rowley, for exercising the office of a councillor of the borough of Lichfield. The material facts, as stated on the affidavits in support of the rule, were as follows.

Taylor, a councillor of the South Ward, whose office would have expired by efflux of time on November 1st, 1843, became disqualified, and his office was thereupon declared void on the 30th October, 1841. On the same day notice was given of an election to be holden on November 1st to supply the vacancy, and also of an election to be then holden to supply the places of three *other councillors of the South Ward, whose [*144 offices then expired by efflux of time. On the election, Bond, Rowley, Gorton and Vale were declared the persons elected. Four other candidates had been proposed. On examination, it appeared that all the voting papers given in favour of the successful parties were in the form. "I vote for Frederick Bond, Butcher Row, attorney at law; Thomas Rowley, Tamworth Road, physician," &c., naming and describing each of the parties voted for, but not otherwise distinguishing them, nor showing

which candidate was intended by the voter to supply the extraordinary vacancy. One voting paper was put in for Garratt (an unsuccessful candidate) to supply the place of Taylor; and thirteen others, also in the proper form, were tendered for him, but (as was alleged, improperly) refused. The affidavits in opposition to the rule stated that the numbers of votes for the successful candidates were, for Bond 141, Rowley 141, Vale 140, Gorton 140; and that no other candidate had more than 121.(a) The presiding alderman and assessor on the 3d of November declared and published that t e said four candidates were duly elected; and they at the same time signified to Bond, Rowley, and Vale, that they were elected in place of the three councillors who regularly went out of office on November 1st, and to Gorton that he was elected in the place of Taylor; in which those four parties respectively concurred. The affidavits also stated that, on 9th August, 1841, it was mentioned at a meeting of the council that Taylor's office would shortly become vacant, and the council then
*145] agreed *unanimously that, to save trouble and expense, the election to fill up the extraordinary vacancy should take place on November 1st, at the same time with the election to supply the three ordinary vacancies then occurring, which arrangement was acquiesced in, and acted upon, by Smith the now proposed relator, Greene, one of the unsuccessful candidates, who made affidavit in support of the present rule, and other persons promoting the election of the last mentioned candidates. That the two sets of candidates were publicly named by their respective parties, on handbills and otherwise, distinguishing those intended respectively to fill the ordinary and extraordinary vacancies. That voting papers in the form objected to were used on both sides at the election, and no objection made there by any person: that Greene and Smith were present at the election, and Green voted: and that he knew of votes being given in the manner now complained of.

Waddington and *Cole* now showed cause. First, Rowley was duly elected. Secondly, the case at all events is one in which the court, exercising its discretion, will not interfere. As to the first point, there could be no doubt, from the manner in which all the proceedings were conducted, that Bond, Rowley, and Vale were the persons elected to fill the ordinary vacancies. There is no illegality in filling up vacancies of each kind at one and the same election. It is true that the councillor who is to go out of office first must be designated; but that was sufficiently understood: and stat. 5 & 6 W. 4, c. 76, s. 32, which regulates the manner of voting, contains nothing prohibitory of the mode here adopted. Had such mode
*146] *been thought incorrect, errors of that kind would probably have been among those cured by stat. 7 W. 4, & 1 Vict. c. 78, s. 11; but they are not noticed in that clause. *Rex* v. *Champion*(b) is an autho-

(a) The votes for the other candidates were as follows. For Greene, 121; Walthew, 114; Holmes, 113; Garratt, 6. The number of burgesses in the ward who did not deliver voting papers was about 13. The affidavits in opposition to the rule stated that the thirteen persons excluded from voting were rejected because they had voted already.

(b) Waddington cited this case from the Jurist, vol. i., pp. 380, 1117. The motion there (for a quo warranto information) was made on two grounds; one not relevant to the question above discussed. On the other, the case does not appear to be an authority. The report cited (p. 381,) states that "the court made the rule absolute, without hearing Sir W. W. Follett, who was to have argued in support of it." The case was not published in these Reports, Lord Denman, C. J., having said, when disposing of the case as above mentioned (May 25th, 1837,) "We give no opinion. There must be a quo warranto." It appears to be one of the cases mentioned in *Regina* v. *The Mayor, &c., of Bridgewater*, (10 A. & E. 281,) in which quo warranto informations were filed, and judgment suffered by default.

rity against the rule. As to the second point, the affidavits prove that the application is not made in good faith, nor founded on any real subject of complaint; and *Rex* v. *Parry*, 6 A. & E. 810, 820, et seq., shows that allegations of this kind may properly be noticed by the court. The success of this application would cause four vacancies in the council. Each of the four councillors whose title is impeached would have had a majority on the whole number of voters in the borough, if all had voted.

Sir *W. W. Follett*, Solicitor General. The question is, whether an election can be supported where there were three ordinary vacancies and one extraordinary, and the votes for the successful candidates were given without specifying in any instance which vacancy the candidate was to fill. Lord DENMAN, C. J. If that distinctly appears, there can be no doubt. It is as if the livery of London were to elect two sheriffs and a bridge-master without saying which candidate was to fill either *of the offices. This objection would supersede any question as to the relators, because it would appear that there had been no election at all. There could have been no objection to the votes being given at the same time for filling all the vacancies, if it had been done properly. PATTESON, J. There is no objection to the votes being all given on the same paper, if a proper distinction were made. But, if that be not done, a man may be declared elected to supply the ordinary vacancy, though some of the voters may have intended to fill the extraordinary one.] (Sir *W. W. Follett* was not further heard.) [*147

Lord DENMAN, C. J. I do not see how this election can be maintained. The rule must be absolute.

PATTESON, WILLIAMS, and WIGHTMAN, Js., concurred.

Rule absolute.

*BAKER v. JOHN GREENHILL and Others, [*148

Where lands charged with repair of a bridge are occupied by a person not the owner, such occupier is primarily responsible to the public for the repairs, but may demand reimbursement from the owner.

A land owner, liable among others to repair a bridge, ratione tenuræ, demised the land, and the lessee covenanted to pay the rent, *clear of land tax and all other taxes and deductions whatsoever, either parliamentary or parochial, taxed or imposed, or to be taxed or imposed upon the premises or* upon the lessor in respect thereof, the landlord's property tax only excepted. By statute, reciting the liability ratione tenuræ, and that part of the bridge was out of repair, it was enacted that the land-owners liable as above should repair, and keep in repair, the said parts, during the continuance of the act: and, on their default, road trustees appointed under the act were empowered to do the repairs and recover against the owners: a power of distress, under a justice's warrant, was also given, to enforce payment. And, for raising the sums required, power was given to the land-owners to call meetings, and to meet and make rates according to the value of the chargeable lands: such rates to be levied, if necessary, by distress. A subsequent act, also reciting the above mentioned liability, made further provisions as to the holding of such meetings and laying rates for the said repairs.

Held, that the original liability for contribution to repairs did not, by these enactments, become a parliamentary tax or deduction within the lessee's covenant,

And, therefore (the court finding no clause in the above statutes which extended the ultimate liability to lessees or occupiers as well as owners,)

That the lessee, having been compelled, in the lessor's default, to pay a rate made as above, and charged upon him as lessee and occupier, might (in manner pointed out by one of the statutes) recover the amount from the lessor.

ASSUMPSIT for money paid and money had and received, and on an account stated. Plea, Non assumpsit. On the trial before Lord DENMAN, C. J., at the sittings in London after Hilary term, 1840, the plaintiff had a

verdict for 30*l.* 7*s.* 6*d.*, subject to the opinion of this court on a special case, which was stated, in substance, as follows.

By indenture of May 31st, 1811, William Greenhill, then seised in fee of the premises after mentioned, demised to John Naylor and William Vooght, their executors, administrators and assigns, two messuages and other premises in the indenture mentioned for thirty-one years from the 24th of June then next, at a yearly rent of 165*l.*, payable on the usual quarter days; and Naylor and Vooght, for themselves, their executors, &c., covenanted with Greenhill, his heirs, executors, administrators and assigns, to pay Greenhill, his heirs, &c., the said rent, "free and clear of and from
*149] any land tax and *all other taxes and deductions whatsoever, either parliamentary or parochial, then already taxed or imposed, or thereafter to be taxed, charged or imposed upon the said demised premises, or any part thereof, or upon the said William Greenhill, his heirs, executors, administrators or assigns, in respect thereof: the landlord's property tax or duty only excepted."

The premises comprised in this lease are situate in the parish of West-ham, in the county of Essex, and, together with other property situate at different parts of that parish, and altogether forming less than one-fourth of the entire parish, were formerly parcel of the possessions belonging to the monastery or abbey of Stratford Langthorne in the said county, which lands were liable, ratione tenuræ, to the repair of two bridges called Bow Bridge and Channelsea Bridge, and the road, causeway and wharfing mentioned more particularly in the acts of parliament hereinafter referred to: and at the time of making the said indenture the said W. Greenhill, in respect of the said premises thereby demised, and by reason of his tenure thereof, was bound to contribute to support, maintain and keep in repair the said two bridges, road, causeway and wharfing. All the said lands were and are tithe free. The said lease and the term thereby granted are still unexpired.

Stat. 25 G. 3, c. 124, entitled "An act for amending and keeping in repair, the road from Whitechapel Church, in the county of Middlesex, to Shenfield, and the furthermost part of the parish of Woodford, towards Epping; and from the causeway in the parish of Low Layton, to the end of the said parish of Woodford, next Chigwell, and through the parishes of Chigwell and Lambourn, in the county of Essex; and for lighting and
*150] watching," *&c., continues the term granted by former acts therein recited for the further period of twenty-one years, and from thence to the end of the next session of parliament; it appoints trustees and regulates their succession, and imposes tolls to be taken on the roads, &c.

Sect. 35 recites as follows. "And whereas five several bridges, lying or being upon the road between the said town of Bow, and the ward of Stratford, in the said county of Essex, are and ought to be repaired, maintained, and kept in repair, by several owners and proprietors of lands and hereditaments thereto adjoining, by reason of their respective tenures, and are not chargeable or to be charged on the said county of Essex; (that is to say) two of the said bridges, called Bow Bridge, and Channelsea Bridge, by the owners and proprietors of divers lands and hereditaments heretofore parcel of the possessions belonging to the monastery or abbey of Stratford; two other of the said bridges, called Peg's Hole Bridge, and St. Michael's Bridge, by the mayor and commonalty of the city of London, by reason of their tenure of several water-mills, lands," &c.; "and one other bridge called by the name of St. Thomas of Acre's Bridge, by

Thomas Chambers, Esq., son of Sir Thomas Chambers, Knight, deceased, and his heirs, by reason of the tenure of a water mill," &c.; "and whereas all the road and foot causeway, and the wharfing by the side thereof, lying between Bow Bridge and Channelsea Bridge aforesaid, ought to be repaired, maintained, and kept in repair, by and at the sole costs and charges of the owners and proprietors of the manors, lands, tenements, and hereditaments, which heretofore were parcel of the possessions belonging to the said late monastery or abbey of Stratford:" this section then further recites that the said foot causeway and wharfing *are in a ruinous condition, and enacts that the said owners and proprietors of the said abbey lands and tenements shall, within six months after the passing of the act, cause, at their own costs and charges, the said foot causeway and wharfing to be substantially repaired, and at the like costs, during the term of that act, keep and maintain the same in good and substantial repair; and, in case of default, the trustees acting in execution of the act are empowered to do the necessary repairs, and to recover the expense from the said abbey land owners and proprietors. Section 36 recites as follows: "And whereas the owners and proprietors of the said abbey lands are now willing and desirous to come to a composition, to be paid in money yearly, during the continuance of this act, for repairing and maintaining all the said road, exclusive of the said causeway and wharfing between Bow Bridge and Channelsea Bridge (other than and except the bridges which are to be repaired, maintained, and kept, at the charge of the respective persons obliged by tenure to repair, maintain, and keep the same as aforesaid:") this section then enacts that after 25th March, 1785, "the owners and proprietors of the said abbey lands and tenements chargeable to the repair of the said road should be charged and liable to pay yearly," during the continuance of that act, "for and towards such repairs of the said road as they are liable to as aforesaid, exclusive of their two bridges, called Bow Bridge and Channelsea Bridge, and the said foot causeway and wharfing," the sum of 55*l.*; which sum was vested in the said trustees, with power, in case of default in payment after demand at the house or usual place of abode of any one of the said abbey land owners living in the said parish of Westham, to levy the same (under *warrant of a justice, grantable on oath of such default) by distress and sale of any cattle, or goods, lying or being in or upon the said abbey lands or tenements, or any part thereof. Section 37, after reciting that "the said abbey land owners stand and remain obliged and liable to the repair of Bow Bridge and Channelsea Bridge, as formerly," enacts "that if any owner, proprietor, or occupier of any parcel or parcels of the said abbey lands shall refuse or neglect to pay such sum or sums of money as shall be payable by him, her, or them respectively, towards the repair of the said two bridges by the said abbey land owners, proprietors, or occupiers to be repaired and kept in repair, it shall be lawful for one or more justice or justices of the peace residing in the parts next adjoining," on complaint by one or more of the abbey land owners, to issue his warrant to levy by distress.

[*151]

[*152]

Sect. 38. "And for the better enabling the said abbey land owners to raise the money expended by or recovered of them for the first great repair and amendment of the said foot causeway and wharfing, and the expense of keeping the same in repair for the future, and the said composition money, by rates amongst themselves, and to reimburse any person or persons on whom any such distress or distresses may be made for the same as

aforesaid, and also to enable them to raise any sum or sums of money for or towards the repair of Bow Bridge and Channelsea Bridge, or either of them, (which they are also liable to repair and keep in repair by reason of their tenure of their said lands,) together with the charges and expenses of making and collecting the said rates, be it further enacted, that it shall be lawful for the said abbey land owners, or any one or more of them, from
*153] time to time to call a meeting or *meetings of abbey land owners for the purposes aforesaid, at any place or places within the ward of Stratford Langthorne, wherein the said abbey lands lie, by giving to or leaving for the several abbey land owners, residing within the said ward, at their usual places of abode, and to or for the tenants (residing within the said ward) of such of the said abbey land owners as do not so reside, six days at least before such intended meeting, notice in writing of the times and places of such meetings respectively, and also by giving such other public notice thereof as by the said abbey land owners shall be agreed on between themselves, at which times and places, so respectively to be appointed, the said abbey land owners, and such other persons as shall be deputed and authorised by them, or the major part of them, who shall be then and there present, shall and may make such rates and assessments, from time to time, for the purposes aforesaid, or any of them, by a pound rate, according to the rents or values of their respective lands and tenements as aforesaid, with power to moderate the same with respect to any houses, new buildings, or improvements, as shall be agreed on by the major part of the said persons present at such meetings; and such rates and assessments, being so made under the hands of the said abbey land owners, and persons deputed as aforesaid, or the major part of them present at such meetings, shall be good and binding on all the said abbey land owners."

Sect. 39 provides for collecting such rates and assessments, and enforcing them by distress and sale of the goods of the person so assessed and making default, or of any occupier of any lands, &c., for which the sums in arrear were assessed, or any goods, &c., upon such lands. Sect. 40 gives to any
*154] person aggrieved by any such *rate an appeal to the quarter sessions. Sect. 41 provides "that where any occupier or occupiers of any of the said abbey lands, messuages, or tenements, shall, by virtue of any distress, or otherwise, pay any sum or sums of money charged or assessed on the owner or owners of such lands, messuages, or tenements, or which such owner or owners ought to pay or bear, by virtue of this act, in every such case it shall be lawful for such occupier or occupiers to deduct the money so paid out of any rent or rents then due, or thenafter to grow due, to such owner or owners, for or in respect of the same messuages, lands, or tenements, any law, usage, or custom, to the contrary notwithstanding."

The case then stated the passing of stat. 43 G. 3, c. lxvi. (local and personal, public,) continuing the term granted by the former statute: and stat. 7 & 8 G. 4, c. cviii. (local and personal, public,) entitled "An act to enable the persons interested in the lands and hereditaments heretofore parcel of the possessions of the monastery or abbey of Stratford Langthorne in the county of Essex, to raise money for repairing and maintaining the bridges and other works, liable to be repaired and maintained by such persons." Both these acts were to be considered part of the case: none of the clauses were set out.(a)

(a) Stat. 7 & 8 G. 4, c. cviii., local and personal, public, sect. 1, recites that "the owners

*Before the making of the distress, and the payments of rent, after mentioned, the plaintiff had, by assignment, become possessed of, [*155 and was then entitled to *the residue of the term granted by the said lease, and was liable as assignee upon the covenants. And the defendants [*156 had become legally seised of the reversion in fee expectant on the determination of the said demise. William Greenhill, the lessor, died seised in 1832, having devised the premises, by will duly executed to pass real estates, to the defendants, who assented to and accepted such devise.

The case set out three rates made on the premises in question in January 1836, July 1837, and October, 1838, by the persons authorised under the statutes. In each of the two latter rates,(a) the parties interested in the premises were described as follows:—"Owner. Greenhill's executors.—Lessee. Tucker.—Occupier. John Tucker." Tucker occupied part of the premises as plaintiff's agent and to conduct his business there.

proprietors, lessees, and occupiers of divers lands, tenements, and hereditaments, heretofore parcel of the possessions belonging to the monastery or abbey of Stratford Langthorne in the county of Essex, are, by reason of their respective tenures or otherwise, bound to support, maintain, and keep in repair two bridges, situate and being at Stratford in the county of Essex; that is to say, a certain bridge lying and being upon the king's highway and turnpike road between the town of Bow in the county of Middlesex, and the town of Stratford aforesaid, called Bow Bridge, and one other bridge, near, adjoining to, or within the said town of Stratford, called Channelsea Bridge; and also to support, maintain, and keep in repair certain parts of the road and foot causeway, and the wharfing, &c., and that it is expedient that they should be enabled to raise the requisite sums, &c.; and enacts that "the affairs and concerns of the owners, proprietors, lessees, and occupiers of all the lands, tenements, hereditaments, and premises, heretofore parcel of the possessions belonging to the said monastery or abbey of Stratford Langthorne, shall be conducted and managed under and subject to the several rules and regulations hereinafter mentioned, specified, and contained."

Sect. 2, provides for the holding of general and special meetings of the "owners, proprietors, lessees, and occupiers," at which all questions shall be decided "by a majority of votes of the owners, proprietors, lessees, and occupiers present," &c., every one of whom is to be entitled to one vote, and to a further vote for every 100*l.*, to which he shall have been rated, &c.; and "not more than one person shall be entitled to vote for and in respect of the same land, &c.; and, if more than one shall claim in respect of the same land, &c., the right shall be in him who shall ultimately have to pay the rates or allow them out of the rent. Provision is also made (sect. 5) for constituting a committee of management.

Sect. 13 enacts, "that it shall and may be lawful for the owners, proprietors, lessees, and occupiers of the lands, tenements, and hereditaments aforesaid, from time to time, at any general or special general meeting to be held under this act, to make any rate or assessment for the purposes of this act, in respect of such lands, tenements, or hereditaments, by a pound rate upon all such owners, proprietors, lessees, or occupiers, according to the rents or values of the respective lands, tenements, or hereditaments, and according to the several interests of the owners, proprietors, lessees, and occupiers thereof respectively, and to apportion such rates according to such several interests, and to moderate or regulate such rates with respect to any houses, new buildings, or improvements, in such manner as shall be agreed on by the major part of the persons present at any such quarterly or special general meeting; and a table of such rates and assessments, being from time to time made and signed by the persons, or the major part of them, present at any such meeting, shall be good and binding upon all such owners proprietors, lessees, and occupiers respectively and upon all other persons concerned."

Sect. 15 provides for levying the rates by distress on the goods of any "owner, proprietor, lessee, or occupier of any messuage, land, tenements, or hereditaments," neglecting or refusing to pay.

Sect. 17 provides and enacts "that whenever any occupier of any such lands, tenements, or hereditaments, aforesaid shall, by virtue of any distress or otherwise, pay any sum or sums of money charged or assessed on any owner, proprietor, or lessee of such lands, tenements, or hereditaments, or to the payment of which such owner, proprietor, or lessee shall be liable by virtue of this act, in every such case it shall be lawful for any such occupier to deduct the money so paid out of any rent or rents then due, or thereafter to grow due, to such owners, proprietors, or lessees, for and in respect of the same lands, tenements, or hereditaments, any law, usage, or custom to the contrary notwithstanding."

(a) In the rate of 1836 the only description of persons was: "Party assessed. Greenhill's executors.—Tucker and Co."

From the time of granting the said lease down to 1836, W. Greenhill in his lifetime, and the defendants afterwards, always paid the rates and assessments made under the said acts, upon and in respect of the demised premises, or allowed the amount, when paid by the lessee or occupier, to be deducted from the rent payable under the said lease, without objection or dispute. When John Tucker (being, as the plaintiff's agent as
*157] *above mentioned, in the occupation, and having the care, of the premises) paid the quarter's rent due at Christmas, 1836, he deducted from that quarter's rent, on behalf of the plaintiff, the amount of the rate for that year above set out, and which he had paid. The defendants then denied the plaintiff's right to make such deduction. They received the next quarter's rent without prejudice to their claim for the amount withheld at Christmas.

The said rates of 1837 and 1838 were regular in point of form, unless the mode of describing therein the parties assessed affects their validity. Mr. John Tucker, named therein, at the respective times of making the said rates, was in the actual occupation of the demised premises, but as the plaintiff's agent only (as before stated.) The defendants, at the said times, were the executors of Greenhill, and are the persons so described therein. Tucker, as the plaintiff's agent, and by his authority, refused to pay the rates, whereupon summonses to him, and distress warrants against his goods, were issued to enforce payment: and, to prevent sales of the plaintiff's property on the said premises under the warrants, Tucker, as his agent, and on his account, paid the sums assessed and costs, amounting together to 30*l*. 7*s*. 6*d*.

The plaintiff claimed to deduct this amount in a subsequent payment of rent to the defendants: but they refused to allow it; and the plaintiff, under threat of distress for the rent, paid it in full, taking a receipt which stated it to be paid without prejudice.

The questions for the opinion of the court were: 1. Whether the defendants were liable to pay the said rates, and to pay the plaintiff the said sum of 30*l*. 7*s*. 6*d*., by the statutes referred to or otherwise, independently of the
*158] provisions contained in the said lease: and, if so, *2. Whether the said rates are taxes or deductions which the lessee is bound to pay by the covenant contained in the said lease. If the court should be of opinion that the defendants were so liable, and that the said rates were not taxes or deductions within the meaning of the covenant, the verdict was to stand; but, if the court should be of a contrary opinion, a nonsuit to be entered.

The case was argued in Michaelmas term, 1841.(*a*)

Sir *W. W. Follett*, Solicitor General, for the plaintiff. First, the plaintiff is not liable to these repairs by his covenant. *The Stratford Bridge Case*(*b*) and *Rex* v. *The Inhabitants of Middlesex*, 3 B. & Ad. 201, show that the burden of repair lay upon these abbey lands, ratione tenuræ, from the time of their being granted. It was like the liability to a quit rent or fee farm rent. When the lands became divided, each owner was contributory. William Greenhill, the devisor, was one of these: and he granted his portion at a rent of 165*l*., "free from any land tax, and all other taxes and deductions whatsoever, either parliamentary or parochial, then already taxed or imposed, or thereafter to be taxed," &c., "upon the said demised

(*a*) November 9th. Before Lord Denman, C. J., Williams, Coleridge, and Wightman, Js.

(*b*) In *Rex* v. *The Inhabitants of Kent*, 2 M. & S. 519, 520, note (a).

premises, or any part thereof, or upon the said William Greenhill, his heirs, executors, administrators, or assigns, in respect thereof, the landlord's property tax or duty only excepted." Repair, ratione tenuræ, is not, in its own nature, a deduction within the meaning of these words. The tenant is no more chargeable in respect of it than he would have been for a mortgage granted *by the landlord. Nor is this a parliamentary tax or deduction, under any of the statutes. Stat. 25 G. 3, c. 124, does not [*159 impose any tax. The clauses cited in the case only direct how those contributions for which the several land owners were already liable may be raised conveniently and without litigation. It is a levy under parliamentary authority, but not a parliamentary tax, which means an imposition laid by parliament for the benefit of the state. Stat. 7 & 8 G. 4, c. cviii. does not alter the case. That act was passed, as its title shows, to faciliate the raising of money by persons already liable for these repairs. Lessees and occupiers, though mentioned in sects. 1, 13, 15, and 17, were liable before this statute: and the statute does not anywhere profess to create any new liability, or change any existing contract. Sect. 13 is a corresponding clause to sect. 38, of stat. 25 G. 3, c. 124: the latter speaks only of the abbey land owners as the persons who are to attend the meeting; the other specifies also lessees and occupiers as persons who may act there: but this was not meant to affect any person's liability, or introduce any tax. The fact that William Greenhill paid this rate till his death shows how the covenant was understood by the original parties. If it be objected that the present rates are incorrect in describing the owners of the property as Greenhill's executors, whereas they are his devisees in fee, the answer is, that such an objection was a ground of appeal, which remedy is given by stat. 25 G. 3, c. 124, s. 40.

Sir *F. Pollock*, Attorney General, contrà. The duty of repair, ratione tenuræ, does not necessarily lie upon the owner of the lands in fee. It appears from the *remarks of the court in *Rex* v. *Sutton*, 3 A. & E. [*160 597, and from *Regina* v. *Bucknell*, 7 Mod. 55, 98, S. C. 2 Ld. Ray. 792, 804, 4 Vin. Abr. 288, tit. *Bridges* (B,) pl. 26, and in marg., and other authorities, there cited, that the occupier is liable, independently of any contract or legislative provision. Occupiers, as well as owners, are mentioned in stat. 25 G. 3, c. 124, sect. 37: and in clauses, which omit that word, the term "owners" is used in a popular sense, which will include the actual occupier. The object both of that act and of stat. 7 & 8 G. 4, c. cviii. was, without reference to any technical distinction, to throw the burden upon those actually enjoying the benefit of the land, according to their respective interests. This intention is clear in the latter statute, particularly from the recital in sect. 1, and from sects. 2 and 13. Neither the plaintiff nor the defendants are named in the rate, according to their respective interests or otherwise. No one is mentioned as owner but Greenhill's executors. Tucker, the occupier, was rated: a distress warrant issued against him; and he paid the rate to avoid a levy. The plaintiff is not entitled to maintain this action because he has reimbursed Tucker. Further, the covenant in the lease at any rate frees the defendants from this burden; for, if not a tax, it is a deduction, and a parliamentary one. To give it that character it is sufficient, according to *Waller* v. *Andrews*, 3 M. & W. 312, that the rate is laid by persons deriving their authority from an act of parliament. [COLERIDGE, J. From what would this payment of rate be a deduction?] From the rent, by stat. 7 & 8 G. 4, c. cviii. s. 17.

*161] *SIR W. W. *Follett*, Solicitor General, in reply. That an occupier is liable to the burden ratione tenuræ is true, as between him and the public, because they must necessarily look to him, not knowing who is the owner. That is the reason given in note (9) to *Rex* v. *Stoughton*, 2 Wms. Saund. 157, 158, d, where this point is discussed, and *Rex* v. *Kerrison*, 1 M. & S. 435, 3 M. & S. 526, is cited in a note, [b,] by the last editors. The ultimate liability rests upon the person really chargeable by reason of his tenure; and the occupier who pays has his remedy against that person. If it had been contemplated, by the statutes now in question, to alter these rights and liabilities, proper language for that purpose would have been used. Sects. 38, 39 and 41 of stat. 25 G. 3, c. 124, show that the land owners and no other persons were intended to be liable under that act: and, even if the words of stat. 7 & 8 G. 4, c. cviii. were doubtful, they could not transfer the liability to others. Occupiers are mentioned in sect. 1; but they could not be liable "by reason of their" "tenures." Their attendance at meetings under sects. 2 and 13 cannot fix liability upon them. Sect. 17 comtemplates the ultimate liability of an owner, or a lessee bound to payment of the rates by his contract. As to the form of the rate, supposing the objection open, the defendants are in fact (as the case states) executors of William Greenhill. The plaintiff was not assessed: but, having paid money to redeem his goods from distress, he is entitled to claim reimbursement from the defendants. The real question is on the covenant. The word "deductions," there, is relied upon by the defendants; but they *162] must be deductions ejusdem generis with the *"land tax" and "other taxes" mentioned before; and they must be "parliamentary or parochial." The Sewers' rate in *Waller* v. *Andrews*, 3 M. & W. 312, was a tax properly so called, imposed by the Commissioners of Sewers in the execution of their public duty: the rate here is of an entirely different character. *Cur. adv. vult.*

Lord DENMAN, C. J., in this term, (April 22d,) delivered the judgment of the court.

This was an action by the assignee of a lease for years of certain premises at Westham, Essex, formerly part of the possessions of the Abbey of Stratford, against the assignees of the reversion, to recover a sum of 30*l.* 7*s.* 6*d.*, which the plaintiff had been compelled to pay towards the repair of two bridges, which the proprietors of the demised premises, and of other lands formerly belonging to the Abbey of Stratford, were bound to repair rationæ tenuræ. And the question is whether, either by the terms of the lease under which the plaintiff held, or by the acts of parliament referred to in the case, or by the common law, the plaintiff was chargeable with the whole or any part of the money raised for the purpose of such repair.

With respect to the liability at common law to the repair of bridges rationæ tenuræ, the result of the authorities seem to be to throw the charge ultimately upon the owner, though primarily, as far as the public are concerned, the occupier may be the person chargeable by indictment in case of nonrepair; *The Queen* v. *Bucknell*, 7 Mod. 55, 98, Hawk. P. C. b. 1, *163] c. 77, s. 3, vol. 2, p. 258, 7th ed., and the *cases there cited: and it would seem from those authorities that, if the owner of land charged with the repair of a bridge rationæ tenuræ suffer it to be out of repair, and the occupier of the land be indicted and fined, he would be entitled to look for reimbursement to the owner who ought to have repaired, and who holds the land by the service of repairing the bridge.

Independently, then, of the lease and the acts of parliament, the lessee would not in this case, as between him and his lessor, the owner of the premises, be liable to the charge of the reparation of the bridges. But the lease contains a covenant for payment of the rent free and clear, "of and from any land tax and all other taxes and deductions whatsoever, either parliamentary or parochial," "charged or imposed upon the said demised premises" then or thereafter, or upon the lessor in respect thereof: and it is contended that the amount assessed in respect of the premises for the bridge is a parliamentary tax within the meaning of the covenant. We are, however, of opinion that the acts of parliament for enabling the persons interested to raise the necessary funds for repairs of the bridges by contribution amongst themselves, do not impose any tax within the meaning of the covenant. The charge was already created; and the acts merely supply a more convenient mode for raising the necessary funds to meet it. And we therefore think that the lessee was not liable by his covenant to be charged with the amount in question.

It is however contended, on the part of the defendants, that, though the plaintiff may not be liable to the charge either by the terms of the lease or at common law, he is so to some extent at least, if not to the whole, by virtue of the acts of parliament referred to in *the case. These acts [*164 are three in number; 25 G. 3, c. 124, 43 G. 3, c. lxvi., and 7 & 8 G. 4, c. cviii., which is the act now in force, the two former having expired. The first of these acts, both in the recitals and the enacting clauses, treats the owners and proprietors of the abbey lands as the persons chargeable with the repairs, and to contribution amongst themselves; and, though, in the case of non-payment, distresses may be made upon the occupiers upon the land, the latter are enabled to deduct the amount from the rent: nor is there any clause in that or the 43 G. 3, c. lxvi. to fix lessees or occupiers with any portion of the burthen.

It is however contended, for the defendants, that stat. 7 & 8 G. 4, c. cviii., expressly authorises and directs an apportionment of the charge between the owners and their lessees according to their several interests; and that the rate which the plaintiff was compelled to pay was defective in not making such an apportionment. The act undoubtedly does contain clauses which at first sight would appear to favour such an argument. But, taking the whole act together, we are of opinion that all the clauses are reconcileable with the general liability of the owners and proprietors to the exclusion of the lessees, and that it was not the intention of the legislature to impose upon the lessees or occupiers any charge to which they were not otherwise liable. The thirteenth section was mainly relied upon for the defendants. By that section, the owners, proprietors and lessees and occupiers of the lands are empowered, at a meeting to be held under the act, to make an assessment by a pound rate upon all such owners, proprietors, lessees or occupiers, according to the rents or values of *the respective lands, tenements or hereditaments, and according to the several [*165 interests of the owners, proprietors, lessees and occupiers thereof respectively, and to apportion such rates according to such several interests, and to moderate or regulate such rates with respect to any houses, new buildings or improvements, in such manner as shall be agreed on by the major part of the persons present at any such quarterly or special general meeting. But, by sect. 2, not more than one person is entitled to vote at any meeting in respect of the same premises: and, if more than one person claims to vote in respect of the same premises, the right of voting is to be

in the person who is ultimately to pay the rates or allow them out of the rent. The terms of the thirteenth section will be satisfied by applying it to cases of contribution between owners having different interests in their respective properties, and between landlords and tenants where the latter may have covenanted to pay the rent clear of any deduction on account of the charge, without interfering with the general rule that in the absence of such a covenant the owner is liable to the charge. In this view of the case it appears to us that the rate sufficiently indicated the charge and the party chargeable, and that the amount ought to have been allowed by the defendants; and, consequently that the plaintiff is entitled to judgment upon both the questions submitted to the court. Judgment for plaintiff.

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*166] *The QUEEN *v.* The LONDON and GREENWICH Railway Company.

By the Greenwich railway act, 3 & 4 W. 4, c. xlvi., the company were empowered to take lands, &c., making recompense, &c., and it was enacted (sect. 45) that, if any person were applied to by them to sell any part of any house, warehouse, &c., in actual occupation, and should require the company to treat for the whole, and if they should not be willing to purchase the *whole of such house, warehouse*, &c., such person should not be obliged to sell them a part only. Sect. 46 provided in like manner as to particular properties therein named, enacting that, if the company would not purchase the whole, the owner or lessee should not be obliged to sell less than *the whole of such property*. Sect. 47 enacted that if the owner, &c., of any house, manufactory, ground or building, *which should be situate within fifty feet of the railway*, should give notice to the company to purchase his interest in such houses, manufactories, ground or building, the company should treat for the purchase of his interest in the *houses, manufactories, ground and buildings* mentioned in such notice, and, in case they should not agree, the compensation should be settled by a jury, whom the company might cause to be summoned. There were clauses providing for the recovery of compensation by owners of buildings, lands, &c., for damage, generally, occasioned by the execution of that act.

S. and Co were lessees of premises, on which were a vinegar manufactory, warehouses, &c., a principal dwelling house and garden, and five smaller dwelling houses, which premises were so situated that a straight line drawn parallel to the railway at the distance of fifty feet would divide the principal dwelling house and the garden, but would pass between the rest of the premises and the railway. S. and Co. required the company to purchase their interest in the whole premises. The company refused, but offered to purchase the principal dwelling house and garden.

Held, that the act did not oblige them to purchase more: and a rule for a mandamus to the company to cause compensation to be assessed for the whole was discharged.

Thesiger, in last Hilary term, obtained a rule nisi for a mandamus calling upon the above named company to issue their warrant to the sheriff of Surrey, under stat. 3 & 4 W. 4, c. xlvi., (local and personal, public, to empannel, &c., a jury, "to inquire of, assess and ascertain and give a verdict for the sum of money to be paid by the said company to Messrs. Noah Slee, William Payne and Edward Richardson Slee for the purchase of their right and interest in certain ground, buildings and premises, belonging to them, situate and being in Church Street, in the parish of St. Mary Magdalen, Bermondsey, in the said county, and the sum of money to be paid by way of compensation, recompense and satisfaction for the loss, damage and injury which have accrued to such property in respect of
*167] *improvement, tenants' fixtures, machinery and otherwise, and for the future damages, as well temporary as perpetual, and also for all recurring damages done and sustained, and which may hereafter be done and sustained to the said property, by reason of the said railway and the works thereof having been erected within fifty feet from the said property." The facts of the case were as follows.

The company made their railway under the above statute, with an extension in width, authorized by stat. 3 & 4 Vict. c. cxxvii. (local and personal, public,) which amended and enlarged the provisions of the former act, but kept alive those referred to in the present case.

By stat. 3 & 4 W. 4, c. xlvi., sect. 4, the company are empowerd to enter upon the lands, tenements and hereditaments of any person according to the provisions and restrictions of that act, and to set out and appropriate such parts thereof as they are by this act empowered to take or use, for the purposes of the act; and to execute various works, which are specified, doing as little damage as may be, &c., and making recompense or satisfaction in manner after mentioned to all persons interested in any lands, tenements or hereditaments which shall be taken, used or injured, for all damages to be by them sustained, in or by the execution of all or any of the powers thereby granted.

Sect. 36 provides and enacts that nothing in the statute contained shall authorize the company to take, injure or damage, for the purposes of this act, any house or building or other property of certain descriptions (including the kinds of property which were the subject of this rule) without the consent in writing of the owner, occupier or other person interested, except such as are specified in the schedule annexed to this act.

*Sect. 45 enacts "That if any corporation or other party by this act authorized to sell and convey any lands, tenements or hereditaments, shall be applied to by or on behalf of the said company to treat for, sell, dispose of or convey any part of any house, warehouse, building or manufactory in the actual occupation of one person, or of several persons jointly, and shall by notice in writing," &c., "signify his inclination or desire to treat for, sell, dispose of and convey the whole of such house, warehouse," &c., "and if it shall happen that the said company shall not think proper or be willing to purchase the whole of such house, warehouse," &c., "then and in every such case nothing in this act contained shall extend or be construed to extend to compel such corporation or party interested therein to treat for, sell, dispose of or convey, or to authorize the said company to take or use part only or less than the whole of such house, warehouse," &c., "any thing herein contained to the contrary thereof in anywise notwithstanding." [*168

Sect. 46 recites that certain persons therein named are owners or lessees of buildings and other property through which the railway is intended to pass, or which may be required for the purposes of the act, and that it may be extremely injurious to such owners, &c., if the company were not compelled to purchase the whole of any of such properties through which, &c., or which may be required, &c., if required by the respective owners, &c., so to do: it therefore enacts that, if such persons or any of them shall be applied to by the company to treat for, sell, &c., for the purpose of the act, any part of any property now respectively belonging to them, any or either of them, as such owners or lessees, and shall give *notice to the company of his or their desire to treat for, sell, &c., the whole of such property, and the company shall not be willing to purchase the whole, nothing in this act contained shall extend, &c., to compel the said persons, any or either of them, to treat for, sell, &c., or to authorize the said company to take or use, part only, or less than the whole, of such property. [*169

Sect. 47 enacts "That in case the owner, lessee or occupier or other person interested in any house, manufactory, ground or building within the the said parishes of St. Mary Magdalen, Bermondsey, and St. Paul, D

ford, or either of them, which shall be situate within fifty feet of such railway, shall by notice in writing, to be left at the office of the said company, require the said company to purchase his right and interest in such houses, manufactories, ground or building, it shall be lawful for the said company, and they are hereby required, within thirty days after the service of such notice, to treat for the purchase of his interest in the houses, manufactories, ground and buildings mentioned in such notice, and for the compensation, recompense or satisfaction to be made to him for any loss, damage or injury in respect of any improvements, tenants' fixtures, machinery or otherwise; and in case the party so giving such notice and the said company shall not agree as to the amount or value of the satisfaction, recompense or compensation to be paid for the value of such houses, manufactories, ground and buildings, improvements, tenants' fixtures, machinery or otherwise, then the amount or value of such satisfaction, recompense or compensation shall be ascertained and settled by the verdict of a jury, in the manner hereinbefore
*170] directed for ascertaining and settling the value or recompense *for other lands," &c., "to be taken or purchased for the purposes of this act.(a)

The affidavits in support of the rule stated that Messrs. Noah Slee, Payne and E. R. Slee were lessee and assignees, for an unexpired term, of certain hereditaments and premises, comprising a piece of ground situate on the west side of Church Street, Bermondsey, containing in the front, next Church Street, 226 feet, on the south side 162 feet, in the rear 260 feet, and on the north side 177 feet, together with six dwelling houses, (one principal and five small ones,) then in the several tenures or occupations of the said Noah Slee and of John Orton, &c., (naming others,) "and the
*171] brewery, *manufactories, warehouses, sheds, stables, coach houses, cooperages, stoves, vaults and buildings on the said piece or parcel of ground erected and built, in the occupation of the deponents" (N. Slee, Payne and E. R. Slee,) "and used as a vinegar manufactory." The principal dwelling house was occupied by Noah Slee. A surveyor deposed "that the said principal dwelling house is situated at the north east corner of the said piece or parcel of ground, which said piece or parcel of ground is, at the north eastern extremity thereof, within twenty five feet of the line of the southern boundary of the said London and Greenwich Railway; and that, if a straight line was drawn parallel with such southern boundary

(a) The full directions as to this proceeding are given in sect. 50. The following sections were also referred to during the argument.

Sect. 61 enacts "That any person being tenant for years, from year to year or at will, or occupier of all or any part of the messuages, shops, cellars, buildings, land, garden, ground and other hereditaments mentioned in the schedule to this act, or which the said company may require for the purposes of this act, who shall or may sustain or be put unto any loss, damage, or injury in respect of any interest whatsoever for improvements, tenants' fixtures, machinery or in any other manner howsoever, by or by reason of the passing of this act, shall and may have, accept, and receive all and every such benefit and advantage by way of satisfaction recompense or compensation from the said company for every or any such loss damage or injury as aforesaid, as shall be agreed upon between them respectively and the said company; and in case such tenant for years," &c., "occupier or party interested in such tenements and hereditaments, improvements, fixtures, machinery or otherwise, and the said company shall not agree as to the amount or value of such satisfaction recompense or compensation, then the same respectively shall be ascertained and settled by the verdict of a jury in manner," &c.

Sect. 64 enacts "That if at any time hereafter any person shall sustain any damage in his lands, tenements, hereditaments or property, by reason of the execution of any of the powers hereby given and for which no remedy is hereinbefore provided, then and in every such case the recompense or satisfaction for such damages shall from time to time be settled and ascertained in such manner as is hereinbefore directed in respect to any other recompense or satisfaction hereinbefore mentioned."

at a distance of fifty feet therefrom. such line would intersect and comprise twenty-nine feet six inches of the said dwelling house on the east side thereof abutting on Church Street aforesaid, and about thirty-seven feet on the north side thereof, five feet on the west side thereof, and about forty-eight on the south western side thereof: which said several last mentioned dimensions would include nearly one half of the said principal dwelling house." And "that the north east corner of the garden, being a portion of the hereinbefore mentioned piece or parcel of ground, together with the greenhouse erected on the said garden and appurtenant to the said principal dwelling house, are situate within twenty-four feet eight inches of the southern boundary of the said railway; and that, if a straight line were drawn parallel with such southern boundary, at a distance of fifty feet therefrom, such line would intersect and comprise on the east side of the said garden thirty feet, on the north side" forty-three feet, and on the south western side about fifty-two feet.

*The affidavits contained some statements (which were contested in the affidavits on behalf of the company) showing that the approach of the railway had made the occupation of the said dwelling house and garden inconvenient, and lessened their value. All the premises were comprehended in the schedule of stat. 3 & 4 W. 4, c. xlvi., and the lessees, when the act passed, were among those named in sect. 46. [*172

Messrs. Slee, Payne and Slee gave notice to the company to purchase their right and interest in the said piece of ground, buildings and premises, and to treat for the compensation to be made for loss, damage and injury in respect of improvements, tenants' fixtures, machinery and otherwise. The company offered, without prejudice, to treat for Mr. N. Slee's dwelling house, and the whole of the yard and garden at the rear of that house, and for the compensation, &c., to be made for improvements, tenants' fixtures, machinery or otherwise: but they declined to treat for the ground except as aforesaid, or for any of the dwelling houses, &c., (the other premises mentioned in the notice,) which were not situate within fifty feet, &c. Messrs. Slee, Payne and Slee, then gave notice to the company to issue their warrant to the sheriff for summoning a jury; which not being done, they made the present motion.

The affidavits in answer referred to a plan, showing that the premises used as a vinegar manufactory, the five smaller dwelling houses, more than one half of the house occupied by Mr. N. Slee, and the greater part of the garden occupied therewith, were more than fifty feet distant from the railway.

Sir *W. W. Follett*, Solicitor General, and *W. J. Alexander* now showed cause. The premises which the *company are required to take consist of several distinct parcels; a manufactory, several dwelling houses, and a garden. One dwelling house only, and part of the garden, are within fifty feet of the railway. The dwelling house, indeed, is indivisible: that the company should take that and part of the garden (which, however, they propose to take entirely,) may be reasonable; but they cannot be bound to take the other premises, merely because they are part of the same estate. If these premises are within the provisions of sect. 46, the company might be obliged to treat for the whole if they proposed to take any part; but they do not require any part. The question arises wholly on sect. 47. The words there used are disjunctive, and the remedy given to the owner, &c., of "any house, manufactory, ground or building" "which," that is, which house, or which manufactory, &c., "shall be situ- [*173

ate within fifty feet of such railway." There is no reason here for considering the several parcels otherwise than as if they belonged to different proprietors.

Thesiger, *Erle* and *Wordsworth*, contrà. Here is a property appropriated to one entire purpose: it cannot be contended that the vinegar manufactory is strictly the building in which the manufacture is carried on, and that all the other buildings and houses, and even the land adjoining, and over which access is had to the manufactory, must be the subject of a distinct consideration. If the statute does not oblige the company to take all, it is difficult to draw any limit. That which affects the usefulness of a part affects the whole. [PATTESON, J. Your argument puts the company in
*174] the same situation under sect. 47 as in cases *within sect. 46; yet the words of the two are very different.] Their effect is the same, in a case like this. If the company had wished to guard themselves against applications like the present, they should have had a clause inserted in their act like sect. 51 of the Blackwall Railway Act, 6 & 7 W. 4, c. cxxiii. (local and personal, public,) which provides "that in no case shall the said company be compellable to purchase any portion of any dwelling house or shop, which portion is situate at a greater distance than fifty feet from the said railway." Here no such express provision is made; and to divide a property which is entire, in the manner contended for on the other side, might lead to the most unjust and absurd consequences. [PATTESON, J. Parties whose property is deteriorated in any manner may recover compensation under sect. 61 or sect. 64; and then no absurd consequence need arise.] Proprietors are entitled to insist on the remedy given by sect. 47, even if their property be not deteriorated. Clauses of this kind are to be liberally interpreted; and the court will give an enlarged construction to the term "manufactory" in sect. 47, as they did in *Lister* v. *Lobley*, 7 A. & E. 124, to the word "owners," and as the Court of Exchequer did, in *Bell* v. *Hull and Selby Railway Company*, 6 M. & W. 699, to the word "injured."

Lord DENMAN, C. J. By this application Messrs. Slee require that the railway company should take, not only the dwelling house and garden, parts of which are within fifty feet of the railway, but also other premises
*175] forming a vinegar manufactory, and five dwelling houses *with their gardens; that is, the whole of Messrs. Slee's property at the place in question. It is difficult to suppose that the application was not made in the first instance under a supposition that it came within sect. 46, which requires, in the case of certain properties, that, if the company desire to take any part, the owner shall not be compellable to treat or sell unless they will take the whole: but that clause does not operate here, as the company do not want any part of the property. The case comes within sect. 47, which enacts that the company, on notice from the owner of any house, manufactory, ground or building situate within fifty feet of such railway, shall treat for the purchase of his interest, in what? Not the whole property, as under the preceding clause, but in "the houses, manufactories, ground and buildings mentioned in such notice." The obligation to purchase the whole property is left out, where the company do not apply for any part. Here Messrs. Slee make their claim, and the company are willing to purchase according to sect. 47. The act cannot mean that, if a house and garden are within fifty feet of the railway, the company shall be obliged to purchase all the rest of the property in that place belonging to the same person.

PATTESON, J. Sect. 45 protects a person in general from being obliged to sell less than the whole of any house, warehouse, building or manufactory in actual occupation, when the company apply to purchase. Sect. 46 is confined to certain owners of properties who are there named, and provides that those persons, if the company call upon them to sell part, shall not be obliged to treat or sell unless the company will take "the *whole of such property." That case does not arise here. The [*176 question turns upon sect. 47, which is general, like sect. 45, and must be considered as if sect. 46 were not in the act. Now, by sect. 45, if the company wish to take part of a house, and the proprietor requires them to take the whole, they must treat for the whole or none: that is the only effect of the clause. The owner may refuse if they will not treat for the whole; that is, not the whole property, as under sect. 46, but the whole of the particular house. Here it is argued, under sect. 47, that, if the railway comes within fifty feet of any premises, the company may be required to take all the property which the owner occupies close by, (though they require none,) because it is all under one occupation: whereas, if they had even wanted to buy a part, the owner could not have compelled them to take the whole property, the case not being within sect. 46. The parties ought to be content with what the company has offered.

WILLIAMS, J. I am of the same opinion. The only ground of this application seems to be that the dwelling house and manufactory are held under one lease. It is not suggested that the taking of one will interfere with the other. The company have offered more than was necessary.

WIGHTMAN, J. If the rule were made absolute, sect. 47 would have as large an effect as sect. 46: but the two sections are different both in their words and in their objects.

Rule discharged.

*ANDREWS v. TURNER. [*177

A will of lands made before January 1st, 1838, and revoked, may, under stat. 7 W. 4, & 1 Vict. c. 26, sects. 9 and 34, be republished after that day by a codicil attested by only two witnesses.

REPLEVIN. Avowry by defendant, as landlord, for rent in arrear. Plea, Non tenuit. Issue thereon. The cause was tried before *Atcherley*, Serjt., at the last Suffolk assizes. The party who was substantially plaintiff claimed the land as devisee, under a will executed on 9th April, 1834. One of the principal questions at the trial was, whether the will was duly executed so as to pass real estate, and, if not, or if it was revoked by a subsequent will, whether it was republished by a codicil, made 18th March, 1841. One of the attesting witnesses to the will of 1834 gave evidence of its having been duly executed; the other two gave evidence that it was not duly executed. It was conceded that the devisor had made a will in 1835; this was not produced. The codicil of 1841 was attested by two witnesses; and evidence was given of the execution. This codicil adopted the will of 1834, by referring to it in express terms. On the defendant's part it was said that the will of 1834, even if duly executed, had been revoked by that of 1835; and it was argued that the first will, if not duly executed, or if revoked, was not rendered effectual or revived by the codicil: first, because a will anterior to stat. 1 Vict. c. 26, could not be revived as to real estate by a codicil having the attestation of only

two witnesses; secondly, because the codicil of 1841, was not annexed to the will, and had not been executed under such circumstances as to be a *178] legal republication. The learned *judge overruled all the objections. Verdict for plaintiff. In this term,(a)

Byles moved for a new trial on the ground of misdirection. It must be admitted that, where both will and codicil are subsequent to 1st January, 1838, the will is brought down to the date of the codicil, because sect. 34 of stat. 7 W. 4, & 1 Vict. c. 26, enacts "That this act shall not extend to any will made before the 1st day of January, 1838, and that every will re-executed or republished, or revived by any codicil, shall for the purposes of this act be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived." But it does not follow that a will of land, not duly executed before the statute took effect, can be set up by a codicil made afterwards and attested by only two witnesses. [Lord DENMAN, C. J. The judicial committee of the Privy Council has held, after great consideration, that the words which prevent the act from extending to any will made before January 1st, 1838, do not apply where a will so made is republished by a codicil after that date; the republication *179] being a new making of the will.](b) **Byles* then argued, secondly, that the codicil was not so executed as to be a republication. On this point also the court intimated that he was not entitled to a rule. He then moved, thirdly, on the ground that the verdict was against the evidence.

The court, on this point, took time to speak to the learned judge: and, on a subsequent day of the term (May 4th,)

Lord DENMAN, C. J., gave judgment that there should be

No rule.

(a) April 18th. Before Lord Denman, C. J., Patteson, Williams and Wightman, Js.

(b) *Brooke* v. *Kent*, argued before Lord Brougham, Lord Denman Sir J. B. Bosanquet, and Dr. Lushington: decided July 1st, 1841. The case is about to be published in vol. iii. of Mr. E. F. Moore's Privy Council Cases. In the judgment, delivered by Dr. Lushington, is the following passage.

"The question is, whether all wills and codicils made before that date are altogether, and for ever, out of the operation of the act, or, if not wholly but in part, in what part, and for how long. Now it is clear that all wills and codicils made before the 1st of January, 1838, were not altogether, and for ever, out of the operation of the act, and to be governed by the old law; for, if they were, they might be re-executed according to the old law, or republished according to the old law, or revived or altered by a codicil executed according to the old law: but this same thirty-fourth section provides for the contrary: for every will or codicil, though made before the 1st of January, if re-executed, republished, or revived by codicil, shall be deemed to bear date at the time it was so re-executed, republished, or revived by codicil. Now, if such re-execution, republication, or revival by codicil took place after the 1st of January, 1838, the whole instrument bears date at such time, and consequently is out of the exception, and within the act. It seems obvious, therefore, that in these three most important particulars, wills dated before the first of January, 1838, may come within the act, if re-executed, republished, or revived by codicil subsequent to the 1st of January, 1838."

The principal question in the case related to obliterations and alterations made after the statute came into operation, in a will executed before: and the judicial committee held that these were not valid unless executed according to the statute, sect. 21.

The reporters are indebted to Mr. Moore for the above extract.

The QUEEN *v.* The Justices of the West Riding of YORKSHIRE.

(DRIGHLINGTON *v.* PUDSEY.)

This case is reported, 2 Q. B., p. 505

The QUEEN v. MICHAEL ROWED and Another.

An indictment charging that two defendants, in a certain open and public place called, &c., frequented by divers of the liege subjects, &c., unlawfully met together for the purpose and with the intent of committing with each other, openly, lewdly and indecently, in the said public place, divers nasty, wicked, filthy, lewd, beastly, unnatural and sodomitical practices, and then and there unlawfully, wickedly, openly, lewdly and indecently did commit with each other, in the sight of divers of the liege subjects, &c., in the said public place there passing, &c., divers such practices as aforesaid, is bad, as not specifying any offence with legal certainty.

An indictment was preferred against these parties at the Westminster sessions, alleging as follows.

1st count. That defendants, "being persons of nasty, wicked, filthy, lewd, beastly and unnatural dispositions, and wholly lost to all sense of decency and good manners, heretofore, to wit on," &c., "with force and arms, at," "in a certain open and public place there, called Kensington Gardens, frequented by divers of the liege subjects of our said Lady the Queen, unlawfully and wickedly did meet together for the purpose and with the intent of committing and perpetrating with each other, openly, lewdly and indecently, in the said public place, divers nasty, wicked, filthy, lewd, beastly, unnatural and sodomitical practices; and then and there unlawfully, wickedly, openly, lewdly and indecently did commit and perpetrate with each other, in the sight and view of divers of the liege subjects of our said Lady the Queen, in the said public place there passing and being, divers such practices as aforesaid, to the great scandal and disgrace of mankind, in contempt," &c., to the evil example, &c., and against the peace, &c.

2d count. That defendants, being such persons as aforesaid, on, &c., with force and arms, at, &c., in a certain open and public place, &c., frequented, &c., (as before,) unlawfully and wickedly did meet together for the purpose and with the intent of committing and *perpetrating [*181] with each other, openly, lewdly and indecently, in the said public place, divers nasty, wicked, filthy, lewd, beastly, unnatural and sodomitical practices, to the great scandal, &c.

3d count. That defendants, being such persons, &c., on, &c., with force and arms, at, &c., unlawfully and wickedly did meet together for the purpose and with the intent of committing and perpetrating with each other divers nasty, wicked, filthy, lewd, beastly, unnatural and sodomitical practices; and then and there unlawfully and wickedly did commit and perpetrate with each other divers such practices as last aforesaid, to the great scandal, &c.

4th count. That defendants, being such persons, &c., on, &c., with force and arms, at, &c., unlawfully and wickedly did meet together for the purpose and with the intent of committing and perpetrating with each other divers nasty, wicked, filthy, lewd, beastly, unnatural and sodomitical practices, to the great scandal, &c.

The bill being found by the grand jury, the indictment was removed into this court. On the trial, before Lord DENMAN, C. J., at the sittings in Middlesex after last Hilary term, *Thesiger* objected to the form of the indictment. The lord chief justice allowed the case to proceed, reserving to the defendant any advantage on subsequent motion which he might have had if the objection had been decided upon before verdict. The defend-

ant Rowed(a) was found guilty on all the counts, and was now brought up for judgment.

Thesiger and *Clarkson* were heard in arrest of judgment No one of
*182] the counts alleges any offence with *proper certainty. The first count, in its commencement, makes no charge of conspiracy, or of meeting with intent to commit any specified misdemeanour. It alleges that the parties met "in a certain open and public place" with intent "openly" (which is a vague expression, and not equivalent to the word "publicly") to commit with each other certain acts, which are described only by general epithets. So far no legal offence is stated. Then it is alleged that they did, openly and indecently, commit with each other, in the sight of divers of the liege subjects being in the said public place, such practices as aforesaid. But none of the epithets given to them have any legal meaning. Had the indictment stated such an exposure of the person as the law makes punishable, or an assault with intent to commit an unnatural crime, describing it in legal language, the charge could have been understood. Here nothing is stated with such certainty that, if the defendant were again indicted on the same evidence for an illegal exposure, or an assault, he could plead auterfois convict. "It is laid down as a good general rule, that in indictments" "the special manner of the whole fact ought to be set forth with such certainty, that it may judicially appear to the court that the indictors have not gone upon insufficient premises." "An indictment accusing a man in general terms, without ascertaining the particular fact laid to his charge, is insufficient; for no one can know what defence to make to a charge which is uncertain; nor can he plead it in bar or abatement of a subsequent prosecution; neither can it appear that the facts given in evidence against a defendant on such a general accusation are the same of which the indictors have accused him; nor can it judicially appear to the
*183] *court what punishment is proper for an offence so loosely expressed;" 4 Bac. Abr. 311, 312, (7th ed.,) tit. *Indictment* (G.) 1, and 4 Hawk. P. C. pp. 27, 29, (7th ed.,) Book 2, c. 25, sects. 57, 59, citing, among other authorities, the *Case of Lembro and Hemper*, Cro. Eliz. 147, and *Somerland's Case*, Cro. Eliz. 201.(b) *Rex* v. *How*, 2 Stra. 699, where the prosecution was for scandalous words spoken of a justice of peace, and *Rex* v. *Richardson*, 1 Moo. & Rob. 402, and *Rex* v. *Biers*, 1 A. & E. 327, where the offence was conspiracy, are instances in which general and indefinite allegations have been deemed insufficient. In *Rex* v. *Gill*, 2 B. & Ald. 204, where the indictment was held good, the charge of conspiracy was well laid, though the means of effecting the object was not stated.

Sir *F. Pollock*, Attorney General, Sir *W. W. Follett*, Solicitor General, and *Bodkin* contrà. The form here used is substantially the same with that which appears to have been adopted in a commitment for a similar offence(c) published in 3 Chitt. Crim. L. 69, (2d ed.) Some of the epithets here given to the word "practices" may be indefinite; but it is sufficient if any one implies a legal offence: the word "sodomitical" does so: and the verdict may be applied to any of the words. [PATTESON, J. When the offence is described in such a variety of words the party does not know what par-
*184] ticular charge he has to meet.] In 1 Stark. Crim. Pl. 144, (2d *ed.) it is said that there are "many instances in which, though the crime

(a) The other defendant did not appear.

(b) See 16 Vin. Abr. 321, tit. *Perjury*, (I) pl. 8, in marg.

(c) For meeting at, &c. in Vere Street, Clare Market, for the purpose of committing, and then and there committing, &c.

rest in tendency only, it may be described by general words, without specifying the means; this happens when the offence is a conclusion of fact arising from a variety of circumstances incapable of any precise definition. These, therefore, are to be regarded as exceptions to the general rule, from the necessity of the case." Some of the cases of solicitation, afterwards cited (pp. 144—148,) exemplify this. PATTESON, J. A charge of soliciting to divers felonies would not be sufficient.] In *Regina* v. *Peck*, 9 A. & E. 686, it was held no objection to an indictment for conspiracy to defraud creditors that no particular creditors were pointed out. [PATTESON, J. It would not have been sufficient to say that the defendants conspired to commit divers fraudulent practices.] The uncertainty in the general count of the indictment in *Rex* v. *Biers*, 1 A. & E. 327, and in the cases adduced in 4 Hawk. P. C. p. 29, B. 2, c. 25, s. 59, far exceeds that complained of in the present case. Here the practices are alleged to have been "sodomitical;" and the parties are stated to have met to perpetrate and to have perpetrated them in a public place. The indictment in 2 Chitt. Crim. L. 48, for keeping an exhibition room of indecent prints, is not more precise than this. In indictments, as in other documents, it is for the jury, as Lord MANSFIELD said in *Rex* v. *Horne*, 2 Cowp. 672, 680, "to construe plain words and clear allusions to matters, of universal notoriety, according to their obvious meaning, and as every body else who reads must understand them." The strictnesss here insisted upon would make it impossible to frame an *indictment for the kind of offence in question. The present form has been in use twenty years. [*185

Thesiger, in reply. DE GRAY, C. J., says in *Rex* v. *Horne*, 2 Cowp. 682, (in error:) "The charge must contain such a description of the crime, that the defendant may know what crime it is which he is called upon to answer; that the jury may appear to be warranted in their conclusion of 'guilty' or 'not guilty' upon the premises delivered to them; and that the court may see such a definite crime, that they may apply the punishment which the law prescribes." The indictment here does not furnish such a description. The form may have been in use twenty years; but no instance is shown in which the court has pronounced a decision upon it. The precedent of a commitment is no authority. If a commitment were bad, but the depositions clearly showed an indictable offence, this court would not discharge the defendant on habeas corpus. Prosecutors ought not to accumulate in a count a number of words implying charges some more and some less extensive, and then contend that, if there is one to which the jury can apply the evidence, it is sufficient. The term "sodomitical" is not known in our statute law. It is argued that where the crime lies in tendency, a latitude in statement must be allowed. But, though an attempt to commit felony would be a misdemeanor, it would not be sufficient to charge the party with "felonious practices." [PATTESON, J. The words "with each other," here, make the charge rather more definite; they indicate something to be done between the particular parties at the time *mentioned.] It is true that a count for conspiracy is good if it show the end for which the parties conspired, though the means be not stated: but still the end must be described with certainty. In the cases cited by Mr. *Starkie*, 1 Crim. Pl. 144, et seq., and refered to on the other side, a specific act was stated; as endeavoring to keep away a material witness; *Rex* v. *Lady Lawley*, Fitzgib. 263, 122. In *Regina* v. *Daniell*, 6 Mod. 99, HOLT, C. J., (after having observed on a former day that "a conspiracy to charge one with a bastard child is indictable; but if one should advise another to do it without more, it would [*186

not") (*a*), said "he was not satisfied, that to seduce one's servant away was indictable, but to persuade him to embezzle his master's goods was:" and that "the indictment might perhaps be for the evil act of persuading" without any allegation of an actual embezzlement. The persuading there is a specific act. The indictment (in 2 Chitt. Cr. L. 48, Ed. 2,) for keeping an indecent exhibition alleges a definite misdemeanor. Here no indictable offence is stated: nor has it been attempted, on the part of the prosecution, to define the misdemeanor imputed. Supposing that the word "sodomitical" had the effect ascribed to it, the prosecutors are not entitled to call the verdict in aid as to that word, because the indictment was objected to before verdict, and the objection reserved as having been taken at that time. [PATTESON, J. An objection to the indictment cannot be taken after plea, and before verdict. If the objection had been one cured after
*187] verdict by stat. 7 G. 4, c. 64, s. 21, you should have *demurred.] The indictment is bad as not stating any charge with certainty: therefore no reference to the statute is necessary. [PATTESON, J. I do not see that the statute has any application to this case. Lord DENMAN, C. J. It has not; and the benefit of objection was claimed and given at the trial merely as a matter of caution.] *Rex* v. *Mason*, 2 T. R. 581, where an indictment for obtaining money by false pretences was held bad because it did not state what the pretences were, is an analogous case to this.

Lord DENMAN, C. J. If we had found a long course of precedents charging misdemeanor in this form, I think we might have held the indictment sufficient: but that is not so. The allegation here is: (his lordship then read the first count.) Now, if any distinct act had been charged, showing the intention implied by the epithets which are used, I think the indictment would have been maintainable. But, as framed, it is too general. Judgment must be arrested.

PATTESON, J. I cannot distinguish this from the case of an indictment charging generally treasonable or fraudulent practices. It is stated that the defendants committed with each other divers "nasty, wicked, filthy, lewd, beastly, unnatural and sodomitical practices;" but it is not said what act they did. We cannot know by these general terms what the charge is. From such words, occurring in common parlance, we might perhaps infer it; but in a legal view we cannot. If it had been shown that such an in-
*188] dictment as this *had ever been before the court, and a conviction upon it upheld, or if there appeared to have been a long series of precedents in the same form, not objected to, there might have been some ground of argument in favour of this form. But we do not find that such has been the case. Therefore the rule must be absolute.

WILLIAMS, J. Up to the allegation that the defendants then and there did commit, &c., in the first count, there is no charge: all rests in intention: and the latter part of the count, referring to that which precedes, does not imply so distinct and specific a charge as, on legal principles, we can notice. The same objection extends to the whole indictment; and I therefore think it is not good.(*b*)

Rule absolute to arrest judgment.

(*a*) See Lord Kenyon's observations on this dictum in *Rex* v. *Higgins*, 2 East, 5, 17.
(*b*) Wightman, J., had left the court.

LYON SAMUEL v. NETTLESHIP.

Where a prisoner, arrested at the suit of A., is ordered by the Insolvent Debtors' Court to be discharged, except as to the debt of S., and, as to that debt, to be discharged after a time named, and to be confined during the interval within the walls of a prison named, and S. thereupon issues a capias, upon which he lodges a detainer in the said prison, the prisoner may nevertheless, under stat. 1 & 2 Vict. c. 110, s. 85, remove himself by habeas corpus into the custody of the marshal.

Kelly, in this term, obtained a rule calling on the plaintiff to show cause why the writ of habeas corpus issued in this cause should not be quashed or set aside, and why the defendant should not be committed to the custody of the keeper of the Debtors' Prison for London and Middlesex in the city of London.

By the affidavits in support of the rule it appeared that, on 5th January in this year, the defendant was *arrested at the suit of Thomas Jefferys, and committed to the said Debtors' Prison. On 6th January, he filed his petition in the Insolvent Debtors' Court; which court, on 17th January, made a vesting order. On 21st January defendant filed his schedule, therein stating the present plaintiff to be his creditor (as he in fact was) for 45*l.* on a bill of exchange of which defendant was acceptor and plaintiff endorsee. The defendant, on his hearing, was opposed on behalf of the plaintiff: and afterwards, on 11th March, the court ordered that the defendant should be discharged from custody, and entitled to the benefit, &c., as to the several debts, &c., "excepting as to a certain debt of 45*l.*, due from the said prisoner to Lyon Samuel: and, forasmuch as it appears to the said court that the said prisoner hath contracted the said last mentioned debt of Lyon Samuel fraudulently, it is adjudged and ordered that the said prisoner shall be discharged from custody, and entitled to the benefit of the said act, as to the said last mentioned debt, so soon as the said prisoner shall have been in custody at the suit of the said Lyon Samuel, creditor for the same debt, for the period of seven calendar months, to be computed from the 17th day of January last, being the time of making such vesting order as aforesaid. And it is directed that the said prisoner shall be confined, during the period aforesaid, within the walls of the said prison, and not within the rules or liberties thereof." [*189

Plaintiff, on 12th March, sued out a capias(*a*) against defendant, endorsed for bail for 45*l.*, upon an affidavit of the debt aforesaid; and, on the same day, lodged it *with the sheriff of Middlesex; who, on the same day, detained defendant at the suit of plaintiff in the Debtors' Prison. [*190

On 18th March, defendant sued out a habeas corpus in this court: and on the same day he was removed from the custody of the sheriff of Middlesex, and committed by Lord DENMAN, C. J., to the Queen's Bench Prison, where he now was in the custody of the marshal. It was further deposed that no notice of the intended removal had been given to the plaintiff, and that he would have opposed the removal if such notice had been given. An affidavit was put in, in opposition to the rule, to the effect that the course pursued was conformable to the usual practice.

Erle now showed cause. The adjudication of the Court of Insolvent Debtors does not, properly speaking, inflict a confinement: it gives a discharge, which however, in certain cases, (as here,) is to take effect only after an interval named in the adjudication. In all other respects a pri-

(*a*) See *Grewcock* v. *Waller*, 11 A. & E. 165.

soner is circumstanced as he would have been if no adjudication had been made. The words of stat. 1 & 2 Vict. c. 110, s. 85, are, "That in all cases where it shall have been adjudged that any such prisoner shall be so discharged, and so entitled as aforesaid, at some future period, such prisoner shall be subject and liable to be detained in prison, and to be arrested and charged in custody at the suit of any one or more of his or her creditors with respect to whom it shall have been so adjudged, at any time before such period shall have arrived, *in the same manner as he would have been subject and liable thereto if this act had not passed*: provided neverthe-
*191] less, that when such period shall have *arrived such prisoner shall be entitled to the benefit and protection of this act, notwithstanding that he may have been out of actual custody during all or any part of the time subsequent to such adjudication, by reason of such prisoner not having been arrested or detained during such time or any part thereof." The habeas corpus therefore is regular. If it were quashed, it would follow that the marshal has acted illegally in detaining the prisoner from the 18th of March.

Kelly, contrà. If the proceeding under this habeas corpus can be supported, the power of the Court of Insolvent Debtors will in effect be nullified. The words of sect. 85, which have been referred to, "in the same manner as he would have been subject and liable thereto if this act had not passed," mean only that the creditor is not to lose the remedies which he possessed independently of the statute. Sect. 81 directs that a prisoner who is remanded, as the prisoner here is, may be ordered, if the Insolvent Debtors' Court think fit, to be confined within the walls of the prison and not within rules. And here the adjudication in fact is that the prisoner "be confined, during the period aforesaid, within the walls of the said prison, and not within the rules or liberties thereof." That cannot be enforced, if the construction of sect. 85 for which the defendant contends be correct. It might as well be said that the defendant could be bailed. [PATTESON, J. I do not know why he might not.] The judge should at any rate remand to the original prison. [PATTESON, J. Mr. Charnock(a)
*192] remarks on the eighty-first section as *follows. "Where an insolvent is detained by a friendly creditor, and he is discharged by the court when he shall have been imprisoned a certain period, it is now a common practice for such creditor to give the insolvent his discharge immediately after the court has pronounced judgment against the insolvent, and thus render inoperative the judgment of the court so far as the public is concerned."] That applies to confinement at the suit of the original detaining creditor. Here the prisoner is detained on the capias ad respondendum issued on behalf of another creditor, for the purpose of giving to the latter the benefit of the adjudication of the Court of Insolvent Debtors. [PATTESON, J. And that capias is merely for the custody of the prisoner until he shall have given bail, or made deposit, or be by other lawful means discharged; stat. 2 & 3 W. 4, c. 39, s. 4, and sched. No. 4.] The only alternative under which the custody can now cease is the last, that is, a discharge by the expiration of the time assigned for his detention by the adjudication of the Court for relief of Insolvent Debtors.

PATTESON, J.(b) I cannot speculate as to the intention of the legislature; the words of sect. 85 appear to me to be quite clear. The party who is adjudged to be discharged at a future period may be detained and arrested

(a) Treatise on the act 1 & 2 Vict. c. 110, p. 113, note (p.)
(b) Lord Denman, C. J., had left the court during the argument.

at the suit of any creditor, with respect to whom it has been so adjudged, "in the same manner as he would have been subject and liable thereto if this act had not passed." If the act had not passed, the creditor could only have sued out a capias ad respondendum *to hold the party to bail. If he was not bailed, he would have remained in custody: whether he was bailed or not, the action would have gone on: and the creditor would have got judgment, and might have issued a ca. sa. He may do so now, if the prisoner is bailed; and then nothing that I know of will discharge the prisoner till the expiration of the seven months. [*193

WILLIAMS and WIGHTMAN, Js., concurred.

Rule discharged.

*EASTER VACATION.(a) [*194

JONES, Public Officer, &c., v. CLARKE.

A declaration on a written guarantee omitted, in the description of the contract, the following clause. "This guarantee is only to extend to secure moneys becoming due in respect of dealings up to, and inclusive of, the day of the receipt by," &c., (plaintiff) "of a written notice from me," (the guaranteeing party) "to discontinue this guarantee." *Held*, no variance.

The declaration described the consideration of the guarantee as follows. "In consideration of the company" (plaintiff) "having discounted bills, or advanced, paid or earned money, for, to or from one H." (the principal,) "and agreeing to give H. time and credit for payment of the same, and also in consideration that the company should thereafter discount bills, or advance, pay or earn money, for, to or from H." The only averment, in the declaration, of performance by plaintiff was, that the company did then, to wit, on the day, &c., of defendant's promise, and on divers other days, &c., between that day and the commencement of the suit, "discount divers other bills, and advance, pay and earn divers other moneys, for, to and from H., to a large amount, to wit, the amount of 2000*l*., and exceeding by a large sum of money, to wit, the sum of 100*l*., all the moneys paid," &c. by H., and also exceeding the amount of the sum guaranteed, "and did also give H. time and credit for the payment of *the said several moneys amounting to the said sum of* 2000*l*., to wit, for a reasonable time," &c.

Held, on motion in arrest of judgment, that, assuming it to be necessary that the declaration should aver the giving of time in respect of the dealings before the guarantee, the last mentioned averment might, after verdict, be referred to those dealings, and was not necessarily restricted by the context to the dealings after the guarantee.

ASSUMPSIT by the plaintiff, as one of the public officers of certain persons united in copartnership, by the name of the Sheffield and Hallamshire Banking Company, for the purpose, &c. The first count charged that, before and at the time of the making of defendant's promise hereinafter mentioned, the company carried on the business of bankers: that heretofore, to wit, 17th July, 1840, in consideration of the company having discounted bills, or advanced, paid or earned money, for, to or from one William Hutchinson, and agreeing to give Hutchinson time and credit for payment of the same, and also in consideration that the company should thereafter discount bills, or advance, pay or earn money, for, to or from Hutchinson, defendant then promised the company that he, defendant, would guarantee and pay to the company all moneys then or thereafter to be due, *to wit, from Hutchinson, to the extent of 300*l*.: and, for the considerations aforesaid, defendant did also promise and agree that the said guarantee should be a running or continuing guarantee, to secure the balance of account for the time being, notwithstanding payments or receipts on either side, and should be available to the company notwithstanding any change might take place in the company by the death or retirement of any of the [*195

(a) The court sat in banc one day during this vacation.

proprietors, or the accession of new proprietors. That the company, confiding in the said promise and guarantee of defendant, did then, to wit, on the day and year on which defendant so made his said promise as aforesaid, and on divers other days and times between that day and the commencement of this suit, discount divers other bills, and advance, pay and earn divers other moneys, for, to and from Hutchinson, to a large amount, to wit, the amount of 2000*l.*, and exceeding by a large sum of money, to wit, the sum of 1000*l.*, all the monies paid to, and had and received by, the company by and from, and on account of, Hutchinson, and also exceeding the said sum of 300*l.*, which defendant so promised to guarantee and pay to the company as aforesaid; and the company did also give Hutchinson "time and credit for the payment of the said several moneys amounting to the said sum of 2000*l.*, to wit, for a reasonable time, to wit, from the respective times of the said several moneys respectively being advanced, paid and earned by them, for, to and from him, and becoming due to them for discounting bills as aforesaid, until the commencement of this suit: that Hutchinson, although he was afterwards, to wit, on 20th January,
*196] 1841, requested by the company so to do, has not paid *the said sum of 1000*l.*, so due from the said Hutchinson to the said company on account and by reason of their said advances, transactions and dealings to and with him as aforesaid, or any part of the said last mentioned sums: by reason of all which several premises Hutchinson was and is indebted to the company in a large sum of money, to wit, the sum of 1000*l.*: of all which premises defendant afterwards, to wit, &c., had notice, and was then requested by the company to pay the said sum of 300*l.* for and in respect of the said monies so due from Hutchinson to the company as aforesaid, according to defendant's said promise and guarantee in that behalf, &c. Breach: non-payment of the 300*l.*, or any part thereof, to the company by defendant. (There was also a count on an account stated.)

Plea: Non assumpsit. Issue thereon.

On the trial, before COLERIDGE, J., at the Middlesex sittings after Easter term, 1841. the plaintiff proved the giving of the following written guarantee by the defendant, signed by him. "I, the undersigned, William St. Thomas Clarke, of," &c., "do hereby engage with the company of proprietors of the Sheffield and Hallamshire Bank for the time being that, in consideration of the company having discounted bills, or advanced, paid or earned money, for, to or from William Hutchinson, of," &c., "and agreeing to give him time and credit for the payment of the same; and also in consideration that the company shall hereafter discount bills, or advance, pay or earn money for, to or from the said William Hutchinson, I will guarantee and pay to the company all moneys now or hereafter to be due to it from the said William Hutchinson, to the extent of 300*l.* This
*197] guarantee is *only to extend to secure moneys becoming due in respect of dealings up to, and inclusive of, the day of the receipt by the manager of the bank of a written notice from me to discontinue this guarantee. It is also intended to be a running or continuing guarantee, to secure the balance of account for the time being, notwithstanding payments or receipts on either side, and is to be available to the company of proprietors for the time being, notwithstanding any change may take place in the company by the death or retirement of any of the proprietors, or the accession of new proprietors. Dated," &c., (17th July, 1840.)

The defendant's counsel objected that a variance appeared; inasmuch as the contract in the declaration did not contain the clause for limiting the

guarantee by a written notice from the defendant. The learned judge overruled the objection; and a verdict was found for the plaintiff on the issue upon the first count.

Pashley, in last Trinity term, obtained a rule nisi for a new trial, on the ground of the alleged variance; or for arresting the judgment, on the ground that the declaration did not aver that the company had in fact given time and credit to Hutchison for the discounts, advances, payments and earnings antecedent to the guarantee.

Fortescue now showed cause. First, as to the question of variance. The declaration states the effect of the contract of guarantee, though it does not set forth the actual instrument: it was not necessary to set forth a power of revocation, which is necessarily implied in every such contract, as was assumed in *Mason* v. **Pritchard*, 12 East, 227, S. C., at N. P., 2 Campb. 436, and *Melville* v. *Hayden*, 3 B. & Ald. 593. It may be [*198 said, however, that the clause makes the revocation take effect from the receipt of a written notice only. But, if so, its effect is merely to enlarge the defendant's liability: it is then equivalent to a proviso that the defendant shall not be able to revoke his guarantee except by writing. It was not necessary that the declaration should set out such a proviso, merely operating for the benefit of the plaintiff by excluding a particular method of closing the guarantee. The plaintiff has only to show the defendant's liability, not overstating it; but he may understate it, provided he show all that is necessary to his claim; *Handford* v. *Palmer*, 2 Br. & B. 359; *Baptiste* v. *Cobbold*, 1 B. & P. 7. [PATTESON, J. Suppose you had set out the instrument in full exactly; how should you have averred the performance of the condition precedent?] No averment would have been necessary in respect of this clause: none could be made except one negativing the notice: but, in such a case, it is for the defendant to allege the notice affirmatively, if it has been given.

Secondly, as to the motion in arrest of judgment. The performance of the agreement to give Hutchinson time and credit for payment of the prior debts is sufficiently averred, at least to meet an objection taken after verdict. It is averred that the company gave Hutchinson "time and credit for the payment of the said several moneys amounting to the said sum of 2000*l.*, to wit for a reasonable time."

Pashley, contrà. First, as to the question of variance. The proviso limits the guarantee to such dealings as *should take place up to the [*199 day of the receipt of a written notice inclusively. Even assuming that, without this clause, a notice might have been given by the defendant terminating his liability, it would be necessary, if such a clause were se out, to bring the dealings affirmatively within the period: that shows that the clause should appear in the declaration. *Handford* v. *Palmer*, 2 Br. & B. 359, decides only that the declaration need not state what is necessarily implied in the matter set out: and *Baptiste* v. *Cobbold*, B. & P. 7, proves only that that which is immaterial to the contract on which the action is brought need not appear. The cases on this subject are collected in 1 Chitt. Pl. 309, 310, (6th ed.) *Vavasour* v. *Ormrod*, 6 B. & C. 430,(a) decides that an exception, qualifying the liability in a particular event, should be set out, even if the event has not happened, if such exception be contained, though only by reference, in the body of the contract imposing such liability. [COLERIDGE, J. Suppose you were sued for rent on a lease providing that, in one particular event, you should pay double

(a) Compare *Ward* v. *Bird*, 2 Chitt. R. 582; *Shaw* v. *Poynter*, 2 A. & E. 312, 323.

rent: could not the plaintiff proceed for single rent without setting out the proviso?] An avowry understating the reservation of rent would fail, upon a plea of non tenuit. [COLERIDGE, J. That is an actual misstatement.] Here the defendant could not crave oyer: he has no opportunity, as this declaration is framed, of raising the question of fact as to the notice. The distinction pointed out in the books is that between an incorporated proviso and an exception subsequent, as pointed out in *Spieres* v. *Parker*, 1 T. R. 141; *White* v. *Wilson*, 2 B. & P. 116, also illustrates
*200] the rule on *this point. But, further, it has never been decided that, without such an express proviso, the party guaranteeing can recal his liability. [Lord DENMAN, C. J. In the report of *Mason* v. *Pritchard*, 2 Campb. 436, at Nisi Prius, WOOD, B., is reported as saying, "Perhaps the defendant might have got rid of his liability for any goods to be subsequently furnished to his brother, by giving the defendant notice that he would be no longer responsible."] The point has not been decided. [Lord DENMAN, C. J. Must the liability endure for the life of the party?] There is usually an express limitation in respect of amount. In *Mason* v. *Pritchard*, 12 East, 227, S. C., at N. P., 2 Campb. 436, the decision was merely that the guarantee there did continue: and in *Melville* v. *Hayden*, 3 B. & Ald. 593, it was only decided that the guarantee, by its terms, was not a continuing guarantee.

Secondly, the declaration does not show a performance of the agreement to give time for the former advances. Those advances themselves were not made at the defendant's request, and therefore are not in themselves a consideration; note (1) to *Osborne* v. *Rogers*, 1 Wms. Saund. 264:(a) and the guarantee must itself express the consideration distinctly as declared upon; *Raikes* v. *Todd*, 8 A. & E. 846; whence it results that the allegation of performance must follow the guarantee exactly. The only allegation here is that time was given "for the payment of the said several moneys amounting to the said sum of 2000*l*." These are, as appears by the preceding part of the declaration, the sums advanced between the day
*201] of the guarantee *and the commence of the suit. [COLERIDGE, J. In the preceding part the 2000*l*. is no otherwise mentioned than under a videlicet.] In the averment which is said to show performance the amount is named, without a videlicet, as matter of description, and express reference is made to the earlier part: the amount named in the earlier part is thus made material, though under a videlicet, as identifying the sum in respect of which time was given. The omission of the allegation cannot be cured by verdict, inasmuch as that which is not alleged is essential to the right of action; Stephen on Pleading, p. 161, &c., (5th edit.); note (1) to *Stennel* v. *Hogg*, 1 Wms. Saund. 228, b.

Lord DENMAN, C. J. I think there is no variance. Mr. Chitty lays down that whatever part of the contract qualifies the defendant's liability must be set out, 1 Chit. Pl. 309, 6th ed. But here the liability is not qualified: without such a clause, a party giving a guarantee may revoke at any time. The mention of the written notice, therefore, operated only to extend the defendant's liability, by debarring him from putting an end to it by a verbal notice. As to the other point, perhaps in absolute strictness Mr. *Pashley's* argument is correct. One naturally refers the allegation of performance to those sums which correspond with the amount by which the allegation of performance gives the description. But, when we take

(a) See *Roscorla* v. *Thomas*, post, p. 234.
(b) See *Davis* v. *Black*, 1 Q. B. 900.

all that is alleged before, and find that the first mention of the 2000*l.* is under a videlicet, and is immediately followed by the mention of a sum of 1000*l.*, also under a videlicet, included in and forming part of the 2000*l.*, we may consider that this is not *laid as an exact description of the sum. Certainly the words "said sum of 2000*l.*," in the allegation [*202 of performance, raise a difficulty: but that may be got over by considering the words to identify, not the actual moneys advanced, but the amount of them, with the amount of the sums advanced since the guarantee. I do not say that the objection might not have prevailed on special demurrer.

PATTESON, J. There was a decision by Lord GIFFORD on a question of variance, in *Hill* v. *Sanders*, 1 C. & P. 80; where, in action of covenant for rent, the lease was described as granted for twenty-one years; but the evidence was of a lease for twenty-one years determinable at the end of seven or fourteen years, at the option of either party. This Lord GIFFORD held to be no variance. That case resembles this very much; for the objection was, that the declaration took no notice of the defendant's power of determining the lease. It was, indeed, only a decision at Nisi Prius: but, if that had been wrong, the defendant, who lost the verdict, might have moved for a new trial; and it is observable that there was no indisposition to litigation; for on another part of the record there was a demurrer, which was decided, and error was brought on the decision.(*a*) And really I think that here is no variance; for I cannot see what it was thrown on the plaintiff to aver or prove. If the guarantee had been limited in its continuance by the duration of something else, then the *plaintiff would have had to show the duration; and omitting the limitation would therefore have made a variance. But here nothing is omitted [*203 except the reservation of a power to determine the liability. As to the other point, the contract in the declaration is upon two considerations. The first of these is that the plaintiff, having discounted bills and advanced money, agrees to give time for the payment of the same. Certainly the declaration does not expressly aver giving time as to these discounted bills, or these sums advanced. But, first, I do not know that this was necessary: for all this part of the debt may have been paid off long ago; and, secondly, if such an averment was necessary, there is matter enough from which, on a motion in arrest of judgment, we may collect a sufficient averment in this respect. On special demurrer the case would be very different. We are asked to construe the allegation strictly on account of the word "said." But I think we may put upon this the interpretation which my lord has suggested. I am, however, by no means certain that the allegation was wanted at all.

COLERIDGE, J.,(*b*) concurred.

Rule discharged.

(*a*) *Hill* v. *Saunders*, 2 Bing. 112. Affirmed on error, *Hill* v. *Saunders*, 4 B. & C. 529. The defendant obtained judgment on the demurrer on the 28th May, 1824, in the Common Pleas. The trial took place on February 2d, in the same year.

(*b*) Williams, J., was absent.

CASES

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

TRINITY TERM AND VACATION,

V. & VI. VICTORIA.

The judges who usually sat in banc in this term and vacation were,

Lord DENMAN, C. J. — WILLIAMS, J.
PATTESON, J. — COLERIDGE, J.

The QUEEN *against* The Inhabitants of the Parish of ST. MARTIN IN THE FIELDS.

The proprietors of Drury Lane Theatre demised, for a term of years at a nominal rent, a private box, with the power of exclusively occupying it upon the nights on which there should be performances. The proprietors had also access to the box, but not the right of occupying it during the performance: and they were entitled and bound to perform the repairs upon it.

Held that the lessee was rateable to the poor for the occupation of the box, under an act (10 G. 3, c. 75,) which authorized the making rates on all persons who should inhabit, hold, occupy, possess or enjoy any land, house, shop, wharf, warehouse, or any other building, tenement, or hereditament.

Although the company of proprietors were rated for the theatre generally.

On appeal by *Angela Burdett Coutts* against a poor rate(*a*) for the parish of *St. Martin in the Fields*, the sessions ordered the rate to be amended by
*205] striking *out the appellant's name, subject to the opinion of this Court upon the following case.

By the rate in question, the proprietors of the Theatre Royal Drury Lane were assessed as follows: The Theatre Royal Drury Lane Company, for the theatre royal, 1800*l.* And the appellant as follows: *Angela Burdett Coutts*, for box, 100*l.*

The box in question is in the parish of *St. Martin in the Fields*; and the rate was duly made, allowed and published pursuant to a local act of parliament, 10 G. 3, c. 75(*b*).

(*a*) The assessment was contained in several columns: the material entries, and the heads under which they appeared, were: "Name of occupier *Angela Burdett Coutts*." "Description of property, &c., Box in Theatre Royal." "Name or situation of property, Little Russell Street." "Gross estimated rental, 120*l.*" "Rateable value, 100*l.*" "Rate, at 4*d.* in the pound, 1*l.* 13*s.* 4*d.*"

(*b*) "For building a workhouse in the parish of *St. Martin in the Fields*, within the liberty of Westminster in the county of Middlesex."

Sect. 13 enacts "That the churchwardens, overseers of the poor, vestrymen, constables, and other ancient inhabitants of the said parish, are hereby authorized and required to assemble and meet together in the vestry room of the said parish twice or oftener in every year, (if occasion shall require,) due notice having been given in the parish church

By indenture of 21st February, 1795, Richard Brinsley Sheridan and Thomas Linley, proprietors of the New *Theatre Royal Drury Lane, [*206 in consideration of 6000*l.* paid by the late Thomas Coutts, Esq., did grant, bargain, sell and demise, for the term of 100 years, at a peppercorn rent, unto him, the said Thomas Coutts, his executors, &c., all that box marked, &c., on the south side or Prince's side of the New Theatre Royal Drury Lane, in the county of Middlesex, being directly and immediately under the box called the stage box, &c., (the dimensions were then stated,) and also all that vacant space or passage containing eight feet four inches or thereabouts, lying immediately between the back part of the same box thereby demised and the wall of the said Theatre, the said vacant space, so lying behind the said box, to be made and converted into a room, and fitted up and finished by and at the expense of the said R. B. S. and T. L., their executors, &c., for the sole and exclusive use of the said T. Coutts, his executors, &c., as thereinafter mentioned and expressed; and also full and free liberty of ingress, &c. (The case then stated the particulars of the privilege granted: which it is unnecessary to set forth here, as the case turned entirely on the subsequent lease.)

The said indenture having been duly executed, the said T. Coutts took possession of, and occupied and enjoyed, the said box, and was possessed thereof, pursuant to the terms, conditions and covenants of the said indenture, until 1809, when the said New Theatre Royal, Drury Lane, was destroyed by fire.

In the year 1812, a new theatre was erected, under the powers of two acts(*a*) of the 50 and 52 G. 3, by *which the proprietors of the theatre were incorporated. [*207 And, on the 27th August, 1812, an indenture was executed, between the committee of the Theatre Royal Drury Lane Company of proprietors, and the said T. Coutts, by which, after reciting the destruction and the re-erection of the theatre under the provisions of the said acts, and the power of the said committee to grant leases of any boxes in the new theatre in the nature of private boxes, with an exclusive right of admission to such boxes on every night of theatrical performance, and reciting the claims of the said T. Coutts to a private box in the said new theatre, and the agreement of the committee that, in lieu and compensation of all claims in respect of such former box so purchased by the said T. Coutts, and in consideration of 3000*l.* to be paid by the said T. Coutts, a private box should be granted and demised to him, his executors, &c., it was witnessed that, in pursuance of the said agreement, and in consideration of the premises, and of 3000*l.* to the said committee paid by the said T. Coutts, the said committee, in pursuance of the powers to them given by the said acts of parliament, and of all other powers enabling them

on the preceding Sunday before such meeting; and they, or the major part of them so assembled, shall make one or more rate or rates, assessment or assessments, for and towards the relief of the poor, and for the several purposes of this act, upon all and every person or persons who do or shall inhabit, hold, occupy, possess, or enjoy any land, house, shop, wharf, warehouse, or any other building, tenement, or hereditament, or any other person or persons who by law is or are chargeable and assessable for and towards the relief of the poor, as the said churchwardens, overseers of the poor, vestrymen, constables, and other ancient inhabitants of the said parish, or the major part of them, at such meeting or meetings, shall think proper to be rated and assessed; which said rates or assessments so to be made shall be allowed by two of his Majesty's justices of the peace for the city and liberty of Westminster, and notice thereof shall be given in the parish church the Sunday next after the same shall have been so allowed."

(*a*) Stat. 50 G. 3, c. ccxiv., local and personal, public: "For rebuilding the late Theatre Royal Drury Lane, upon the conditions, and under the regulations therein mentioned." Stat. 52 G. 3, c. xix., local and personal, public: "For altering and enlarging the powers of an act of his present Majesty, for rebuilding the late Theatre Royal Drury Lane."

in that behalf, did bargain, sell, demise and lease to the said T. Coutts, his executors, &c., all that newly erected whole and entire box in the said newly erected Theatre Royal Drury Lane, situate and being on the ground tier, &c., and also the lobby, and the small room adjoining to and communicating therewith, situate behind the said newly erected private box, and the free and exclusive use and enjoyment thereof, and of every part thereof,
*208] respectively, together with the full and free *liberty of ingress, egress, regress, way and passage, into and from the said theatre, and to and from the said box and room, every evening and night upon which any public entertainment, whether theatrical or musical, should be exhibited in the said theatre, to and for the said T. Coutts, his executors, &c., or for any number of persons by his or their order or authority, not exceeding in any one night or time of performance the number of eight, and who should respectively be entitled to admission thereto upon producing to the door keeper, at the private box door of the said theatre, a ticket belonging to such box, or a note or order in writing under the hand of the said T. Coutts, his executors, &c., for his, her or their admission, respectively; and also all rights, &c.(a); excepting and always reserving out of this demise unto the said company of proprietors, their successors and assigns, free liberty, at all times, to paint, decorate, and make such alerations in, the front of the said private box, for the purpose of making the same uniform and like the fronts of the other private boxes in the said theatre, as the committee of management for the time being of the said company of proprietors should from time to time think proper; and excepting always, and subject to, such regulations, from time to time to be made by such committee for the time being, as should be made by them respecting other private boxes in the said theatre; but so as such regulations did not prevent or hinder the said T. Coutts, his executors, &c., from enjoying the exclusive liberty and use of the said private box and room, with all rights and privileges thereto belonging or appertaining, in the manner thereby in-
*209] tended and expressed to be *granted and demised. To hold the same (except as before excepted) unto the said T. Coutts, his executors, &c., from the 1st of October then next for eighty-two years and one quarter, to commence from 29th September then next; yielding and paying the yearly rent of 1*d*. This indenture also contained covenants for quiet enjoyment; and, by the lessors, at their own expense, during the said term, to preserve the said box and room thereby demised for the sole and exclusive use and accommodation of the said T. Coutts, his executors, &c., and such other persons as thereinbefore named, and repair, ornament and finish the same in the same manner as the private boxes and rooms adjoining thereto: and, in case of destruction by fire of the said new theatre, or any other theatre to be erected on the site thereof, or that it should be necessary to make any alterations in the same which should interfere with the full and free use and enjoyment of the said box, room and premises, then, upon the re-edification of such theatre, and in the meantime and during the progress thereof, a box and retiring room, with all proper conveniences, in the said theatre, or such new erected theatre, and also a box with such accommodations as it should be in the power of the said company to provide in such other theatre as during the erection thereof should be opened for public performances, should be appropriated for the exclusive use of the said T. Coutts, his executors, &c., in lieu of the said box, room and premises thereby demised, and be held by him and them under the same privileges

(a) So in the case.

as were granted in respect of the said demised box, room and premises. There was also a covenant from the said T. Coutts, his executors, &c., not to line or hang the front of the said box, or do any thing to interfere with the uniformity of the said theatre. *After the execution of the said last mentioned indenture, the said T. Coutts took possession [*210 of the last mentioned box, room and premises, and, according to the terms, &c., of that indenture, the said T. Coutts, during his life, had the use and enjoyment thereof: and the appellant, at the time of the making of the rate, had, and now has, the use and enjoyment thereof according to the provisoes, terms, &c., of the said indenture.

The said box and room are placed upon a level with the stage, and form a component part of the theatre, which is in the occupation, and under the management, of parties to whom it is let by the Company of Proprietors. The occupiers and managers have access to the said box and room from the other parts of the building, by internal doors, of which they keep the keys. The approach to the box and room from the street is by an outer door, which opens to a staircase, by which staircase persons going to other private boxes in the theatre (some of which are let nightly by the occupiers and managers of the theatre) ascend to those boxes. The outer door next to the street, and also the staircase, are under the control of the occupiers and managers of the theatre; and the door is closed and fastened by them at all times, except during the hours of performance.

The theatre has been opened for public entertainment, either theatrical or musical, for about two hundred evenings in the year. The performances usually continue from seven o'clock in the evening until twelve at night.

The question for the opinion of this Court was, whether the appellant was liable by law to be assessed to the said rate in respect of the said box. If the Court should be of opinion that she was, the order of sessions was to be quashed: if otherwise to be affirmed.

*The case was argued in last term(*a*). [*211

Clarkson and *Bodkin*, in support of the order of sessions. The appellant was not liable to be rated for any part of the theatre. The proprietors are in possession of the whole. In 1 Nol. P. L. 176, Ed. 4, it is said that "no lodger, though possessing the principal part of the house, was ever rated; but the owner, how small soever the part reserved for himself, is in the eye of the law the tenant for the whole, and is rated as the occupier." This is cited from the judgment of BULLER, J., in *Rex* v. *Eyles*, Cald. 407. 414, and *Rex* v. *Watson*, 5 East, 480, is also referred to. The passage in Nolan is assented to by LITTLEDALE, J., in *Rex* v. *Ditcheat*, 9 B. & C. 176. 184, where it was held that, under stat. 6 G. 4, c. 57, s. 2, a party who lets a part of his house to a lodger may gain a settlement as occupier of the whole. The box could not be called the dwelling house of the appellant if it were broken and entered with intent to steal. The trustees of a methodist chapel, and not the renters of the pews, were held rateable in *Rex* v. *Agar*, 14 East, 256. The renter of a stall in the bazaar in Soho Square would surely not be rateable. Indeed, if the appellant be rateable, a party who hires a stall in the Opera House, or who occupies a place in the theatre for a single night's performance, would be rateable; or the counsel who occupies exclusively the Tub in the Court of Exchequer: for there is no principle upon which a distinction can be introduced as to time. Occupiers of part of a house would not be entitled to vote for members of parliament, *as occupiers, except for the special clause in the Reform Act, stat. 2 & 3 W. 4, c. 45, s. 29. [PATTESON, J., [*212

(*a*) April 27th. Before Lord Denman, C. J., Patteson, Williams and Wightman, Js.

referred to *Rex* v. *Brown*, 8 East, 528, and *Rex* v. *Bell*, 7 T. R. 598.] Those cases appear to show that, if there be a distinct subject of occupation, the occupier of that may be rated separately from the owner who is the general occupier; as in the case of a dairy farm or a waggon way. But where that is not so the owner is rateable for all, as in the case of the General Cemetery Company, *Regina* v. *St. Mary Abbots, Kensington*, 12 A. & E. 824. And here, in fact, the proprietors are rated for the theatre generally. One party may be rateable for the surface of the soil, another for the occupation of part under the surface by pipes, &c.; *Rex* v. *The Chelsea Water Works Company*, 5 B. & Ad. 156; but both parties could not be rated for the same part. It is observable that in this case, not only the appellant does not repair, but the proprietors reserve the right to do so.

Sir *W. W. Follett*, Solicitor General, and *Chambers*, contrà. The question is not as to the rateability under the general law of stat. 43 Eliz. c. 2, s. 1, but as to the effect of the words, in stat. 10 G. 3, c. 75, s. 13, "inhabit, hold, occupy, possess, or enjoy any land, house, shop, wharf, warehouse, or any other building, tenement, or hereditament." The appellant here enjoys a tenement, taking the word as it must be understood from the context(*a*). It is urged that the company of proprietors is already rated for this tenement. *Probably, however, the value of the theatre in their hands has been estimated with a deduction for the value of the box, which, properly speaking, is not their's. It is true, as pointed out, that the proprietors reserve the right of repairing: that, however, is not an uncommon proviso in cases where a whole house is let, and where it could not be suggested that any but the lessee was the occupier. *Rex* v. *Morgan*(*b*) shows that it cannot always be assumed that a landlord occupies where a tenant does not. It is asked whether a party could be rated for a stall at the Opera House; but in *Rex* v. *Caversham*, 4 B. & C. 683, the Court seemed to think that even a settlement might be gained, under stat. 13 & 14 C. 2, c. 12, s. 1, by occupying a stall in a market on the market days.

Cur. adv. vult.

Lord DENMAN, C. J., in this term, (May 28th,) delivered the judgment of the Court.

The question in this case is, whether *Miss Burdett Coutts* is liable to be rated under an act, 10 G. 3, c. 75, in respect of a private box at the Theatre Royal, Drury Lane.

This box was demised to the late Mr. Coutts, under an act for rebuilding the theatre, for a long term of years. The lease grants an exclusive right to occupy the box and a small room adjoining, whenever any performances take place, and a private entrance to the same in common with other private boxes.

The words of stat. 10 G.3, c. 75, s. 13, are, that the persons there mentioned "shall make one or more rate or rates, assessment or assessments, for and towards the relief of the poor, and for the several purposes of this act, upon all and every person or persons who do or shall inhabit, hold, occupy, possess, or enjoy any land, house, shop, wharf, warehouse, or any other building, tenement, or hereditament."

We are of opinion that the box in question is a tenement within the meaning of this act, and that it is held and occupied by the appellant so as to

(*a*) See *Rex* v. *The Manchester and Salford Water Works Company*, 1 B. & C. 630; *Rex* v. *Mosley*, 2 B. & C. 226; *Rex* v. *The Trustees for paving Shrewsbury*, 3 B. & Ad. 216; *Colebrooke* v. *Tickell*, 4 A. & E. 916; *Rex* v. *Barker*, 6 A. & E. 388.

(*b*) Note (*a*) to *Rex* v. *Greame*, 2 A. & E. 618.

make her liable to be rated. The words are too large to admit of any other construction; and none of the cases referred to at the bar lead to any different conclusion.

It is argued that the proprietors are rated for the whole theatre, and that, if the appellant be also rated, the same premises will in effect be rated twice over. But this consequence by no means follows. The proprietors are rated in respect of their general possession of the theatre, of which the box in question forms a very small part, the rent being only 1*d*. per annum, and may fairly be considered as not taken into account in rating the proprietors; whereas the appellant is rated in respect of this particular box. If, however, the consequence did follow, it would show only that the proprietors were rated too highly, not that the appellant is not liable at all, which is the question submitted to us.

The order of sessions must therefore be quashed.

Order of sessions quashed.

*The QUEEN *against* The Inhabitants of TIPTON. [*215

Pauper was born a bastard in the workhouse of the parish of H., where her mother was then maintained as a pauper belonging to H. H. consisted of several townships, maintaining their poor jointly: the workhouse was in one of these; and pauper's mother was settled in H., in respect of a part of H. which was in another township. After pauper's birth, separate parish officers, under stat. 13 & 14 C. 2, c. 12, s. 21, were appointed for each of the townships, and thenceforward they maintained their poor separately.

Held that, both under and independently of stat. 54 G. 3, c. 170, s. 3, the pauper, at her birth, was settled in the parish of H., but not in any particular township: and that she had not, after the separation of the townships, a settlement in the township in which the workhouse was.

ON appeal against an order of two justices, removing *Elizabeth Shaw* from the parish of Tipton in Staffordshire to the township of the borough of Hales Owen in Shropshire, the sessions quashed the order, subject to the opinion of this Court upon the following case.

The parish of Hales Owen, at the time of the birth of the pauper, which took place about twenty years ago, in the workhouse situate in the town of Hales Owen in Shropshire, consisted of the appellant township of Hales Owen, the township of Oldbury, and ten other townships in Shropshire, and three other townships in Worcestershire. The three Worcestershire townships had always separate overseers, and supported their poor, and managed their parochial affairs apart from each other, and also apart from the rest of the parish; but the other part of the parish of Hales Owen, which is in Shropshire, and which includes the appellant township of Hales Owen, the township of Oldbury, and the other ten townships in Shropshire, formed a distinct parish, from time immemorial up to the year 1832, and never had but one set of overseers, who were annually appointed overseers of the poor of the parish of Hales Owen in Shropshire, and who, with the churchwardens, made a joint rate which formed one common fund for the relief of the poor and other parochial disbursements, and of which a joint account was kept and audited in the usual way.

*In 1832, an application was made to the justices of Shropshire to appoint overseers of the township of Oldbury: and, upon their refusing, the inhabitants of Oldbury applied to the Court of King's Bench, and obtained a rule for a mandamus to compel such appointment; which [*216

rule, after argument, was made absolute(*a*): and the justices accordingly appointed separate overseers of the poor of the township of Oldbury, and each of the other Shropshire townships, and from that time ceased to appoint overseers of the poor for the parish of Hales Owen.

The pauper *Elizabeth Shaw* was born a bastard in the workhouse, which was situate within the appellant township, about ten years before the division of the parish of Hales Owen in 1832: which workhouse was then, and always previously had been, used for the reception and accommodation and maintenance of the poor of the whole of the said parish of Hales Owen in Shropshire, then consisting of all the said townships: but the pauper's mother, at the time of the birth of the pauper *Elizabeth Shaw*, was legally settled in that part of the parish of Hales Owen which subsequently became, and now forms, the distinct township of Oldbury; and, at the time of the pauper's birth, she was maintained in the said workhouse as a pauper of the parish of Hales Owen.

The question for the opinion of the Court was, whether, upon the foregoing facts, the pauper *Elizabeth Shaw* was settled in the township of Hales Owen in Shropshire, by reason of her having been born in the said workhouse under the circumstances before stated. If so, the judgment of the sessions was to be quashed, and the order of removal affirmed; if not, the judgment of the sessions to be affirmed.

*217] *The case was argued last term(*b*).

Corbet, in support of the order of sessions. The pauper had not a birth settlement in the township of the borough of Hales Owen. It is not to be assumed that an illegitimate child must necessarily have a birth settlement somewhere: that was pointed out by BAYLEY, J., in *Rex* v. *St. Nicholas, Leicester*, 2 B. & C. 889. 891. There is, indeed, primâ facie, ground for believing the settlement to be in the appellant township, because the pauper was in fact born within that township, and it is now, for purposes of settlement, a parish. But, in 1822, the year of her birth, there was no such district, supporting its own poor, as the township of the borough of Hales Owen. Such a district has since been created; but it is not thereby made liable, in its parochial character, in respect of what occurred before that character attached to the district. The pauper is therefore no more a parishioner of the appellant township than of any other district in the old parish. In *Rex* v. *Oakmere*, 5 B. & Ald. 775, it was held that a bastard, born in an extraparochial district which afterwards, under an act of parliament, was made a township maintaining its own poor, had no settlement in such township: and, in principle, it can make no difference as to this question, that the new township here formed, at the time of the pauper's birth, part of a parish. There the pauper had no settlement when born, and gained none by the creation of the district; here the pauper, when born, had indeed a settlement in the old parish, but was equally

*218] incapable of gaining one in the new district. If *this leads to the conclusion that the pauper has no settlement, it may be a hardship, but, as has been pointed out, such an argument does not affect the question. But, further, under stat. 54 G. 3, c. 170, s. 3, if the townships, in their new character, are places of settlement, the pauper, having been born in a workhouse, has a birth settlement, not in the appellant township, but in the township from which her mother was sent to the workhouse, which must have been Oldbury. That view may perhaps be countenanced by the re-

(*a*) *Rex* v. *The Justices of Salop*, 3 B. & Ad. 910.
(*b*) April 23d, 1842. Before Lord Denman, C. J., Patteson, Williams, and Wightman, Js.

marks made upon *Rex* v. *Oakmere*, 5 B. & Ald. 775, by Lord DENMAN, C. J., in *Rex* v. *Oldbury*, 4 A. & E. 167. 173, which was a case relating to this parish.

F. V. Lee, contrâ. [Lord DENMAN, C. J. If the Court agrees with you as to the first point, must not it hold against you upon stat. 54 G. 3, c. 170, s. 3?] The statute is inapplicable. The mother of the pauper was actually maintained as a pauper, not of Oldbury, but of Hales Owen. The act therefore merely causes the present pauper's birth place, for the purpose of settlement, to be in the Shropshire district at large. That does not fix the birth place in any one of the twelve districts rather than another. But now it has become material to inquire in what part of that district this pauper was born in fact. In *Rex* v. *Oakmere*, 5 B. & Ald. 775, the question arose in respect of a place which had been extraparochial at the time of the birth. and Lord TENTERDEN said "this is not like the case of a modern appointment of overseers to places that formerly had no such officers; because all such places must have been vills from time immemorial, and consequently under a legal obligation to maintain *their poor, and possessing a legal right to the appointment of officers, and by such appointment to remove persons under the same circumstances as other townships or parishes might do." The pauper therefore is here settled in the immemorial township of the borough of Hales Owen. *Rex* v. *St. Nicholas*, *Leicester*, 2 B. & C. 889, is inapplicable, because there, as in *Rex* v. *Oakmere*, 5 B. & Ald. 775, the place was extraparochial. Here, if the order of sessions is upheld, all the settlements gained in the parish before the division will be destroyed. [*219]

Cur. adv. vult.

Lord DENMAN, C. J., in this term, (May 28th,) delivered the judgment of the Court.

The question in this case arises upon the removal, by order of two justices, of a pauper, *Elizabeth Shaw*, from the parish of Tipton to the township of the borough of Hales Owen, in the county of Salop. The sessions quashed the said order, and stated a case for the opinion of the Court of Queen's Bench, which is in substance as follows.

Previously and up to the year 1832, the parish of Hales Owen consisted of fifteen townships, twelve of which are in the county of Shropshire and three in the county of Worcester. The three latter were always independent of the other twelve townships, and of each other, for the purposes of maintaining their poor. The former twelve "from time immemorial" (until the year 1832) constituted one parish, having one set of overseers, and maintained their poor as such *parish*.

In the said year 1832, by virtue of a writ of mandamus *(on the application of one of the said twelve townships, Oldbury,) the said parish of Hales Owen became divided; and all the said twelve townships in the county of Shropshire have since maintained their poor apart, have had separate overseers, and none have since been appointed for the parish of Hales Owen. About ten years before such subdivision, the pauper was born a bastard in the parish workhouse in the township of the borough of Hales Owen. And the question is, whether she gained a settlement in the latter township by such birth. And that must depend upon this: how far, before such subdivision, each township ought to be considered as connected with, or independent of the parish for purposes of settlement. Generally speaking, they are not so connected: any act, by which a settlement may be gained, has no reference to the township in which it may be acquired, but to the parish only. Whether that settlement was gained in the township [*220]

of the borough of Hales Owen, or Oldbury, or any other of the twelve townships constituting the parish of Hales Owen, was, before the separation, wholly immaterial. It was not a settlement gained in township A. or B., but in the district where alone it could be gained, the parish.

This point has been, to a certain extent, under the consideration of the Court in respect of this same parish and townships, in the case of *Rex* v. *Oldbury*, 4 A. & E. 167. There was an order of removal into the township, Oldbury; and, in support of it, a former order was produced, removing the pauper into the parish of Hales Owen, against which there had been no *221] appeal. Such latter *order was relied upon as conclusive against the township of Oldbury, and was held so to be by the court of quarter sessions. The court, however, decided, with some hesitation, that it was not; which decision could only have been upon the ground that a settlement in the parish is not a settlement in the *whole* and also *in every part* or township in it. Because, if it had been, the sessions were unquestionably right. For if, as was then contended, the proof of a settlement there given applied to the parish and to every township, equally and to the same extent, the order of removal unappealed against would have been conclusive, and all evidence against it inadmissible.

The *decision* in the case of *Rex* v. *Oakmere*, 5 B. & Ald. 775, cited in the argument, was to this effect: that the birth of a pauper in the forest of Delamere, whilst extraparochial, gained no settlement in the township of Oakmere, which was constituted such township by act of parliament long after; or, in other words, that the state of things at the time of the birth was to be considered; and then no settlement could, of course, be gained. So here, by stat. 54 G. 3, c. 170, s. 3, the settlement of the pauper, at her birth, was in the *parish* of Hales Owen, that being "the district," "on whose account" the pauper's mother "was received and maintained" in the workhouse. The *locality* therefore of the township of the borough of Hales Owen is excluded; and all the townships contributing to the workhouse stand on the same footing. Indeed, independently of the statute, the settlement by birth would have been in the parish.

*222] *That being so, to sustain the order of removal into the township of Hales Owen, we must hold that a settlement by birth was gained equally in the parish and each of the twelve townships composing it, for which we can find no warrant of direct authority, or analogy in the law of settlement.

It has been suggested, as a difficulty, that, unless we so hold, the parish by subdivision will get rid of settlements, and that persons, who would otherwise have gained them, may have none. A similar result happened under circumstances nearly the converse of the present, in the case of *Rex* v. *Saighton on the Hill*, 2 B. & Ald. 162. There the pauper had gained a settlement in Saighton on the Hill, and afterwards in Gloverstone, *then* a township: afterwards, by a certain alteration in the castle of Chester, all the houses in Gloverstone were pulled down; and it ceased to exist as a township. The removal was accordingly into Saighton on the Hill, as the last practicable place of settlement. The Court, however, decided that the settlement in Saighton on the Hill was extinguished by that in Gloverstone, though the necessary effect of the decision was to leave the pauper without any settlement at all.

Upon the whole, we are of opinion that the decision of the sessions was right, and that their order must be confirmed.

Order of sessions confirmed(*a*).

(*a*) The above decision was relied upon in *Regina* v. *Hunnington*, decided November 15th, 1843, which case the Court held to be the same in principle with *Regina* v. *Tipton*, (suprà,) and to be governed by it

*The QUEEN *against* The BIRMINGHAM and GLOUCESTER Railway Company.

A corporation aggregate may be indicted by their corporate name for disobedience to an order of justices requiring such corporation to execute works pursuant to a statute. And, if such indictment be preferred at assizes or sessions, where parties cannot appear by attorney, the proper course is to remove it into this Court by certiorari, and compel appearance by distress infinite.

On motion to quash such indictment, as not maintainable against a corporation, the Court refused to quash, but directed them to demur, reserving leave to them, if judgment should be given against them on the demurrer, to plead over.

INDICTMENT, found at the Spring assizes for the county of Worcester, 1840, against a corporation aggregate, the Birmingham and Gloucester Railway Company, for disobedience to an order of justices and an order of sessions confirming it, whereby the defendants, pursuant to certain provisions contained in the statute(*a*) incorporating the company, were directed to make certain arches to connect lands which had been severed by the railway. The defendants not coming in to plead under the usual venire, some of the goods of the company were seized under a distringas; and at the Worcester Summer assizes, 1840, two of the directors appeared in court to plead, but the officer of the court refused to receive their plea; and, an application on the subject being made to the learned Judge, (PARKE, B.,) he intimated an opinion that the defendants could appear only by attorney, that they could not appear by attorney at the assizes, and that the only course was to remove the indictment by certiorari into this Court, and that the defendants should plead by attorney there(*b*).

In Hilary term, (January 21st,) 1841, *Whateley* obtained a rule for a certiorari to bring up the indictment; LITTLEDALE, J., observing, on the motion, that he never heard of an indictment against a company for disobedience to an order. In the same term *Whateley* obtained a rule to show *cause why the indictment should not be quashed, as not being maintainable against a corporation. In Trinity term, 1841, (*c*) [*224

Talfourd, Serjt., showed cause, and contended that, although an indictment for misfeasance would not have lain, corporations were indictable for omission of duty(*d*). (The authorities and precedents mentioned were again cited on the argument of the demurrer.) He also urged that the objection taken was no ground for a motion to quash, but might be raised on demurrer, in arrest of judgment, or by writ of error. On this point he cited *Rex* v. *Cooke*, 2 B. & C. 618.

Whateley, in support of the rule, contended that in all the precedents individual, were pointed out against whom ulterior proceedings could be taken on conviction: here it was not known who composed the company. And that, if the prosecutors demurred and judgment were given against them, they would be concluded.

Lord DENMAN, C. J. As to the proceedings, I do not feel the difficulty so strongly as you put it. We do not, however, wish to decide the point on this motion. We take upon ourselves to say that you may demur; and, if we decide against you, you may plead over.

Per curiam; Rule discharged.

(*a*) 6 & 7 W. 4, c. xiv., local and personal, public.

(*b*) *Regina* v. *The Birmingham and Gloucester Railway Company*, 9 C. & P. 469.

(*c*) May 27th. Before Lord Denman, C. J., Patteson, Williams, and Wightman, Js.

(*d*) Stat. 6 & 7 W. 4, c. xiv., s. 1, enacts that the company may "sue and be sued" by their corporate name; and sect. 120, regulates the form of indictment in prosecutions by them: but the act gives no direction as to indictments against them.

*225] *The defendants appeared in this Court, and demurred: and, the prosecutors having joined in demurrer, the case was argued, in last Hilary term,(*a*) by

Whateley, for the defendants. This indictment might have been found at sessions; and the defendants, though willing to plead and exposed to a distringas from time to time for not pleading, could not have pleaded below, because as a corporation they can appear and plead only by attorney, whilst at sessions the parties must appear in person. This is a strong argument against the validity of such an indictment; and it is no answer to say that the indictment may be removed into the Crown Office.(*b*) But, supposing the defendants to have pleaded and to have been found guilty, no punishment can follow: the judgment for a misdemeanor is that the defendant be fined, et quod idem A. B. capiatur ad satisfaciendum dicto Domino regi de fine prædicto: that is the form in *Fanshawe's Case*, Trem. P. C. 202. 204; and a similar form is used in *Holles' Case*, Trem. P. C. 294. 302. A corporation aggregate cannot be taken; and, supposing it to have no property, there is no punishment that could be enforced; they cannot "be outlawed, nor excommunicate, for they have no souls, neither can they appear in person, but by attorney; 33 H. 8, Br. Fealty," Bro. Ab. Fealtie & Homage, pl. 15; *The Case of Sutton's Hospital*, 10 Rep.1 *a*,
*226] 32 b. So in Com. Dig. Franchises, *(F 19,) it is said that "process of outlawry does not lie against a corporation aggregate;" "and therefore trespass does not lie against a corporation, but against the particular persons only; for a capias and exigent do not go against a corporation." And in an *Anonymous Case*, 12 Mod. 559, it is said: "Note: Per HOLT, C. J. A corporation is not indictable, but the particular members of it are." The authorities which may be cited on the other side do not impugn this position. There is the precedent of an indictment, 3 Chit. Cr. Law, 600, against a company of proprietors and certain individuals, assignees of the corporation of Bath, for non-repair of a bridge: but the joinder of individuals removes the difficulty; for they might be taken to satisfy the fine. In *Rex* v. *Mayor, &c. of Liverpool*, 3 East, 86, this objection was not taken, and the indictment failed on a different ground. In *Rex* v. *Mayor, &c. of Stratford-upon-Avon*, 14 East, 348, the indictment, which was for non-repair of a bridge, was successful; but this objection was not taken; and, as the defendants were indicted by their corporate style of mayor, aldermen and burgesses, the difficulty would not exist, for the sheriff would only have to ascertain the individual person who was mayor, and take him; and the same observation applies to all the modern cases. It appears from a note in the Crown Office that in *Rex* v. *Owners and Occupiers of ground called Burn, in the Parish of Easingwold*, Hil. T. 1778,(*c*) for not repairing a highway, a motion was made to quash the indictment because no particular person was named: a rule nisi was granted; and in the following term the rule was made absolute without opposition; and this remark is appended: "It appears therefore that an
*227] *indictment of a road repairable ratione tenuræ ought to mention the names of the persons bound to repair, and not to run generally

(*a*) Wednesday, January 26th. Before Patteson, Coleridge, and Wightman, Js.

(*b*) "Although" "at the assizes and sessions, the defendant must appear in person, before plea, it is otherwise in the King's Bench in the case of misdemeanors;" 1 Chit. Cr. L. 411, 2d ed. Even in this Court, the appearance of a defendant in a criminal case by attorney seems to be ex gratiâ curiæ. See 4 Hawk. P. C. 118, 7th ed. B. 2, c. 26, s. 53, *Bacon's Case*, 1 Lev. 146.

(*c*) By Mr. Dealtry.

against the owners, &c., as if it was against the inhabitants of a district." It it not contended that the company cannot be punished for disobedience; but this is not the form. In some recent indictments against a gas company a shareholder was indicted by his individual name. If it be said that, although, in the case of a misfeasance, the individual members who are guilty must be indicted, a corporation as such is indictable for nonfeasance, this case falls within the distinction, for the indictment is for a contempt, averring notice: notice cannot be given to the corporation, but only to individual members: and if one of them can be shown to have had notice, he is liable for the contempt.

Talfourd, Serjt., contrà. For a nonfeasance a corporation aggregate is indictable in the corporate name: there is indeed no direct authority for the position; but the course of precedents has been uniform for centuries; and the doctrine has frequently been taken for granted both in arguments and by the Judges, and is consistent with every thing advanced on the other side except the Anonymous note in 12 Mod. 559. Mr. Kyd comments on that case,1 Kyd on Corp. 225, ch. 2, s. 1, and draws the distinction correctly: "It seems" that, "where a corporation is bound to keep a bridge or a highway in repair, an indictment will lie against it for not repairing. It is, indeed, reported to have been said by Lord Chief Justice HOLT, that a corporation is not indictable, but the particular members of it are; but I apprehend that can apply only to the case of a crime or misdemeanor, and *that an indictment may lie against a corporation, in the cases mentioned, as well as against a county or a parish." In [*228] cases of active misfeasance the individuals step out of their corporate capacity: and it may be on this analogy that it is said trespass will not lie: but trover will, and, as it seems, even for the act of servants not authorized under seal; *Yarborough* v. *Bank of England*, 16 East, 6;(*a*) and doubtless it would now be held that trespass will lie.(*b*) There seems to be no reason against pleading either at assizes or sessions by attorney properly constituted; at all events the party might plead in this Court: the process will be the same as it is in all cases where outlawry does not lie: thus, on an indictment against a peer, other than for treason, felony, or force, it is by venire and distress infinite; 4 Hawk. P. C. 139, B. 2, ch. 27, s. 12.(*c*) The difficulty now suggested was felt and overcome as to an appearance in Chancery; in *Salmon* v. *The Hamborough Company*(*d*) a bill was dismissed because in the ordinary course of proceedings the Chancery could not relieve the plaintiff; for the defendants, being a company, and served with process would not appear, they having nothing to be distrained by: but on appeal the House of Lords ordered that the dismission should stand reversed, that the Court of Chancery should issue forth the usual process, and, if cause were, a distringas thereupon against the corporation, and that, if upon return of the process the corporation should not appear, or *should appear [*229] and not answer, the bill should be taken pro confesso, and a decree should thereupon pass, to be enforced, if necessary, by levies upon every member of the company. In *Rex* v. *Clifton*, 5 T. R. 498, the same difficulty was urged as a reason for not indicting a whole parish for non-repair

(*a*) See *Smith* v *The Birmingham Gas Company*, 1 A. & E. 526.

(*b*) It was so held in *Maund* v. *Monmouthshire Canal Company*, C. P., June 9th, 1842; 5 Scott, N. S. 457. As to service of declaration in ejectment on a corporation, see Doe dem. *Fisher* v. *Roe*, 10 M. & W. 21.

(*c*) See also 4 Hawk. P. C. 143, B. 2, c. 27, s. 14; *Rex* v. *Mayor, &c. of Hertford*, 1 Salk. 374, 1 Chit. Cr. L. 347, 348.

(*d*) Ca. Chan. 204. S. C. 6 Vin. Abr. 310, tit. Corporations, (B. a,) pl. 2.

where it lay in two counties; and (though ASHHURST, J., differed in opinion) Lord KENYON and BULLER, J., held that the difficulty might be obviated by removing the record into this Court. Neither does it follow that because it may turn out under certain circumstances, such as want of corporate property, that a corporation cannot be punished, it is therefore not indictable: otherwise there could not be a mandamus to a corporation; for on a contempt obedience is enforced by attachment(*a*): parishes are indicted for the non-repair of highways, and counties for non-repair of bridges; but they cannot be imprisoned. [COLERIDGE, J. You indict the inhabitants of the parish, and the men of the county: may you not take any of them?] In practice all of them could not be taken; but any particular inhabitants may be made the defendants, which is otherwise in the case of a corporation. In *Rex* v. *The Severn and Wye Railway Company*, 2 B. & Ald. 646, it was assumed that the company might have been indicted for taking up their railway, which was a public highway; and the books contain many precedents of similar indictments(*b*). That of *Rex* v. *The Mayor*, *&c. of Strat-*
*230] *ford-upon-Avon*, 14 East, 348, is *very strong. The mode in which a corporation might be reached was discussed in the case of Thusfeild and Jones, Master and Wardens of the Company of Waxchandlers, Skin. 27, who, being cited in the spiritual court, for a church-rate on the company's hall, by their names of baptism and their sirnames, with the addition of Master and Wardens of the Company of Waxchandlers, moved for a prohibition on the ground that they were sued in their natural capacity, when it should be in their politic capacity; "but the Court said, there was no other way of citing them than this; they could not cite the body politic; and therefore, unless by this way, they had no remedy: and it was not like a distringas at common law, by which they may take lands or goods of the company; but if the company had neither land nor goods, there was no way to make them appear; but here they said they were cited by their proper names, but in their politic capacity; but if they stood out, then they must lie by the heels in their natural capacity:" and the prohibition was denied.

It is clear that no individual member of the corporation could be indicted for an act done by him as one of the corporation; unless perhaps it were proved that he had committed a wrong from malicious motives; *Harman* v. *Tappenden*, 1 East, 555: and, whatever might be the case if the order were made on individual members, here it is made on the corporation as such, and, under the act, it could not have been otherwise. The joinder of individuals in *Rex* v. *The Kennet and Avon Navigation Company*, 3 Chit. Cr. Law, 600, could make no difference; for the individual defendants
*231] could not plead for the *company. Corporations have pleaded misnomers to actions brought against them. It does not follow that, because process of outlawry does not lie, a party is therefore not indictable: in The Lord Dacre's Case(*c*) the defendant was indicted for encroaching upon the highway, and an exception was taken under the statute of additions, 1 H. 5, c. 5, because it was not expressed of what place he was: "sed non allocatur, for process of outlawry lieth not against him, but distress."

(*a*) See *Morgan* v. *The Corporation of Carmarthen*, 3 Keb. 350.
(*b*) He referred to Cro. Circ. Comp. 355, 3 Chit. Cr. L. 586, 4 Wentw. 157. 3 Chit. Cr L. 603. (indictment against the Dean and Chapter of Christ Church, and the Mayor, Bailiffs and Commonalty of Oxford, for not cleansing a water course,) was also cited, in showing cause against the motion to quash.
(*c*) Cro. Eliz. 148. See also Johnson's Case, Cro. Jac. 609.

Whateley, in reply. In all the modern precedents individual members of the corporation are included or ascertained, and they may be proceeded against. In the case of The Corporation of Poole(a) it was found necessary to direct the mandamus to individuals specified by name.

Cur. adv. vult.

PATTESON, J., in this term, (May 28th,) delivered the judgment of the Court. After stating the indictment, removal by certiorari, appearance, demurrer, and ground of demurrer, his Lordship proceeded as follows.

Upon the argument it was not contended on the part of the company that an action of trespass might not be maintained against a corporation; for, notwithstanding some dicta to the contrary in the older cases, it may be taken for settled law, since the case of *Yarborough* v. *The Bank of England*, 16 East, 6, in which the cases were reviewed, that both trover and trespass are maintainable: *but it was said that an indictment will not lie against a corporation. Only one direct authority was cited for this [*232 position; and it is a dictum of Lord HOLT in an Anonymous case reported in 12 Mod. 559. The report itself is as follows: "Note: Per HOLT, Chief Justice. A corporation is not indictable, but the particular members of it are." What the nature of the offence was to which the observation was intended to apply does not appear; and as a general proposition it is opposed to a number of cases, which show that a corporation may be indicted for breach of a duty imposed upon it by law, though not for a felony, or for crimes involving personal violence, as for riots or assaults; Hawk. P. C., B. 1, c. 66, s. 13, Vol. ii. p. 58, 7th. ed.

A corporation aggregate may be liable by prescription, and compelled, to repair a highway or a bridge; Hawk. P. C., B. 1, c. 76, s. 8, c. 77, s. 2, Vol. ii. pp. 156. 258: and in the case of *Rex* v. *The Mayor, &c. of Liverpool*, 3 East, 86, the corporation were indicted by their corporate name for non-repair of a highway, and, upon argument in this Court, the indictment was held to be defective; but no question was made as to the liability of a corporation to be indicted.

In the case of *Rex* v. *The Mayor, &c. of Stratford-upon-Avon*, 14 East, 348, the corporation was indicted by its corporate name for a non-repair of a bridge, and found guilty, and upon argument in this Court the verdict was sustained, and no question made as to the liability generally of a corporation to an indictment for breach of a duty cast upon it by law.

*Upon the discussion of the question in the present case, the counsel for the company relied chiefly upon the circumstance of the indictment being found at the quarter sessions,(b) where the company could not appear and take their trial, even if so disposed, as a corporation can only appear by attorney, and the appearance at the sessions must be in person. We think there is no weight in this objection. It may indeed impose some difficulty upon the prosecutor, and render his proceeding more circuitous, as he will be obliged to remove the indictment by certiorari into this Court in order to make it effective; but the liability of the corporation is not affected. [*233

In the case of *Rex* v. *Gardner*, 1 Cowp. 79, it was objected that a corporation could not be rated to the poor, because the remedy by imprisonment upon failure of distress was impossible; but the Court considered the objection of no weight, though it might be that there would be some difficulty in enforcing the remedy.

(a) See *Regina* v. *Ledgard and Others*, 1 Q. B. 616. 620.
(b) It was so put, hypothetically, in the argument for the defendants.

The proper mode of proceeding against a corporation, to enforce the remedy by indictment, is by distress infinite to compel appearance, after removal by certiorari, as suggested by Mr. Baron PARKE in this very case, reported in 9 Car. & Payne, 469, and as appears by Hawk. P. C., B. 2, c. 27, s. 14, Vol. iv. p. 140, and the cases cited in 6 Vin. Abr. 310, &c., tit. Corporations, (B. a) Vol. iv. p. 140.

We are therefore of opinion that upon this demurrer there must be judgment for the Crown. Judgment for the Crown.(a)

(a) The defendants pleaded over in the same term, (see p. 224, antè,) and were convicted at the ensuing Summer Assizes, 1843, and fined 6s. 8d.

*234] *ROSCORLA *against* THOMAS.

Declaration stated that, in consideration that plaintiff, at the request of defendant, had bought a horse of defendant at a certain price, defendant promised that the horse was free from vice; but it was vicious. *Held* bad, on motion in arrest of judgment; for that the executed consideration, though laid with a request, neither raised by implication of law the promise charged in the declaration, nor would support such promise, assuming it (as must be assumed on motion in arrest of judgment) to be express.

ASSUMPSIT. The declaration stated that, whereas heretofore, to wit, &c., in consideration that plaintiff, at the request of defendant, had bought of defendant a certain horse, at and for a certain price, &c., to wit, &c., defendant promised plaintiff that the said horse did not exceed five years old, and was sound, &c., and free from vice; nevertheless defendant did not perform or regard his said promise, but thereby deceived and defrauded plaintiff in this, to wit, that the said horse, at the time of the making of the said promise, was not free from vice, but, on the contrary thereof, was then very vicious, restive, ungovernable, and ferocious; whereby, &c.

Pleas: 1. Non assumpsit. Issue thereon.

2. That the horse, at the time of the supposed promise, was free from vice, and was not vicious, restive, ungovernable or ferocious, in manner, &c.: conclusion to the country. Issue thereon.(a)

On the trial, before WIGHTMAN, J., at the Cornwall Spring assizes, 1841, a verdict was found for the plaintiff on both the above issues. In Easter term, 1841, *Bompas*, Serjt., obtained a rule nisi for arresting the judgment on the first count.(b) In last term,(c)

*235] **Erle* and *Butt* showed cause. The objection is, that the first count states only a nudum pactum. But there is an execution consideration, which, with a request, will support a promise. Now the request need not be express: wherever the law will raise a promise, a request by the party promising will be implied; note [c] to *Osborne* v. *Rogers*, 1 Wms. Saund. 264 a. *Payne* v. *Wilson*, 7 B. & C. 423, was the converse of the present case: there a consideration, which in its form was executed, was declared on as executory; and this was held to be no variance, because in reality the consideration was continuing. Here the declaration states an executed consideration in form; but it is, practically, executory, because the sale and warranty would be coincident. In *Thornton* v. *Jenyns*,

(a) There were other counts, on which issues were joined and found for the defendant.

(b) The rule was also for entering a verdict, on the evidence, for the defendant; but on this the Court did not decide.

(c) April 28th, 1842. Before Lord Denman, C. J., Patteson, Williams and Wightman Js.

1 Man. & G. 166, the declaration charged that, in consideration that plaintiff *had promised* to defendant, defendant *then promised* plaintiff. It was objected that this was an executed consideration without a request, which was insufficient where the law would not raise a promise; and *Brown* v. *Crump*, 1 Marsh. 567, was cited: but the Court held that the two promises might be considered as simultaneous, and that the objection therefore could not be sustained.(*a*)

Bompas, Serjt., and *Slade*, contrà. The warranty ought to be given at the time of the sale: if made after, it is without consideration; 3 Blackst. Com. 166, Com. Dig. Action upon the Case for a Deceipt, (A. 11,) *Roswell* v. *Vaughan*, Cro. Jac. 196; *Pope* v. *Lewyns*, Cro. Jac. 630; *Thornton* v. *Jenyns*, 1 Man. & G. 166, *was a case of mutual promises, which can never literally be made at the same moment: here the [*236 declaration definitely lays the perfect sale as antecedent to and distinct from the warranty. And the warranty is a matter not implied by law upon a sale; *Parkinson* v. *Lee*, 2 East, 314. Even an express promise without a legal consideration is invalid; *Collins* v. *Godefroy*, 1 B. & Ad. 950. In *Hopkins* v. *Logan*, 5 M. & W. 241, there was an executed consideration from which a promise to pay on request would have arisen: and it was holden that this did not support a promise to pay on a future day named. [PATTESON, J., referred to *Hunt* v. *Bate*, 3 Dyer, 272 a, as cited in *Eastwood* v. *Kenyon*, 11 A. & E. 438. 452, and to *Lampleigh* v. *Brathwait*, Hob. 105, 5th ed.(*b*.) *Cur. adv. vult.*

Lord DENMAN, C. J., in this term, (May 30th,) delivered the judgment of the Court.

This was an action of assumpsit for breach of warranty of the soundness of a horse. The first count of the declaration, upon which alone the question arises, stated that, in consideration that the plaintiff, at the request of the defendant, had bought of the defendant a horse for the sum of 30*l*., the defendant promised that it was sound and free from vice. And it was objected, in arrest of judgment, that the precedent executed consideration was insufficient to support the subsequent promise. And we are of opinion that the objection must prevail.

It may be taken as a general rule, subject to *exceptions not applicable to this case, that the promise must be coextensive with the [*237 consideration. In the present case, the only promise that would result from the consideration, as stated, and be coextensive with it, would be to deliver the horse upon request. The precedent sale, without a warranty, though at the request of the defendant, imposes no other duty or obligation upon him. It is clear, therefore, that the consideration stated would not raise an *implied* promise by the defendant that the horse was sound or free from vice.

But the promise in the present case must be taken to be, as in fact it was, *express*: and the question is, whether that fact will warrant the extension of the promise beyond that which would be implied by law; and whether the consideration, though insufficient to raise an *implied* promise, will nevertheless support an *express* one. And we think that it will not.

The cases in which it has been held that, under certain circumstances, a consideration insufficient to raise an implied promise will nevertheless support an express one, will be found collected and reviewed in the note [*a*,

(*a*) It was also argued that the warranty might here, after verdict, be taken to be coincident with the sale: to which it was answered that, if it were so, the evidence negatived the declaration.

(*b*) See S. C., 1 Smith's Leading Cases, 67.

to *Wennall* v. *Adney*, 3 Bos. & Pul. 249, and in the case of *Eastwood* v. *Kenyon*, 11 A. & E. 438. They are cases of voidable contracts subsequently ratified, of debts barred by operation of law, subsequently revived, and of equitable and moral obligations, which, but for some rule of law, would of themselves have been sufficient to raise an implied promise. All these cases are distinguishable from, and indeed inapplicable to, the present, which appears to us to fall within the general rule, that a consideration past and executed will support no other promise than such as would be implied by law.

*238] *The rule for arresting the judgment upon the first count must therefore be made absolute. Rule absolute.

The QUEEN *against* STOCKLEY.

An indictment for stealing valuable securities, the property of L. M., and an indictment for misdemeanor in selling and converting securities of the same description in all respects, the property of the same L. M., and entrusted by him to defendant for safe custody, were found, at the same session of the Central Criminal Court, against the same party, and removed by certiorari. Defendant moved that the indictments or one of them might be quashed, on affidavit that both were preferred for the same alleged offence.

The court refused a rule to show cause.

Two bills of indictment were preferred and found, at the same session of the Central Criminal Court, (March 1842,) against *John Bagnall Stockley*. The first indictment charged him, under stat. 7 & 8 G. 4, c. 29, s. 5, with stealing French-Dutch bonds, the property of Lambert Molony, the said bonds being securities entitling L. M. to shares and interests in public funded stock of the kingdom of Holland. There were other counts, laying the property in different parties, and otherwise varying the statement. The second indictment was for a misdemeanor, under stat. 7 & 8 G. 4, c. 29, s. 49, in selling and converting to defendant's own use certain French-Dutch bonds entrusted to him by Lambert Molony (defendant then being a banker and agent) for safe custody, &c., and without any authority to sell, &c. The property was described as in the indictment for felony. There were several counts, varying in the statement. The indictments were removed into this Court by certiorari.

Wordsworth now moved for a rule to show cause why one or both of the indictments should not be quashed, on the defendant's affidavit, stating that they were preferred "for the same identical offence, if any:" it also went

*239] into the merits of the case, and contained *allegations of hardship and misconduct in the prosecutors. *Wordsworth* relied upon *Rex* v. *Doran*, 1 Leach's Cro. C. 538, 4th ed.

Lord DENMAN, C. J. We ought to see a distinct authority, enabling us to do what is required; and even then we should be very careful in exercising such a discretion. The case cited is no authority. It shows only that a judge considered it wrong to prefer the two indictments at once for the same offence, and desired the grand jury not to do so in future. We cannot grant a rule.

PATTESON, WILLIAMS, and COLERIDGE, Js., concurred.

Rule refused.(a)

(a) See The Case of Swan and Jefferys, Fost. Cr. L. 104.

STOCKBRIDGE v. SUSSAMS.

On replication, to a plea of set-off in an action of debt, that plaintiff "never was indebted in manner and form," &c., the plaintiff cannot prove payment.
To let in such proof, he should reply that he was not, nor is, indebted.

DEBT for work and labour, and goods sold, &c., and on money counts. Pleas. 1. Nil debet. Issue thereon. 2. Set-off. Replication: That defendant "never was indebted in manner and form," &c. Issue thereon On the trial, before GURNEY, B., at the Kingston Spring Assizes in this year, the defendant proved his set-off to an amount exceeding the plaintiff's demand; and the plaintiff then offered to prove that he paid part of that amount. The defendant objected that such an answer was inadmissible under the replication "never indebted;" but the learned judge received the evidence, *which reduced the set-off below the claim proved on the other side. The plaintiff had a verdict, and certificate for speedy execution. [*240

Wallinger, in the ensuing term, obtained a rule to show cause why a new trial should not be had, the judgment vacated, and execution withdrawn. He cited *Brown* v. *Daubeny*, 4 Dowl. P. C. 585, and *Jackson* v. *Robinson*, 8 Dowl. P. C. 622.(*a*) A rule nisi was granted.

Platt now(*b*) showed cause. The rule Hil. 4 W. 4, *Pleadings in Particular Actions*, II. 2, 5 B. & Ad. viii., that "The plea of 'nil debet' shall not be allowed in any action," does not affect replications. That the party "never was indebted" means that he was not so before or at the time of action brought; and the plea of payment is applicable to such a replication. Before the new rules, a plea of "never indebted" would have let in such proof, as the plea of non assumpsit would: the one is not more inconsistent with evidence of payment than the other. *Jackson* v. *Robinson* was decided on the authority of *Brown* v. *Daubeny;* and this latter case may, on principle, require to be reconsidered. [COLERIDGE, J. It was acted upon by the court in *Grover* v. *Price*.(*c*) *PATTESON, J. I am not aware that, before the new rules, the plea "never indebted" had been used in the sense you give to it. The rule you refer to says, in speaking of pleas, that "nil debet shall not be allowed in any action," but (II. 3) that, in certain cases, the defendant may plead that he never was indebted in manner and form, &c. Therefore the two forms have different meanings in a plea. Can we then say that they mean the same in a replication? "Never was indebted," primâ facie, means that the party was not indebted at any time whatever; not that he has paid the debt.] The allegation is that the party never was indebted in manner and form, &c.: that is, at the commencement of the suit, as alleged in the plea. [PATTESON, J. The plea "never indebted" uses the same words with reference [*241

(*a*) See the errata at the beginning of the same volume.

(*b*) The court, on granting the rule last term, desired that the case should not be set down in the new trial paper.

(*c*) Easter term, 1842. The plaintiff had replied, to a plea of set-off, that he was not nor is indebted modo et formâ, &c.; whereupon issue was joined; and on the trial, before Coleridge, J., at the Monmouth Spring Assizes, 1841, the plaintiff proved payment, and obtained a verdict. On motion for a new trial, and cause shown (May 2d, 1842, before Lord Denman, C. J., Patteson, Williams, and Wightman, Js.), the court held that, on the issue joined, payment might be shown in answer to the set-off; and the rule was discharged. *Brown* v. *Daubeny*, 4 Dowl. P. C. 585, *Jackson* v. *Robinson*, 8 Dowl. P. C. 622, and *Faithfull* v. *Ashley*, 1 Q. B. 183, were cited. R. Richards and Busby for the plaintiff; Talfourd, Serjt., and W. J. Alexander for the defendant.

to the declaration. COLERIDGE, J. You might have replied that the plaintiff was not nor is indebted, &c.(a)] The defendant was bound by his plea to show that the plaintiff was indebted before and at the time of the commencement of the suit: his defence failed unless the debt were shown to have continued due till action brought: and the replication includes the negative of that fact.

Wallinger, contrà, was stopped by the court.

PATTESON, J.(b) This is an attempt to read "never" as "not." We
*242] cannot give this effect to a replication *while we refuse the same construction to a plea. It was only necessary for the plaintiff to adopt the old form "was not nor is indebted:" but he has chosen to say "never indebted." We cannot assist him without holding that to mean the same as "not indebted." The rule must be absolute.

WILLIAMS and COLERIDGE, Js., concurred.

Rule absolute. Defendant to bring no action.

(a) See Com. Dig. *Pleader*, 2 W. 17.
(b) Lord Denman, C. J., was attending the Privy Council.

The QUEEN *v.* The Inhabitants of VANGE.

The proprietors of lands, situate in parish V. and other parishes of the Isle of Canvey, granted one-third of all the lands in fee to J., in consideration of his embanking and keeping from inundation all the lands in the island. By a local act afterwards passed, commissioners were appointed to keep up the embankment, and empowered for that purpose to tax the owners and occupiers of the granted lands by an annual rate, to the full annual rent or value of such lands respectively; and, if the moneys so levied should prove insufficient (but not otherwise), to tax the other lands in the island.

W. H., being the owner and occupier of all the granted lands in V., was rated, by the commissioners, as owner and occupier, for that property, described in the rate as "house, premises, and lands." W. H. had taken the lands subject to the above liability, paying no purchase money. The assessment on these and the rest of the granted lands equalled the rack rent or full annual value. The annual expenditure on the embankment was necessary to maintain the lands within the island in a state to command any rent from a tenant or to be capable of occupation by the owner.

Held, that W. H. was rateable to the poor in V. for the full annual value of his said lands, without deduction on account of the embankment tax.

BY a rate made for the relief of the poor of the parish of Vange, in Essex, and allowed, March 23d, 1841, William Hilton was assessed in the sum of 9*l.* 6*s.*, as the occupier of premises in Canvey Island; the extent of which premises was estimated at 133a. 1r. 6p., the gross rental at 143*l.*, and the rateable value at 128*l.* The Commissioners of Sewers of Canvey Island were stated to be the owners. On appeal, the Quarter Sessions amended the rate, leaving it as follows:(a)

Name of Occupier.	Name of Owner.	Description of Property, &c.	Name or Situation of Property.	Estimated Extent.	Gross estimated Rental.	Rateable Value.	Rate at 1s. 6d. in the Pound.
				a. r. p.	£ s. d.	£ s. d.	£ s. d.
Hilton, William.	Hilton, William.	House, premises and lands.	Canvey Island.	108 0 0	143 0 0	0 0 0	0 0 0

*243] *subject to the opinion of this court on the following case.

The appellant was the owner and occupier of the property for

(a) The first column, headed "No. of assessment," and the third and fifth, headed "No. of votes," are omitted.

which he was assessed, being a farm called Scar House, lying in that part of the parish of Vange which is situate in Canvey Island. This island contains altogether about 4000 acres, and is situate in, or forms detached parts of, the parishes of Vange and eight others. A considerable portion of the lands of the island are called and known by the name of "Third Acre" lands; of which description the farm before mentioned entirely consists. In the year 1621, Sir Henry Appleton and others, being the owners of certain lands lying in Canvey Island, which lands were at every spring tide overflowed by the river Thames, by indenture, dated 9th of April, 1621, contracted and agreed with Joos Cropenburgh for the inning, enclosing, and fencing of all the grounds in the island, and the same, at his own proper costs and charges, maintaining and keeping from all inundations and overflowings of the said river Thames for ever: and it was in and by the said indenture covenanted and agreed that the said Joos Cropenburgh, in consideration thereof, and of his great pains, hazard and charge in and about the inning and fencing of the said grounds from the inundation and overflowing of the said waters, should have and enjoy to him and his heirs, in fee-simple for ever, one full third part of all and singular the lands of the said parties, situate in the said island.

*Joos Cropenburgh having inned, gained, recovered, and fenced the lands of the island, the said indenture was, in Hilary term, 1622, [*244 by consent of all parties thereto, made a decree of the Court of Chancery; and the third part of all the same lands so inned was thereby decreed and established to Joos Cropenburgh, his heirs and assigns for ever, upon the conditions in the said indenture mentioned.

The lands thus vested in Joos Cropenburgh, his heirs, and assigns, were and are called the "Third Acre" lands, and are known by that name: and the farm before mentioned, belonging to and occupied by appellant, comprises a part thereof. Those lands which remained in Sir Henry Appleton and other persons were and are called the "Free Lands." And those lands which have been since the embankment of the island recovered at different times from the sea by different individual proprietors, are called "Outsands."

By statute 32 G. 3, c. 31, intituled "An act for more effectually embanking, draining, and otherwise improving the island of Canvey, in the county of Essex," (and which is declared a public act,) certain commissioners therein named, and their successors, to be appointed as in the said act is mentioned, were directed and required from time to time, and at all times thereafter, to support or build, raise, strengthen, and maintain the walls and banks and other works of drainage then standing and being in the island, (except such as were erected and made around those parts called the Outsands,) and to make and erect such other walls and banks, sluices and tunnels, and to cut such other drains in, upon, through, and over the island, (except as aforesaid,) as should be necessary for the more effectually *protecting, preserving, and draining of the island; and all such [*245 walls, banks, drains, sluices, tunnels, and other works from time to time to repair, support, maintain, work, cleanse, and use in such manner as the commissioners should direct and appoint.(a)

The act (b) then gave the commissioners power, for the above purposes, from time to time, and at all times thereafter, to tax and charge the owners or occupiers of the Third Acre lands (c) to the full annual rent or

(a) Sects. 1, 11. (b) Sect. 19.
(c) "By an annual rate or assessment upon the several owners and occupiers" &c.

value of such lands respectively, if necessary.(a) And the commissioners were by the act further empowered, if the moneys to be raised upon the owners or occupiers of the Third Acre lands should not amount to the sums which the exigencies of the several years might require, to supply such deficiency by taxing and assessing the several other lands within the island, except the Outsands.(b)

*246] Since the passing of the act, the several works therein mentioned have been and are vested in the commissioners and their successors for the purposes of the act: and they have, in the exercise of the powers given them by the act, repaired and kept in repair the walls, embankments and other works mentioned in the act; and have, in three recent years, (viz. 1837, 1838, and 1839,) in consequence of the proceeds of the Third Acre lands being insufficient for the exigencies of those years, and in pursuance of such powers, assessed and raised certain sums of money on the "free" lands to supply such deficiency. The whole of the sums assessed and raised by the commissioners are applied generally to the repair of the whole of the works vested in the commissioners; and no sum assessed and raised upon any particular portion of the land is applied to any particular portion of the works. There are no more or other Third Acre lands within the parish of Vange than the farm before mentioned. The other land in the island, situate within Vange parish, consists of the "free" land.

The appellant paid nothing for the purchase of the Scar House farm, which he has occupied as the owner thereof, subject to the liabilities imposed on it by the above-mentioned decree and act of parliament. The quantity or extent at which the Scar House farm was estimated in the original assessment includes the portion occupied by that part of the sea wall or embankment, vested in the commissioners, which is contiguous, and upon which the farm is abutting. And the extent at which the same farm is estimated in the rate, as amended by the sessions, is the extent of *247] that portion which belongs to and is occupied by the *appellant, exclusive of the same sea walls, embankments and other works vested in the commissioners.

For several years since, the sums assessed and raised by the commissioners upon the Third Acre lands for the purposes of the act have been equal to the rack rent or full annual value of those lands; and the sum which has been assessed upon and paid by the appellant in respect of the Scar House farm has been, for the current and preceding years, 123*l.* per annum.

The annual outlay and expenditure in and about the repair and main-

(a) "But if not, then only pro tanto by an annual pound rate."

(b) Sect. 19. But the owners, proprietors or occupiers of such several other lands were not to be taxed "except in the case of the absolute inability of the owners of the said Third Acre lands, in respect of those lands, to raise and supply the moneys which from time to time may be wanted."

Sect. 27 provides, "That it shall be lawful for all persons who shall be tenants at rack-rent of the said lands, and who shall have paid any rate or tax to be imposed or levied by virtue of this act, or from whom the same shall have been recovered, to deduct or reimburse themselves the moneys they shall have so paid, or which shall have been recovered from them as aforesaid, and all expenses attending the same, out of the next rent to become due and payable to their respective landlords, who shall and are hereby required to allow such deduction accordingly."

Sect. 38 exempts the works made or to be made under this act from the survey, control, direction or order of the commissioners of sewers.

Parts of sects. 1 and 19, cited, p. 250, post, do not require further mention.

tenance of the sea walls, embankments and other works mentioned in the act, has been and is an expense necessary to maintain the lands within the island in a state to command any rent from a tenant, or to be capable of occupation for any purpose by the owner.

No deduction whatever is made to the appellant, in the rate appealed against, in respect of the sea-wall rate, or embankment tax, paid by him as before mentioned.

The question for the opinion of this court was, whether the said sum of 123*l.*, so assessed upon and paid by the appellant, ought to be deducted from the assumed "gross rental" in estimating the "annual" or "rateable" value of the same farm and lands in assessing the appellant to the poor rate. The decree in chancery was annexed to the special case, and to be considered part of it.

The case was argued in last term.(*a*)

Sir *W. W. Follett*, Solicitor-General, *Knox*, *Ryland* and *W. H. Watson*, in support of the order of sessions. *First, if the appellant's land were rateable at all, the whole 123*l.* assessed by the commissioners upon the Scar House farm must be deducted from the next annual value. [*248 In the judgment of this court, in *Rex* v. *Adames*, 4 B. & Ad. 61. it is said: "The question" "is, in effect, whether the occupier of lands in a district" "which is liable to be flooded, and is protected from floods at a certain occasional expense, (for that is the nature of the sewers' rate,) ought to be rated at the same sum as the occupier of lands of similar quality and of equal annual produce, lying in the same parish, but not liable to the same expense. We are of opinion that he ought not. It is obvious that the average annual net profit of one description of land is not the same as that of the other; and, both upon principle and authority, we think the rate ought to be made in proportion to that profit." And again: "If the subject of occupation be of a perishable nature, or require an annual expense to secure its existence, an allowance ought to be made on this account; for the total annual profit is not the net annual profit; a part must be set aside for the restoration and maintenance of the subject of occupation. It is on this principle that buildings have been permitted to be rated at less in proportion than arable and other land. The cases, especially those of a more recent date, in which the principle of rating has been more fully discussed and considered, will be found to have established this rule of rating, which is, in other words, that all lands are to be assessed in proportion to the net rent which a tenant at rack rent would pay, he discharging all rates, charges and outgoings." Applying these principles (which have since been adopted in the Parochial Assessment Act, 6 and 7 W. 4, c. 96,) to the present case, the [*249 necessary expense incurred by the appellant in the maintenance of sea walls, and for the other purposes of the local act, will reduce the rateable value of his property to nothing; since he pays, to command the rent on which the rate should be estimated, a sum exceeding that rent. The "annual outlay," as described in the case, falls literally within the words of stat. 6 & 7 W. 4, c. 96, s. 1, "other expenses, if any, necessary, to maintain them in a state to command such rent:" the sessions have, in effect, determined that the payment was of such a character; and the point was one properly to be decided by them. This burden is, in effect, a sewers' rate, more than equalling the full annual value of the lands. It may be contended on the other side that this charge is in reality a rent, nc

(*a*) April 27th. Before Lord Denman, C. J., Patteson, Williams, and Wightman, Js.

other rent being paid; but that cannot be so, there being no value to command a rent. And whenever this imposition is mentioned in the local act, it is spoken of as a tax. That the appellant's land should be exempted from poor rate is no hardship on the other landholders in the parish, their property being increased in value by his outlay. If the charge now imposed on him were distributed over the parish, they would bear that additional burden but pay less poor rate, according to *Rex* v. *Adames*. It makes no difference that, escaping this burden, they pay more poor rate in proportion. It may be argued that the payment of this tax by the appellant is not, within the meaning of stat. 6 & 7 W. 4, c. 96, s. 1, an expense
*250] necessary to maintain his own land in a state *to command rent, because it is for the protection of the level generally: but the effect of it is that his own land is raised in value.

But, secondly, the appellant may contend that he has no beneficial occupation of Scar House farm, the whole value being taken away for the purposes of the local act, 32 G. 3, c. 31, which, in section 1, recites that "the whole rents and profits of the said Third Acre lands have, for several years last past, been applied" to the repair and support of the sea walls and embankments, and, in sect. 19, authorizes the commissioners, by reason of those rents and profits being for the time inadequate, to tax other lands in the island, but enacts that no tax for the purposes of that statute shall be laid on any but Third Acre lands, "except in the case of the absolute inability of the owners of the said Third Acre lands, in respect of those lands, to raise and supply the moneys which from time to time may be wanted."

Erle, *E. James*, and *Marsh*, contrà. First, The Third Acre lands should at all events, pay poor rates to the extent of two-thirds of the rack rent If the burden in question were an ordinary sewers' rate for Canvey Island, the whole level would be bound to contribute; the Third Acre lands, which now pay the whole, would pay one-third of the charge, the rest being distributed over the other lands in the level: and in that case the Third Acre lands would be exempt from poor rate to the extent of one third of the rack rent, but liable on the other two-thirds. The charge imposed upon the Third Acre lands is an annual expense, necessary, according to stat. 6 & 7 W. 4, c. 96, s. 1, to maintain all the lands in a state
*251] to command their rent. Although, *by compact among the proprietors, it has been cast upon particular lands, it would, in the case of a common sewers' rate, be a burden upon all, and must be so reckoned in adjusting the poor rate. A private compact cannot alter the liability to such rate.

It is argued that to exempt the appellant is no injustice to the other landholders in Vange, because, as they pay more to the poor rate, they pay, in proportion, less to the maintenance of sea walls and embankments. But the burden on this latter account is, not on the parish of Vange, but on the island; and, although the island may be relieved by throwing part of that burden upon lands in Vange, it does not follow that the ability of the landholders in Vange to pay poor rate may be proportionably increased.

But, further, the appellant is rateable to the poor upon the entire rack rent. He holds the land, enjoying all the advantages of an ordinary occupier; and it commands a rent of 123*l*. Upon that rent there is a known and permanent charge, by act of parliament, in respect of the sea walls and embankments. The appellant, individually, does not pay the charge in question for the purpose of maintaining his lands in a state to command

rent, but to keep up public works. He holds his farm on the condition of contributing to this object, which is not necessarily connected with any benefit to his own lands. It is as if he held on condition of repairing a street in London; or by some service wholly independent of any improvement of these lands. It happens that his own lands derive benefit from this payment; but they would be equally subject to the burden if they derived none. If the charge *equals 123*l*., it absorbs the rent: if it falls short of 123*l*., there is a surplus of rent, which the occupier, [*252
if holding under a landlord, would pay to him, but which the appellant, as owner and occupier, would receive to his own use. He has taken the land, with its benefits, subject to the encumbrance, and, in consideration of it, paid nothing for the purchase. The liability to pay, if necessary, 123*l*., is the condition upon which he enjoys land worth 123*l*. a year. The form in which that liability is imposed can make no difference. [Wightman, J. You say that, if the appellant had let for 123*l*., a tenant under him would not be the less rateable as an occupier, because the rent was swallowed up by the assessment.] That is the argument. It makes no difference to the occupier that the rent is handed over to the commissioners. The case is the same as if the landlord were a mortgagor paying over the amount of the rent to a mortgagee. A party is rated to the poor as being the owner or occupier of property which is a subject of rate, and therefore having ability by something occupied within the parish; it is not necessary, in justification of the rate, to point out any mode in which a rent is made. In *Rex* v. *Terrott*, 3 East, 506, and other cases of the same class, this could not have been shown.

As to *Rex* v. *Adames*, 4 B. & Ad. 61, the sewers' rate there was an occasional charge on the occupier, not a permanent charge on the rent. The present case differs in both respects. Parke, J., in delivering judgment, said: "Land which requires some occasional expenditure to preserve it from being damaged by water, and to make it as productive as it is, would let for less *rent than similar land which requires none, the tenant defraying amongst others that occasional expenditure. In other words, [*253
the net average annual profit of both is not the same, and consequently the rate ought not to be the same." That reasoning would be inapplicable here. [Wightman, J. What do you say is the annual value of this property in the appellant's hands?] It is worth 123*l*. to him as occupier; as owner, nothing. But the rateability to the poor depends on the value to the occupier: and to what particular fund he pays over the rent is of no consequence.

Cur. adv. vult.

Lord Denman, C. J., in this term, (May 28th,) delivered the judgment of the court.

This was an appeal against a poor rate for the parish of Vange, in the island of Canvey, in the county of Essex, wherein the appellant was assessed, as the owner and occupier of a house, premises, and lands, in the sum of 128*l*. The sessions relieved the appellant by striking out the whole amount from the assessment, subject to the opinion of this court upon the following case.

In the year 1621, Sir Henry Appleton and others conveyed to Joos Cropenburgh one-third of their lands, situate in the said island, in fee, upon consideration of his defending the same against the waters of the river Thames. The lands then so vested in Joos Cropenburgh were and are called the "Third Acre" lands; and the premises for which the appellant is assessed form a portion of those lands. By an act passed in 32 G

3, c. 31, for more effectually embanking, &c., the said island of Canvey,
*254] certain commissioners were appointed, and *empowered to do such acts as to them might seem right from time to time, and necessary, to protect the said island: the said commissioners were further empowered to tax the owners and occupiers of the "Third Acre" lands to *the full amount* of the annual rent or value of the same; and, also, if the moneys raised therefrom should be insufficient, to tax other lands. The appellant paid nothing for the purchase of the said premises, but holds them as owner, subject to the liabilities aforesaid. The case then states that, for several years, the sums raised in "Third Acre" lands for the purposes of the act have been equal to the rack rent or full annual value of those lands, and the sum assessed upon and paid by the appellant in respect of the said premises has been, for the current and preceding years, 123*l.* per annum.

The question thus presented for our consideration, is, whether the occupation of the premises by the appellant be such as to make him liable to the rate; a question of some difficulty, undoubtedly, and which is usually expressed to be, whether the occupation be *beneficial*. The distinctions in many of the cases upon this subject are certainly very fine; and, except the subject immediately under consideration requires it, we do not know that it is useful to enter into a minute examination of them. This question of beneficial occupation, moreover, has been frequently before the court; and, at no distant time, we had occasion to comment upon the import and meaning of the expression. See the case of the *Governors of the Bristol Poor* v. *Wait*, 5 A. & E. 1. We will only here again ob-
*255] serve that "beneficial" and "profitable," *in the ordinary sense of the word, are not convertible terms; that a party holding property in its nature rateable is not discharged from his legal liability because he does it at a loss. Suppose a farmer to be able to prove that he was holding his farm at any assignable amount of loss, would that constitute an exemption from the poor rate? It is unnecessary, however, to put hypothetical cases: *Rex* v. *Parrott*, 5 T. R. 593, is *the* case. The unprofitable and losing occupation (expressly so found) of a coal mine was held to create no exemption, because a coal mine is, by the stat. of 43 Eliz. c. 2, eo nomine made rateable. In the present instance the subject of the rate is of the same description, "house" and "lands," and therefore directly within the statute. What, then, is to exempt this property from rateability? The answer is, because it yields no profit to the owner, the appellant. Suppose, however, the premises to be let to a tenant at the rent of 123*l.* per annum, the sum at which the sessions seem to think, if rateable at all, that they ought to be assessed. It seems to be clear that, in such case, the tenant would be rateable for such occupation. Again, suppose that, instead of having paid nothing for it, and taking it, as he has, with the incumbrance, he had purchased it, and left the whole purchase money unpaid, but secured by mortgage upon the property. In what respect would that charge have differed from the present? Yet in the case lastly supposed he surely would have been rateable. The case of *Rex* v. *Adames*, 4 B. & Ad. 61, which was quoted in argument in support of the rate, was one of comparative amount of assessment; whether property A. was fairly rated in respect of property B.; but there was no question, as here, of abstract rateability.

*256] *Upon the whole, we are of opinion that the said sum of 123*l.* ought not to be deducted from the assumed gross rental in assessing this appellant

Order of sessions quashed.

RICHARDS v. DYKE and Another.

Stat. 53 G. 3, c. 127, s. 7, entirely takes away the jurisdiction of the ecclesiastical courts over complaints for non-payment of church rate, where the amount claimed does not exceed 10*l.*, and the validity of the rate, or liability of the party charged, is not disputed.

Where a suit is commenced in the Ecclesiastical Court for non-payment of rates below the amount of 10*l.*, *Quære*, how far it is necessary in order to show jurisdiction, that the libel should show the existence of a dispute to the validity of the rate, or liability of the party.

Semble, that on proceedings in prohibition this would be deemed a matter of practice determinable only by the Ecclesiastical Court. But,

Where the declaration in prohibition stated a libel exhibited in the Consistory Court for non-payment of church-rate; that the party libelled appeared, and objected to the jurisdiction, and to the libel, and to any proceedings being had thereon, on the ground that the suit was for church rates under 10*l.*, "*the validity of which or of any of them had not been disputed or denied by the plaintiff*," and did not appear by the libel to have been so, and that the proceeding ought to have been before justices of peace according to the statute; nevertheless the court proceeded, &c.: and the plaintiff averred that in fact no proceeding had been taken or complaint made against him before justices for recovery of such rates, nor had he at any time disputed the validity of such rates or any of them, or his liability to pay, and that the subject matter of the suit was not of ecclesiastical cognisance, and the rate should have been proceeded for before justices under the statute:

Held, on general demurrer to the declaration, that it sufficiently showed the absence of a dispute within sect. 7 to oust the Ecclesiastical Court of jurisdiction.

DECLARATION in prohibition against the guardians or wardens of the parish of Monmouth and of the parish church of St. Mary, Monmouth, with the chapel of St. Thomas, Monmouth, thereto annexed, within the diocese of Hereford.

The declaration stated that defendants, on the 9th October, 1839, prosecuted a plea in the Consistory Court of the said diocese against plaintiff, and to which plaintiff had before then appeared under protest against the jurisdiction; and defendants did in that plea exhibit a libel against plaintiff, wherein they alleged and did in law articulately propound, &c. The matters of the libel were then set out, which were, in substance: That, the parish church of St. Mary, &c., being out of repair, the guardians or wardens for 1836, in order to raise money *for the repair, and for other expenses incidental to the office of churchwardens of the said parish, did, with other inhabitants, meet together pursuant to notice, to make a church rate, and, being so met, did agree and resolve that a rate should be made, taxing every parishioner at 1*s.* 6*d.* in the pound for all houses, lands, or tenements which they held, occupied, or enjoyed in the said parish. That a rate to the like amount was resolved upon by the guardians or wardens for 1837, 1838, with other inhabitants, for the like purposes: and another rate for the like purposes to the amount of 6*d.* in the pound, by the defendants, churchwardens for 1838, 1839, with other inhabitants, the church, on each occasion, being out of repair, and due notices having been given. That the plaintiff in prohibition, at the time of the making of the first-mentioned rate, was an inhabitant of, and occupied, possessed, enjoyed, and rented meadows and a house, within the parish and diocese, of the yearly values, &c., respectively, for which he was rightly, duly, and equally rated in the said rate at the sums of 12*s.* 9*d.* and 4*s.* 6*d.* respectively. (There were similar allegations of the plaintiff being rated under the second and third rates respectively at 12*s.* 9*d.* and 11*s.* 1*d.*, and 9*s.* 4½*d.* and 3*s.* 2½*d.*) That plaintiff refused and [*257]

neglected to pay on request: that he was of the said parish and diocese, and thereby subject to the jurisdiction of the said court: and that the defendants by the libel prayed that plaintiff might be condemned in payment of the said several sums and costs. The declaration went on to state: That afterwards, viz. on 6th November, A. D. 1839, "at a holding of the court, being a day appointed for the plaintiff to answer the matters
*258] contained in the said libel, the *plaintiff appeared and then objected to and protested against the jurisdiction of the said court, and to the said libel, and to any proceedings being had or taken therein, on the ground that the said suit was brought for church rates under 10*l.*, the validity of which or of any of them had not been disputed or denied by the plaintiff, and that it did not appear in or by the said libel that the plaintiff had disputed or denied the validity of them, and that the proceedings against the said plaintiff for the recovery of the said church rates ought to have been before justices of the peace according to the statute in that case made and provided. Nevertheless the plaintiff says that afterwards, to wit on the 4th day of December, A. D. 1839, the said court proceeded to hold jurisdiction in the said suit, and made a decree therein for a monition against the plaintiff for his personal answers to the said libel in the said suit, and to appear at a court to be holden on Wednesday the 8th day of January, A. D. 1840, and the said suit is still pending in the said court." Averment, "that the said sum or sums at which he the plaintiff was so rated for church rates as in the said libel mentioned, or any or either of them, never did amount to the sum of 10*l.* And" "that no proceeding or proceedings whatever hath or have been at any time had or taken, nor has any complaint been made, against him" (plaintiff) "before any justice or justices of the peace for the recovery of the said church rates or any or either of them, or any part thereof. And" "that he" (plaintiff) "hath not at any time disputed the validity of the said church rates or any or either of them, or any part thereof, or his liability to pay the same or any or either of them, or any part thereof. And, because the
*258] said *suit for the recovery of the said church rates ought not to have been commenced, instituted, or prosecuted against the plaintiff, and because the subject matter of the said suit was not nor is of ecclesiastical cognisance and jurisdiction, and the said church rates ought to have been recovered by proceedings before justices of the peace, in pursuance of, and according to, the statute in that case made and provided, therefore the plaintiff prays judgment of this court that a writ of prohibition may issue," &c., prohibiting the Consistory Court from proceeding further, &c.

General demurrer and joinder.

The point stated in the margin of the demurrer was: "That the Consistory Court is not precluded from entertaining the suit by reason that the amount of church rate at which the plaintiff was assessed did not amount to 10*l.*, and that the jurisdiction of the said court is not by reason of that circumstance taken away by stat. 53 G. 3, c. 127." The point stated on the demurrer books by the plaintiff in prohibition was: "That the Consistory Court is precluded from entertaining the suit by reason that the amount of church rates at which the plaintiff was assessed did not amount to 10*l.*, the validity of the same not having been disputed or denied by the plaintiff, nor his liability to pay the same, and no complaint or proceeding having been made or had for the recovery of the same before any justice of the peace That the said court, by reason of the circumstances stated in the declaration, had no jurisdiction to entertain the suit."

The demurrer was argued last Easter term.(*a*)

* *F. Robinson* for the defendant. Stat. 53 G. 3, c. 127, s. 7, enacts that, on complaint of the non-payment of a church rate, "the [*260 validity whereof has not been questioned in any Ecclesiastical Court," "it shall and may be lawful" for two justices to order and enforce payment, "so as the sum ordered" to be paid do not exceed 10*l.* over and above costs: "provided" "that nothing herein contained shall extend to alter or interfere with the jurisdiction of the Ecclesiastical Courts to hear and determine causes touching the validity of any church rate or chapel rate, or from proceeding to enforce the payment of any such rate, if the same shall exceed the sum of 10*l.* from the party proceeded against: provided likewise, that if the validity of such rate, or the liability of the person from whom it is demanded to pay the same, be disputed, and the party disputing the same give notice thereof to the justices, the justices shall forbear giving judgment thereupon, and the person or persons demanding the same may then proceed to the recovery of their demand, according to the due course of law, as heretofore used and accustomed." The question whether the Ecclesiastical Courts are deprived of jurisdiction where the sum assessed does not exceed 10*l.*, and the validity of the rate or liability of the party is *not* disputed, or whether those courts have, in such case, a co-ordinate authority with that of the justices, was touched upon, but the circumstances rendered a decision unnecessary, in *Ricketts* v. *Bodenham*, 4 A. & E. 433, 441—444; *Regina* v. *Thorogood*, 12 A. & E. 183, 195, 196, and *In re Baines*, Craig & Phillips, 31, where Lord COTTENHAM, C., treats it as still undetermined. The preamble of sect. 7 ("and whereas it is expedient that church * rates or chapel rates of limited amount, unduly refused [*261 or withheld, should in certain cases be more easily and speedily recovered") shows an intention to give additional redress, not to limit the existing remedy. But for the statute, the Ecclesiastical Courts clearly would have jurisdiction: the question then is, whether the statute ousts them of it. "Where the superior courts have a jurisdiction, it can only be taken from them by the express words of an act of parliament, or by necessary implication;" *Shipman* v. *Henbest*, 4 T. R. 109, 116, judgment of ASHHURST, J. And in *Rex* v. *Sanchee*, 1 Ld. Ray. 323, where a Quaker was cited into the Ecclesiastical Court for non-payment of tithes and for contumacy, it was held that that court still retained its jurisdiction, though stat. 7 & 8 W. 3, c. 34, s. 4, had given a remedy by proceeding before justices of peace. The provisions of that section were extended by stat. 53 G. 3, c. 127, s. 6, "to any value not exceeding 50*l.*:" stat. 7 & 8 W. 3, c. 6, (extended also, by stat. 53 G. 3, c. 127, s. 4, from the amount of 40*s.* to that of 10*l.*) gave jurisdiction to justices in the case of small tithes generally: and the legislature thought an express enactment necessary (stat. 5 & 6 W. 4, c. 74) to prevent the Ecclesiastical Courts from exercising a concurrent jurisdiction in cases within those statutes. In criminal cases, "where an offence was antecedently punishable by a common law proceeding as by indictment, and a statute prescribes a particular remedy, there such particular remedy is *cumulative*, and proceedings may be had either at common law, or under the statute:" note (4) to *Rex* v. *Dickenson*, 1 Wms. Saund. 135 b. *Rex* v. *Carlile*, 3 B. & Ald. 161, confirms that doctrine. *Foster's* * *Case*, 11 Rep. 56 b, 63 b, shows that an act of parliament direct- [*262 ing that the remedy in certain cases shall be pursued before a particular jurisdiction, does not exclude jurisdictions which had cognisance of

(*a*) April 22d. Before Lord Denman, C. J., Patteson, Williams, and Wightman, Js.

such matters before, if the act use affirmative words only. The law on this subject is stated in 19 Vin. Abr. 511, &c., tit. *Statutes*, (E. 6.)(a) It would be a very inconvenient consequence of the enactment in question, as construed on the other side, that a party, if summoned before justices for non-payment of a rate, might at once put the case out of their control by saying that he meant to dispute the validity of the rate, (*Rex* v. *The Chapelwardens of Milnrow*, 5 M. & S. 248;) and yet that, if the same complaint had been prosecuted in the first instance by suit in the Ecclesiastical Court, prohibition would have lain. It may be argued here, as was said in *Foster's Case*, 11 Rep. 63 b, that the later statute restrains the original jurisdiction as to enforcing the remedy, but not as to entertaining the suit. [PATTESON, J. The Ecclesiastical Court seems to have jurisdiction to entertain the suit in all cases, and an exclusive jurisdiction both to hear and to enforce payment when the amount exceeds 10*l.*, or the validity of the rate is questioned.] It does not appear in this case that the Ecclesiastical Court is about to enforce the rate; and, if such proceeding would be an excess of jurisdiction, this court will not presume that it is about to take place: *Hall* v. *Maule*, 7 A. & E. 721.

Supposing that the ecclesiastical jurisdiction is abridged as the plaintiff here contends, still it cannot be inferred from the declaration that the suit
*263] does not call in *question the validity of the rate. It is not a condition precedent to the commencing of a suit in that court that the validity should have been questioned: *Ricketts* v. *Bodenham*, 4 A. & E. 433, 444—447. Lord COTTENHAM, C., in the case *In re Baines*, Cr. & Phill. 43, after referring to *Ricketts* v. *Bodenham*, said: "In that case it was decided that a previous proceeding before magistrates is not necessary to give the Ecclesiastical Court jurisdiction in cases of church rate under 10*l.*, if the validity or liability be in question. It would seem, therefore, that it must be competent to institute the suit, for without a suit, in such a case, there may be no means of showing that the validity or liability is in dispute; and if so, it does not seem very obvious how the suit can be objected to, upon the ground that the validity or liability is not disputed, before the defendant appears." And in *Regina* v. *Thorogood*, 12 A. & E. 196, Lord DENMAN, C. J., said: "All church rates were of spiritual cognisance before stat. 53 G. 3, c. 127; which, by giving power of enforcing them to the justice of the peace when their validity is unquestioned, and the sum due is less than 10*l.*, may possibly, by implication, deprive the Ecclesiastical Courts of their power in the same description of cases: on which point, however, it is not necessary for us now to decide. For we are of opinion that it lies on the defendant to show the exception, not on the court to negative its existence." Nothing appears on this record to raise the exception: the plaintiff in prohibition says only that he protested against the jurisdiction because the suit was brought for church rates, "the validity of which or of any of them had
*264] not been disputed or denied by the plaintiff," and did not *appear by the libel to have been so. That does not show that the plaintiff has admitted the validity, or may not yet deny it. Suppose he had protested on the ground that there was a modus; this court would not prohibit unless it appeared that the modus had actually become a matter in dispute. The declaration ought to show, in the words of the statute, that the suit regards a church rate, "the validity whereof has not been questioned in any Ecclesiastical Court."

(a) See pl. 1, 5, 8, 11, 76, 132.

Sir *F. Pollock*, Attorney-General, contrà. The third proviso of stat. 53 G. 3, c. 127, s. 7, is, that, on the proceeding before justices, there directed, if the validity of the rate, or liability of the party called upon to pay, be disputed, and notice thereof be given to the justices, they shall forbear giving judgment, and the persons demanding the rate "may *then* proceed to the recovery of their demand, according to due course of law, as heretofore used and accustomed." The fact of the rate being disputed must have been ascertained in this manner to warrant commencing a suit in the Ecclesiastical Court, where the amount does not exceed 10*l*. Some expressions of this proviso may appear inconsistent with the previous words of the same section; but the whole context must be taken together, and the preamble of the section looked to. According to the argument for the defendants, parish officers may, in every case, commence a suit in the Ecclesiastical Court, and compel the party sued to allege that he does not dispute the validity of the rate. The words of sect. 7 are, "church rate or chapel rate, the validity whereof has not been questioned," &c.: here the rate is within the letter of that enactment; the validity has not been, and is not now, *disputed. It is, in fact, a condition precedent to commencing a suit in the Ecclesiastical Court, that the rate should have been disputed before justices. [PATTESON, J. Do you assume that sect. 7 is for the benefit of the rate-payers?] It is for their benefit, or for the benefit of both rate-payers and churchwardens. [PATTESON, J. Stat. 7 and 8 W. 3, c. 6, ss. 1, 2, 8, contains enactments as to small tithe, very like those of sect. 7 here, and would seem, by the language, to oust the Ecclesiastical Courts of jurisdiction; yet sect. 14 of that act shows that their jurisdiction is meant to continue, and shows also that the power of recovery before given is deemed to be for the benefit of the tithe-owner.] There is no clause in this act corresponding to sect. 14 of stat. 7 and 8 W. 3, c. 3. The object of the present statute was to prevent the scandal of suits in the Ecclesiastical Courts for very small sums. The saving of jurisdiction to those courts "if the" rate "shall exceed the sum of 10*l*." applies both to the jurisdiction of hearing and that of enforcing payment. That is the view taken in the judgment of this court in *Ricketts* v. *Bodenham*, 4 A. & E. 442, on a full analysis of sect. 7. It cannot have been meant that those powers should, in any case, be divided between the Ecclesiastical Court and the justices: but, according to the argument on the other side, there might be first a hearing in the Ecclesiastical Court, and then a proceeding before justices to enforce the rate. [PATTESON, J., referred to *Rex* v. *Sillifant*, 4 A. & E. 354.] In *Rex* v. *Wrottesley*, 1 B. & Ad. 648, this court granted a mandamus calling upon justices to hear the churchwarden's complaint, that they might ascertain whether the validity *of the rate was bonâ fide disputed or not. Now, a mandamus is not granted where there is another remedy: therefore, if the Ecclesiastical Court could have heard for the purpose pointed out, a mandamus to the justices was unnecessary. In *Ricketts* v. *Bodenham*, 4 A. & E. 443, it is laid down by the court that, in "cases under 10*l*.," "the moment it appears that the question is one not merely of enforcing payment, but touching the validity of the rate, the summary jurisdiction is at an end, and that of the Ecclesiastical Court attaches." The plaintiff here contends that the authority of that court to inquire, and its authority to enforce, both attach where the validity has been disputed, or the amount is above 10*l*., and both are taken away in the contrary cases; and neither the practice which has hitherto prevailed, nor any

[*265]

[*266]

express decision, sanctions a different construction of the statute. The very proviso which saves the jurisdiction as to rates exceeding 10*l.* impliedly shows the intention to take it away in others. [PATTESON, J. The saving there may be only ex majori cautelâ.]

F. Robinson, in reply. The first cited proviso of sect. 7 may be considered in two ways: first, as intended to preserve an exclusive jurisdiction to the Ecclesiastical Court where the amount exceeds 10*l.*, in which case its jurisdiction is not to be interfered with at all. [PATTESON, J. No proviso was wanted for that purpose, as the clause is framed.] Or, secondly, to leave the jurisdiction of that court exclusive where the sum is above 10*l.*, but make it concurrent with that of the justices where less than 10*l.* is demanded. Then the saving of jurisdiction is not so re-
*267] dundant. As to *Rex* v. *Wrottesley*, *the argument for the defendants here is, that the remedy, in cases below 10*l.*, is cumulative; and, in that case, unless a mandamus had lain to the justices, the cumulative remedy could not have been enforced. [PATTESON, J. The doctrine, that mandamus does not lie where there is another remedy, has prevailed only where such other remedy was attainable against that party to whom the mandamus should have been directed: not where the purpose was to call forth the exercise of a jurisdiction against one party by mandamus to another.] In *Rex* v. *Sillifant*, the observations of this court went no farther than the suggestion of a doubt, sufficient to prevent the granting of a mandamus. In the present case, the plaintiff, to entitle himself in prohibition, ought distinctly to admit that he does not deny the validity of the rate: if he does so admit, the Ecclesiastical Court must forbear proceeding, unless it has a co-ordinate jurisdiction with that of the justices. If the controverting of the rate before them be not a condition precedent, the suit has been properly commenced; and the plaintiff in prohibition must show that, by reason of something subsequent, it is now improperly carried on. *Cur. adv. vult.*

Lord DENMAN, C. J., in this term, (May 31st,) delivered the judgment of the court.

In this case the question is directly raised, whether the seventh section of stat. 53 G. 3, c. 127, has taken away the jurisdiction of the Ecclesiastical Courts to enforce the payment of a church rate, where the sum does not exceed 10*l.*, and where the validity of the rate and the liability of the party are undisputed.

*268] *This court has already expressed a strong opinion in the affirmative in the case of *Ricketts* v. *Bodenham*, 4 A. & E. 442, 443, but, as the validity of the rate was disputed in that case, the jurisdiction of the Ecclesiastical Court clearly remained, and it became unnecessary to act upon that opinion. So in the subsequent cases of *Regina* v. *Thorogood*, 12 A. & E. 183, and *Regina* v. *Baines*, 12 A. & E. 210, and *In re Baines*, Craig & Phillips, 31, it was unnecessary to determine the question now raised. We adhere to the interpretation put upon the statute in the case of *Ricketts* v. *Bodenham*, and for the reasons there stated. The two provisoes by which the jurisdiction of the Ecclesiastical Courts is declared not to be altered or interfered with whenever the validity of the rate or the liability of the party is disputed, or the sum demanded exceeds 10*l.*, show the intention of the legislature that such jurisdiction should be altered and interfered with where the sole object is to enforce an undisputed rate for a sum not exceeding 10*l.*, that being the only case in which jurisdiction is given to justices of the peace. The

proviso was indeed unnecessary so far as regards cases where the sum exceeds 10*l.*, and can only have been inserted ex majori cautelâ: still it shows the intention of the legislature. If, however, the jurisdiction of the Ecclesiastical Courts be altered and interfered with in such cases, it can only be by taking it away.

The general rule of law and construction undoubtedly is, that, where an act of parliament does not create a duty or offence, but only adds a remedy in respect of a duty or offence which existed before, it is to be construed as cumulative: but this rule must *in all cases be applied with due attention to the language of each act of parliament. For instance, [*269 the fourth section of the act in question extends the provisoes of stat. 7 & 8 W. 3, c. 6, s. 1, respecting the recovery of small tithes before justices, from 40*s.* to 10*l.*; and on reference to that act, sect. 8, it will be found that if any person charged before the justices shall insist upon any prescription, composition, or modus, the justices shall forbear to give any judgment in the matter, and that *then and in such case* the person complaining shall be at liberty to prosecute in any other court where he might have sued before the making of this act, any thing in this act to the contrary notwithstanding. This section is nearly as strong as sect. 7 of the act now under consideration, except that it does not mention in express terms *altering or interfering with* the jurisdiction of the Ecclesiastical Courts: yet it is plain that the legislature did not intend to take away that jurisdiction; for, by sect. 14, it is provided that any person who shall begin any suit for small tithes in the Court of Exchequer or in any of the Ecclesiastical Courts shall have no benefit by this act for the same matter; evidently treating the remedies as concurrent. The omission of any similar clause in the act under consideration strengthens our opinion that it was intended to take away the jurisdiction of the Ecclesiastical Courts.

We are not called upon in this, any more than in the former cases already referred to, to determine whether it be necessary, in order to give jurisdiction to the Ecclesiastical Court, that the fact of a dispute existing respecting the validity of the rate or the liability of the party should appear upon the face of the libel. That court has general jurisdiction in matters regarding *church rates; and perhaps this is rather a question of practice or pleading in that court. It is sufficient for us to say [*270 that it does appear that the absence of any dispute as to the validity of the rate or the liability of the party was shown to the Ecclesiastical Court, and it is averred and not denied that the court proceeded notwithstanding. Objections were taken as to the form in which that was shown by the plaintiff in this action; and it was contended that he might, notwithstanding any thing which he has alleged in the Ecclesiastical Court, set up before the justices that he disputed the validity of the rate, or his liability to pay it. We think that those objections cannot prevail, and that he is concluded by what he has alleged.

Our judgment will therefore be for the plaintiff.

Judgment for plaintiff.

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*ANDERSON and Others v. RICHARD THORNTON. [*271

Declaration against surety on a bond, which recited that G. *had been appointed clerk of a banking company*, and it had been agreed that G., *on his appointment*, should find sureties for his *fidelity and honest conduct while in the service of the bank*; and that defendant should become such surety: condition, that if G., *while he should continue in the service*

of the bank, should faithfully serve them, devote his whole time to their business, give such attendance as the directors or managers should require, keep the secrets, &c., inform the directors of whatsoever should come to his knowledge respecting the business, account for and pay over all cash, &c., not embezzle, &c., and in all other respects *skilfully and faithfully conduct himself as one of the clerks* of the said bank, *and perform the duties of his said office in that or any other capacity*, and if defendant and a co-surety should indemnify the bank against all losses, &c., by reason of any thing done, &c., by G. *in or during his service*, the obligation should be void.

Plea, after oyer, that before any breach of the condition, to wit, on January 11th, 1836, G. was duly appointed by the banking company to be manager of a branch of their bank, and was thenceforward employed by them as such manager; that the duties and responsibilities of a manager were much greater than those of a clerk as in the condition mentioned, and the office of manager other than and different from that of clerk; that C. G. R. *from the day aforesaid* ceased to be such clerk; and that, *while he continued such clerk and before he was appointed such manager*, he well and truly fulfilled all things, &c., and the bank suffered no loss, &c., from any thing done or omitted by G. in or during the service as in the condition mentioned, and *before he was appointed such manager*.

Special demurrer.

Quære, whether the condition made the sureties responsible for G. in the office of manager as well as that of clerk. But

Held that the plea was bad, as not showing conclusively that G. had ceased to be clerk when he became manager, so that no breach of the condition could have happened after he became manager.

DEBT ON BOND. The deed was set out on oyer, showing that Charles Goldney Rees, the defendant, and Nathaniel Penry Rees, thereby bound themselves to the plaintiffs for payment of 4000*l.*, on condition, the material parts of which were as follows:

"Whereas the above bounden C. G. Rees has been appointed one of the clerks of a certain public joint-stock banking company called the London and Westminster Bank, of which company, and for the general purposes thereof, the above named" &c. (plaintiffs) "have been appointed trustees, and it was agreed that, on the appointment of the said C. G. R. to be such clerk as aforesaid, he should, with sureties, enter into a bond
*272] to guaranty his fidelity and honest conduct while *in the service of the said company; and whereas each of them, the above bounden Richard Thornton and N. P. Rees, at the request of the said C. G. R., agreed to become sureties as aforesaid to the extent of 1000*l.* each: Now the condition of the above written bond or obligation is, that, if the said C. G. R. do and shall, from time to time while he shall continue in the service of the said company, diligently and faithfully serve them, and devote the whole of his time and attention to their business, and give such reasonable attendance at their banking-house as the directors or managers, for the time being, of the said company shall from time to time require:" (further condition, that C. G. R. should keep the company's secrets; inform them of whatever should come to his knowledge respecting the business; account for, render and make over cash, bills, &c., coming or which might without his wilful default have come to his hands; not embezzle, &c.): "And, also if the said C. G. R. do and shall in all other respects diligently, skilfully, and faithfully demean and conduct himself as one of the clerks of the said company, and perform *the duties of his said office in that or any other capacity*: And, moreover," (condition that defendant and N. P. Rees, their executors, &c., should indemnify the company against all losses, &c., which might happen to them "for or by reason of any deed, matter or thing whatsoever done or omitted to be done" by C. G. R. "in or during his service"): Then the obligation to be void; otherwise, &c.

Second plea (after oyer): "That, after the making of the said writing

obligatory, and before any breach of the said condition of the said writing obligatory, to wit on the 1st day of January, A. D. 1836, the said [*273 *C. G. R. was duly appointed by the said company to be manager of a certain branch of the business of the said company, to wit, manager of the Whitechapel Branch Bank of the said company; and the said C. G. R. thenceforward hath been employed by the said company as manager of the said branch bank." "That the duties and responsibilities of such manager as in this plea mentioned are much greater than the duties and responsibilities of a clerk of the said company as in the said condition of the said writing obligatory mentioned; and that the office of such manager as aforesaid is other and different than the said office of clerk in the said condition mentioned: And the said defendant in fact says that the said C. G. R. *did*, *from the day and year aforesaid*, *cease to be such clerk of the said company as in the said condition of the said writing obligatory mentioned*:" And, "that, while the said C. G. R. continued such clerk as aforesaid, and *before he was appointed such manager* as aforesaid, he did well and truly fulfil, keep and observe all matters and things in the said condition mentioned, by him to be performed," &c.; "and the said company did not, nor did the directors, nor did any member thereof, sustain any loss, costs," &c., "for or by reason of any deed, matter or thing whatsoever done or omitted to be done by the said C. G. R. in or during the service as in the said condition mentioned, and before he was appointed such manager as aforesaid." Verification.

Demurrer, assigning for causes: "That the said bond is conditioned for the faithful service of C. G. R. whilst he continued in the service of the company; and the said second plea merely states that he was appointed manager, and was employed as such; but it is not *stated that he was employed in no other capacity as well as that of manager: [*274 that it is not shown that the duties of manager were not within the condition, nor that the said C. G. R. did not, after his appointment as manager, also perform other services within the meaning of the condition, nor that he did not perform the duties of manager in conjunction with other services. That it is no answer to the action, nor any performance of the said condition, to show that C. G. R. committed no breach thereof before he was appointed manager. That the second plea confesses a breach and does not avoid it. That it is consistent with the said second plea that the said C. G. R. was employed, as alleged, as manager of the said branch bank, and also continued, in addition thereto, to perform such services for the faithful performance of which the said bond was given. That the said second plea does not show performance during all the time that C. G. R. continued in the service of the company according to the said condition. That it is a plea of part performance only. That it is argumentative and otherwise informal and insufficient," &c. Joinder in demurrer.

The demurrer was argued in last Easter term. (*a*)

Sir *W. W. Follett*, Solicitor-General, for the plaintiffs, contended (*b*) that the bond, by its terms, operated so long as C. G. Rees continued "in the service" of the company, whether as clerk or otherwise. He relied upon the words "in that or any other capacity." And,* he urged also that, consistently with the plea, C. G. Rees might still have been [*275 liable to the performance of duties within the condition, when a breach

(*a*) April 29th. Before Lord Denman, C. J., Patteson, Williams, and Wightman, Js.

(*b*) A short summary of the arguments is given, as no judgment was pronounced upon the point chiefly contested.

took place. He cited *Augero* v. *Keen*, 1 M. & W. 390; S. C. Tyr. & Gr. 709.

Erle, contrà, argued that the deed, properly construed, was a security for the conduct of C. G. Rees as clerk only, and not after he became manager, and that the recital prevented a larger interpretation, even if other parts of the deed seemed capable of it: on which point, and, generally, as to the effect of such an instrument after an alteration of circumstances, he cited *Lord Arlington* v. *Merricke*, 2 Saund. 403, 411; note (5) to the same case, 2 Wms. Saund. 414, and the cases there collected; *Payler* v. *Homersham*, 4 M. & S. 423; *Simons* v. *Johnson*, 3 B. & Ad. 175; *The Wardens of St. Saviour's, Southwark*, v. *Bostock*, 2 New Rep. 175; *Peppin* v. *Cooper*, 2 B. & Ald. 431; *Hassell* v. *Long*, 2 M. & S. 363; *Bellairs* v. *Ebsworth*, 3 Camp. 53. He urged that the duties of a manager were very different from those of a clerk, implying a much greater responsibility, and hazard to sureties; that the words "any other capacity" could not reasonably be extended to such duties; that, so far as particular duties were specified, they were those of a clerk, not of a manager: and that the plea showed such a distinction between the two offices as made it clear that the one ceased when the other was accepted. He contended that *Augero* v. *Keen* differed materially from this case, and might be considered an authority for the defendant.

*276] *Sir *W. W. Follett*, in reply, urged that a recital could not have the restrictive effect contended for on the other side, if the result would be that words in the subsequent part of the deed must become inoperative: he cited *Sansom* v. *Bell*, 2 Camp. 39; Com. Dig. *Parols* (A 19): and he insisted on the omission to show, in the plea, that C. G. Rees had not continued to be clerk down to a time when the bond became forfeit. *Cur. adv. vult.*

Lord DENMAN, C. J., in this term, (June 9th,) delivered the judgment of the court.

This was an action of debt on bond. The defendant, after craving oyer of the bond, which recited that one C. G. Rees had been appointed one of the clerks of a banking company, and was conditioned for his fidelity, &c., whilst in the service of the company, pleaded, in substance: That before any breach of the condition, *to wit, on the 1st of January*, 1836, Rees was appointed manager; that the office of manager is different from that of a clerk, and the responsibilities greater; that Rees did, *from the day and year aforesaid, cease to be clerk* of the company, and that he performed the condition whilst he was clerk, and *before he was appointed manager.* To this plea there was a demurrer; and upon the argument two points were insisted upon for the plaintiffs. First, that the condition of the bond is not limited to service by Rees as clerk only, but extends to any other employment of Rees in the service of the company. Secondly, that it does not appear by the plea that Rees ceased *277] to perform the *service of a clerk to the company upon his being appointed manager; and consequently that a plea of performance until he was appointed manager is insufficient.

Upon the first of these objections it is unnecessary to give any opinion, as we think the second must prevail, and that the plea is bad for not alleging that Rees ceased to be clerk of the company when he was appointed manager. It is perfectly consistent with the allegations in this plea, that Rees continued to be clerk *after* he was appointed manager; and the performance ought not to have been limited to the time of his

being appointed manager. The plea, if put in issue, would have been supported by proof that Rees had been appointed manager on some day *previous* to the day stated in the plea, (the time being laid under a videlicet and not material,) and that he ceased to be clerk *on* the day stated in the plea, or some *subsequent* day, leaving an interval between the appointment to be manager and the ceasing to be clerk; it not being alleged in the plea that he ceased to be clerk when he was appointed manager, and it not appearing that the offices are necessarily inconsistent. There may, therefore, have been an interval during which a breach occurred, which is not covered by the plea: and we are therefore of opinion that the plaintiffs are entitled to judgment. Judgment for plaintiffs.

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*Sir CHARLES MORGAN, Baronet, v. POWELL. [*278

In trespass for digging plaintiff's coals in his mine, and taking and converting them, the proper measure of damages is the value of the coal when it was first severed from the mine: if defendant has afterward removed the coal and brought it to the pit's mouth, plaintiff cannot recover damages according to the increased value given to it by these operations, though he may have had no opportunity of claiming the coal before they were performed.

The defendant, therefore, in trespass, must be allowed in damages for his expense and labour in removing the coal and bringing it to the pit's mouth, but not in first severing it from the mine.

TRESPASS for breaking and entering plaintiff's coal mine and strata, and digging and getting plaintiff's coal, to wit, 20,000 tons, &c., out of the said mine and strata; also for digging and making levels in certain strata, &c., of plaintiff, and carrying away and converting the materials, to wit, 10,000 cart loads of coal; and for carrying coals with horses, trams, &c., through the said levels; and by the several means aforesaid damaging the strata, &c., and causing loss of plaintiff's coal, &c. Judgment by default.

An inquiry of damages was executed, before COLERIDGE, J., at the Monmouthshire Spring assizes, 1841; when it appeared that the plaintiff and defendant were proprietors of adjoining coal mines, the defendant holding two, and the plaintiff a third, partly situate between them. The defendant had, from one of his own mines, entered that of the plaintiff, and had there worked coal belonging to the plaintiff, carried it away, and brought it up to the mouth of his own pit, and had also carried coal from one of his own mines (held under Lord Dynevor) through the workings so made in the plaintiff's mine. Compensation was claimed: 1. For the value of plaintiff's coal worked and taken away by defendant: 2. For the injury which plaintiff's unworked coal had sustained by the mode in which defendant had made the headings or workings: 3. In respect of the coal from Lord Dynevor's mine which *defendant had conveyed through the workings of plaintiff's mine. On the last two heads [*279 damages were assessed,(a) as to which no subsequent question arose. On the first, the plaintiff demanded compensation at the rate per ton which a purchaser would pay for the coal at the pit's mouth, and which was proved to be 5*s.* 8*d.* For the defendant it was urged that he ought not to pay more than the value of the coal after deducting the expenses of cutting and bringing it to the pit's mouth, which were estimated at 3*s.* 10*d.* per ton. *Martin* v. *Porter*, 5 M. & W. 351, was cited for the plaintiff; and the learned judge, considering himself bound by the decision as stated, though he expressed a doubt of its correctness,(b) advised the jury to

(a) 1*s.* and 20*l.*

(b) By a short-hand writer's note his lordship appears to have said: "But for that

give their verdict on the principle of the plaintiff's estimate, but reserved leave to move to reduce the damages by the difference between the values at the pit's mouth and in the ground. The jury found their verdict as directed; damages, on this head of claim, 1400*l*.

Sir *J. Campbell*, Attorney-General, in Easter term, 1841, obtained a rule to show cause why the verdict should not be reduced "by the amount of the expense of getting the coals and bringing them to the pit's mouth." Cause was shown in Easter term, 1842.(*a*)

*280] **Ludlow*, Serjt., for the plaintiff, cited *Martin* v. *Porter*, 5 M. & W. 351. The court then called upon the other side.

Sir *W. W. Follett*, Solicitor-General, *Talfourd*, Serjt., and *Keating*, in support of the rule. This is an action of trespass for taking away the plaintiff's coal. In such an action he is entitled to recover the value which the coal had when it first became a chattel, that is, when it was first severed from the soil. The labour afterwards bestowed in bringing it to the pit's mouth gave it an additional value; but that cannot be brought into account by the plaintiff in the present action. This must be the effect of the decision, rightly understood, in *Martin* v. *Porter*, 5 M. & W. 351. [Lord DENMAN, C. J. If a trespasser makes himself owner of the coal by digging it out, and then does something more to it, which increases the value, must not he bear the loss of such added value when the true owner recovers his property?] It would be hard to say where that doctrine would stop. If correct, it might apply when the coals had been carried to Newport or London; or if ore had been taken, and manufactured. It would introduce a new estimate of damages in an action for mesne profits; if valuable crops had been raised during the wrongful occupation, the defendant could claim no allowance for culture. [COLERIDGE, J. There an entirely new thing would have been produced. PATTESON, J. Mesne profits for past years are estimated according to a fair rent. But, if a party is ejected while crops are in the ground, he gets nothing for them.] If the plaintiff had brought trover or detinue for the coal after it

*281] was brought to the pit's mouth, he might have recovered *the full value which it had then acquired, without deduction, or the coal itself, as improved in value; but the taking and converting for which this action is brought consists in detaching the mineral from the freehold, and must be referred to the moment when that was done. [*Ludlow*, Serjt., The plaintiff may claim his damages for the coal as accruing at the first moment when he could take it; and that was when it reached the pit's mouth. He could not enter the pit to take it.] That does not alter the nature of the claim in this action. If the plaintiff was put to any expense in obtaining the coal after the first severance, which he would not otherwise have incurred, that damage might be the subject of a distinct claim, but cannot be assessed here. [COLERIDGE, J. In an action of trover, the plaintiff might have recovered the goods, without deduction for the additional value, at the first moment when he was able to take them.] That is a very different kind of action. The damage here lies in what was done at the time of severance from the mine itself; and the plaintiff must recover according to the value there and not elsewhere. This is precisely

case I should have thought that the ordinary principle would have prevailed, and that Sir Charles Morgan would be entitled to recover compensation only for the damage he has actually sustained, and that all he would have a right to ask at your hands would have been, to put him in the same position as he would have been if the coal had never been stirred."

(*a*) May 2d. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.

the opinion expressed by PARKE, B., at Nisi Prius, in *Martin* v. *Porter*, 5 M. & W. 352. The present case bears some analogy to *Jones* v. *Gooday*, 8 M. & W. 146. There a commissioner of paving had cut away part of the plaintiff's land in widening a ditch; the plaintiff claimed to recover in trespass such a sum as would restore the land to its former condition; but the Court of Exchequer held that he could demand only so much as would compensate for the damage actually sustained. Here the plaintiff claims, not only that which would indemnify him for the damage complained of in this action, *but a large additional value created by the defendant's labour, and for which he furnishes no equivalent. [*Ludlow*, Serjt., mentioned *Wild* v. *Holt*, 9 M. & W. 672, not then reported.] That case and *Martin* v. *Porter*, 5 M. & W. 351, if they have the effect contended for, go too far. The argument drawn from them would show that, if a man had taken another's timber, and made it into a piece of furniture, the loser might claim the article of furniture, or its value. [Lord DENMAN, C. J. It might be answered that the timber had become a different thing.(*a*) But if a trespasser carries away my tree, and I follow and retake it, can he make a charge for his labour? COLERIDGE, J. In trover, could the defendant set up a lien for the labour he had bestowed? Lord DENMAN, C. J. The new value given by the wrongdoer might be less than the article would perhaps have had if left. The coal owner, in this case, might have deferred raising his coal till there was a better market.](*b*) [*282

Ludlow, Serjt., and *R. V. Richards*, were then called upon to show cause. The argument from the increased value given by the trespasser's labour is answered by the passage in 2 Blackstone's Commentaries, 404, b. 2, c. 26, which lays down the doctrine adopted by our courts from the civil law, as to "property arising from accession." And the rule, as applied here, is not unjust. The labour is bestowed upon the chattel without the owner's consent. He might wish to keep the tree in its first state, or to reserve his coal for the chance *of a better market. When the tree has been wrongfully cut down and removed, the owner may follow and retake it at the first opportunity. Can it be said, when he claims to do so, that he shall not have his tree back without paying for the trimming, carriage, and turnpikes? Here, a trespass was committed by severing the coal in the mine; the owner could not retake it there; by a continued trespass it was brought, through the defendant's land, to the pit's mouth; and there, first, the owner was enabled to take it. Suppose, at that earliest opportunity he had actually repossessed himself of the chattel; could the trespasser then have sued him for work and labour done upon the chattel since the first severance? Or could he have claimed a lien? If the claim of reduction here be well founded, he might. *Jones* v. *Gooday*, 8 M. & W. 146, has no bearing on this case. The decision of the Court of Exchequer last term, in *Wild* v. *Holt*, 9 M. & W. 672, supports and goes beyond that in *Martin* v. *Porter*, 5 M. & W. 351. [*283

Cur. adv. vult.

Lord DENMAN, C. J., in this term, (June 9th,) delivered the judgment of the court.

This was an action for breaking a mine, digging coal, carrying it un-

(*a*) See Com. Dig. *Biens*, (H) (p. 141, 4th ed.); and the anonymous case, Moore, 19, pl. 67, there cited.

(*b*) In the course of this argument, reference was made to the principle of estimating damages laid down at nisi prius by Parke, B., in Morewood v. Wood, Derby Summer Assizes, 1841. See p. 440, note, post.

lawfully along the plaintiff's adit, and taking and converting it to the defendant's use. Judgment was suffered by default, and a writ of inquiry executed before my brother COLERIDGE.

The question was, how the value of the coal taken was to be estimated: and the learned judge directed the jury to act on the rule laid down in *Martin* v. *Porter*, 5 M. & W. 351. The rule, however, was misstated at [*284] the trial; and the *calculation has been accordingly taken without making certain allowances which that rule provides for. The direction of the learned judge in that case was, that the plaintiff was entitled to the value of the coal as a chattel, "at the time when the defendant *began* to take it away," that is (as there stated), as soon as it existed as a chattel; which value would be the sale price at the pit's mouth, after deducting the expense of carrying the coals from the place in the mine where they were got to the pit's mouth: and this direction the Court of Exchequer has affirmed. In the present case the rule was taken to be absolute, and without the deduction.

We are of opinion that the rule in *Martin* v. *Porter* is correct, and properly applicable to the present case. The jury must give compensation for the pecuniary loss sustained by the plaintiff from the trespass committed in taking his coal, compensation having been separately given for all injury done to the soil by digging, and for the trespass committed in dragging the coal along the plaintiff's adit: and the estimate of that loss depends on the value of the coal when severed; that is, the price at which the plaintiff could have sold it. This plainly was the value of the coal itself at that moment. The defendant had no right to be reimbursed for his own unlawful act in procuring the coal; nor can he, properly speaking, bring any charge against the plaintiff for labour expended upon it. But it could have no value as a saleable article without being taken from the pit: any one purchasing it there would, as of course, have deducted from the price the cost of bringing it to the pit's mouth. Instances may easily be [*285] *supposed where particular circumstances would vary this mode of calculating the damage; but none such appear here. We do not find that the cost incurred by the defendant in bringing the coal to the pit's mouth is greater by a single farthing than that which the plaintiff must have incurred for the same purpose.

The damages found by the verdict must therefore be reduced by the amount of this charge, which may be ascertained by reference to the judge's note; or there must be a new execution of the writ.

Rule absolute for reduction as above.

The QUEEN *v.* The Mayor, Aldermen, and Burgesses of NORWICH.

B. was town-clerk in the borough of N., holding during good behaviour. At the time of the passing of stat. 5 & 6 W. 4, c. 76, he was, as his predecessors in that office had always been, solicitor in matters relating to the charity trusts under the management of the corporation. When the town-council under that act came into office, he was displaced from the office of town-clerk. The members of the body corporate, who, under sect. 71, acted as trustees for the charities after quitting office, continued to employ B. in matters relating to the charities, but during pleasure only; and the trustees subsequently appointed by the Lord Chancellor, under sect. 71, ceased to employ him.

The Lords of the Treasury, in awarding compensation to B., under sect. 66, for the loss of his offices of town-clerk and clerk of the peace, gave a sum, as they stated in their minute, for the loss of the employment in matters relating to the charities.

Held, that the lords had jurisdiction to make an allowance in this respect; that B. was

entitled to compensation for loss of the last-mentioned employment when the act came into operation; and that, supposing any deduction due on account of his continuing to be employed afterwards, that was a question of amount, as to which the award was final.

The court enforced the award by mandamus.

Kelly obtained a rule, in last Hilary term, calling on the Mayor, Aldermen, and Burgesses of the city and borough of Norwich to show cause why a mandamus should not issue, commanding them to prepare and execute a bond under the common seal of the city and borough, for the payment to Augustus Adolphus Hamilton Beckwith of an annuity of 469*l.* 12*s.* 9*d.*, together with all arrears thereof, due for the loss of salaries, fees, and emoluments, profits and perquisites, of the several offices of town-clerk, clerk to the visitors of lunatic *houses, and clerk of the peace, of the said city and borough; and of the business connected with the several charities lately under the management of the corporation of the said city and borough; such annuity to commence from the date at which he ceased to hold such offices respectively, and to continue for his life. [*286

The affidavits in support of the rule stated that, on 15th December, 1834, Beckwith was elected common or town clerk, and clerk of the peace, for the city and county of Norwich, to hold during good behaviour, and to have the same usual salaries, perquisites, and profits as his predecessors; and that he held the said offices until 1st January, 1836, when he was removed from the office of town clerk by the town council acting under stat. 5 & 6 W. 4, c. 76. That certain offices and employments, which were specified in the affidavit, were held by him as attached to, or in conjunction with, the offices of town clerk and clerk of the peace: and, among these, "that it was part of his duty and employment, as such town clerk, and had been part of the duty and employment of his predecessors in that office, to act as the attorney and solicitor for the said corporation, and to transact all the legal and professional business of the said corporation, and of the several charities under their management, and the legal and professional business relating to the estates belonging to the said corporation, and the estates vested in such corporation in trust or for the benefit of the said charities; and that he, and his predecessors, as such town clerk, was and were entitled to and did receive the perquisites, profits, and emoluments accruing from the transaction of such business:" that he ceased to be clerk of the peace on 1st May, 1836, under the statute; and that, on 25th *May, 1836, he sent in his claim for compensation to the new town clerk. [*287

The document was set out in Beckwith's affidavit: and among the items suggested as being incident to the offices formerly held by him, was the following: "Emoluments, profits, and perquisites arising from professional business and attendances connected with the several charities lately under the management of the corporation, done and made in consequence of holding the office of town clerk." It further appeared that Beckwith, at the time of making his claim, was employed as solicitor to the new trustees of the charities (being the members of the old body corporate who, when the act passed, were trustees); (*a*) but he urged in his claim that this was a new office, and that the emoluments had decreased. The affidavit stated that the matters set forth in the above claim were true. Beckwith attended before a committee appointed by the town council, and received, on 14th

(*a*) Stat. 5 & 6 W. 4, s. 71.

January, 1837, a copy of the resolution of the council, dated 18th November, 1836; from which the following are extracts. "That the said A. A. H. Beckwith is entitled to compensation in respect of the salaries, fees, emoluments, and profits referred to under the several heads or branches of his said claim, except under the fourth head or branch thereof, being emoluments, profits, and perquisites arising from professional business and attendances connected with the several charities lately under the management of the corporation." "That the said A. A. H. Beckwith is not entitled to compensation in respect of the sums mentioned under the fourth *head or
*288] branch of his claim, viz., for emoluments, profits, and perquisites arising from professional business transacted by him in the capacity of clerk and solicitor to the trustees of the several charities under the management of the late corporate body in consequence of his holding the said office of town clerk, inasmuch as the members of the said late corporate body continued, by virtue of certain provisions in the municipal reform act, to be and act as trustees of the same charities after the passing of the same act, and inasmuch as the said trustees re-appointed the said A. A. H. Beckwith such clerk and solicitor as aforesaid to them, the said charity trustees, immediately after his removal from the said office of town clerk, and he has ever since continued to receive, or be entitled to, the emoluments, profits, and perquisites arising from the professional business transacted for the said charity trustees." The council then awarded him a life annuity of 365*l.*, to commence 1st January, 1836; with a deduction not material here.

Beckwith further deposed that the corporate functionaries who went out of office after the first election of councillors, and who continued to be trustees (*a*) of the charity estates, employed him as their clerk and solicitor during their pleasure only, and not by virtue of any corporate office; and that the trustees, subsequently appointed (*a*) by the Lord Chancellor for the administration respectively of the church of England and general charities, had each, at their first meetings, removed him from the employment. Beckwith, after addressing letters of remonstrance to the town clerk without effect, appealed *to the Lords of the Treasury, who, after receiving
*289] memorials from each side, made their award of compensation, accompanied by a minute, dated 26th October, 1841, in which was the following passage. "My Lords are of opinion that Mr. Beckwith is entitled to compensation for the loss of the emoluments received by him for performing professional services connected with the charity trusts." The minute then gave an estimate of the compensation to be made in respect of the several items of the claim; and, as to the fourth claim, (treated as third in the minute,) as follows. "As clerk and solicitor for the charity estates, under the third head of the claim, the sum of 84*l.* 0*s.* 4*d.* per annum, to commence from the time when Mr. Beckwith ceased to hold that office, and to continue for his life, being two-thirds of the average amount of his fees for professional business." The total compensation awarded was 469*l.* 12*s.* 9*d.* per annum: and the Lords made their order accordingly. Beckwith applied to the council for a bond. The town council, by a resolution of 29th November, 1841, resolved that a bond of 385*l.* 12*s.* 5*d.* should be tendered to Beckwith: which, however, had not been done.

Sir *W. W. Follett*, Solicitor General, and *W. H. Watson*, now showed cause. This is not a case within sect. 66 of stat. 5 & 6 W. 4, c. 76. The Lords of the Treasury have therefore acted without jurisdiction. They had no power to decide except as to amount; *Regina* v. *The Corporation of*

(*a*) Stat. 5 & 6 W. 4, c. 76, s. 71.

Warwick, 10 A. & E. 386, *Regina* v. *The Mayor, &c. of Newbury*, 1 Q. B. 751. (a) This cannot be treated simply *as a decision on the [*290 amount, because the Lords of the Treasury have expressly distinguished the items, one of which is in respect of the charities. Now the corporation never had any beneficial interest in the charity estates; and at present they have no control over them. The applicant has not been removed from any corporate office at all: the proviso at the end of sect. 66 is therefore inapplicable. This is a stronger case than *Regina* v. *The Corporation of Poole*, 7 A. & E. 730, where the compensation was disallowed; for there the local act enabled the corporation to remove. [PATTESON, J. There the officer might have been removed if the municipal act had not passed.] The officer there collected the dues on behalf of the corporation. The applicant here contends that the office from which he was removed was itself a new office, and that he was not continued in the old one: but that would prove that he would have been entitled to compensation even if he had not been removed by the trustees appointed by the Chancellor. The strongest case on behalf of this claim is *Rex* v. *The Mayor, &c. of Bridgewater*, 6 A. & E. 339. But there the claimant held an office in the corporation from which certain incidents were severed by the operation of the act. Here the party may be immediately re-appointed by the trustees.

Sir *F. Pollock*, Attorney General, and *Kelly*, contrà. This is a mere question of amount. It is clear that the applicant is entitled to compensation for the loss of the office of town clerk; and, that being so, the Lords [*291 of the Treasury had jurisdiction to determine what the *compensation was to be; *Regina* v. *The Mayor, &c. of Norwich*, 8 A. & E. 633. Continuation in the new employment, supposing the dismissal had not followed, might possibly be a ground for lessening the compensation; but, as to that, the Lords of the Treasury would be the final judges: and, at any rate, this could furnish no reason for refusing compensation altogether as to the item in question, since the office was held only at pleasure, and its emoluments were less than those of the old one. But the claimant has in fact been dismissed even from the new office.

Lord DENMAN, C. J. I think this falls within the principle of *Rex* v. *The Mayor, &c. of Bridgewater*, 6 A. & E. 339, and that the Lords of the Treasury had jurisdiction. It was a mere question of amount.

PATTESON, J. I think also that the case is within the principle of *Rex* v. *The Mayor, &c. of Bridgewater*, and not within that of *Regina* v. *The Corporation of Poole*, 7 A. & E. 730. If stat. 5 & 6 W. 4, c. 76, had never passed, the applicant would have continued to enjoy all the emoluments. But the act has made the offices tenable by different persons: the loss therefore arises "under the provisions of this act," according to sect. 66.

WILLIAMS, J. There is nothing far-fetched in the construction which this court has given to the act on all occasions. The applicant must, in all fairness, be understood to have lost all which he had enjoyed; and *that appears to have been the view on which the Lords of the [*292 Treasury acted.

COLERIDGE, J. I think that this is a mere question of amount; though at first I was of a different opinion. Consider what the state of the office of town clerk was before the act passed: it can hardly now be called the same office. The Lords of the Treasury were to judge what was fairly incidental to the old office. If the new charity trustees, in such a case,

(a) See *Regina* v. *The Mayor, &c., of Sandwich*, 2 Q. B. 895; *Regina* v. *The Mayor, &c of Harwich*, 2 Q. B. 909.

employ the person who previously discharged the duty, that is a mere accident; but this the lords may take into consideration, and, if they please, consider the re-appointment as a compensation pro tanto, and reduce the amount of their award accordingly.

Rule absolute for a mandamus, according to the treasury order.

The QUEEN *v.* BENJAMIN PARKER, JOHN PARKER, and PHILIP MAY.

An indictment charged that defendants conspired by false pretences to obtain, from persons named, divers goods and merchandise, and to cheat and defraud them of the said goods and merchandise; and, in pursuance of the conspiracy, did, by false pretences, which were stated, obtain from them the goods and merchandise aforesaid, and did cheat and defraud them thereof, to the damage of the persons named.

Held bad, in arrest of judgment, for not stating whose the goods and merchandise were.

THE defendants were indicted, at the Central Criminal Court, for conspiracy. The first count charged that the defendants, being evil disposed persons, and contriving and intending to cheat and defraud divers of the liege subjects of our Lady the Queen of their goods and merchandise, on 1st May, 4 Vict., at, &c., in the city of London, unlawfully, wickedly, and
*293] fraudulently did conspire, &c., among themselves and *with divers other persons, &c., by divers false pretences and subtle means and devices, to obtain and acquire of and from divers liege subjects of our Lady the Queen then carrying on business in the said city, to wit, of Thomas Farn, David Law, John Bradbury, Jeremiah Greatorex, (and others named,) divers goods and merchandise of great value, to wit, &c., and to cheat and defraud the said liege subjects of the said goods and merchandise: and that, in pursuance of the said conspiracy, the said Benjamin Parker afterwards, to wit, on, &c., at, &c., did falsely pretend to the said Thomas Farn that, &c.: several pretences made by B. and J. Parker were then set out, as overt acts, and charged to be false; among the rest, a pretence made to John Rand, clerk of Bradbury and Greatorex, by B. Parker, "that certain goods which he then purchased of the said John Bradbury and Jeremiah Greatorex were for shipping." And the jurors, &c., that, in pursuance of the said conspiracy, the said Philip May, at, &c., on, &c., and on divers other days, &c., fraudulently did receive the said goods, so obtained by the said B. Parker and J. Parker of and from the said Thomas Farn, &c., (the parties named before,) by the false pretences and false representations aforesaid, and did fraudulently secrete and conceal the said goods and merchandise: and so the jurors, &c., say that the said B. Parker, J. Parker, and P. May, in manner and by the means aforesaid, and in pursuance of the said unlawful, &c., conspiracy, unlawfully and fraudulently did obtain from the said Thomas Farn, &c., (the parties named before,) respectively, the goods and merchandise aforesaid, and did cheat and defraud them thereof: To the great damage of the said Thomas Farn, &c. (the parties named before): To the evil example, &c., and against the peace, &c.

*294] *The second count omitted the overt acts, but in other respects was substantially the same as the first, except that no damage to any person was stated at the end.

Third count. That defendants, contriving and intending as aforesaid, on, &c., at, &c., unlawfully, wickedly, and fraudulently did conspire, &c., to cause it to be believed that the said B. Parker, who was then an uncertificated bankrupt, was not B. Parker but John Parker; and that he carried

on an extensive shipping business at No. 70½ in Lower Thames Street in the city of London, and was a man of large property, and had a large capital engaged in the said business; and, by means of the said belief, to obtain and acquire of and from divers liege subjects of our said Lady the Queen, then carrying on business in the said city, divers goods, wares, and merchandise of great value, to wit, of the value, &c., and to cheat and defraud the said liege subjects of the said goods and merchandise: to the evil, &c., and against the peace, &c.

Fourth count. That defendants, on, &c., at, &c., unlawfully, &c., did conspire, &c., by divers false pretences and subtle means and devices to obtain and acquire, of and from divers liege subjects of our said Lady the Queen, divers other goods and merchandise of great value, to wit, of the value, &c., and to cheat and defraud the said liege subjects of the said goods and merchandise: to the great damage of the said liege subjects: to the evil, &c., and against the peace, &c.

The indictment having been removed into this court by certiorari, the defendants pleaded not guilty, and were found guilty on the trial before Lord DENMAN, C. J., at the London sittings after last Hilary term. In last *Easter term, *Chambers* and *Humfrey*, for different defendants, [*295 obtained a rule nisi for arresting the judgment.

Platt and *Swann* now showed cause. The indictment is objected to because it does not state whose property the goods were which the defendants are charged with having conspired to obtain, and obtained. In *Regina* v. *Martin*, 8 A. & E. 481, it was held that an indictment for obtaining goods by false pretences, under sect. 53, of stat. 7 & 8 G. 4, c. 29, must state to whom the goods belong. But that section was intentionally framed to comprehend cases where the offence might turn out to be technically a larceny: therefore the rule was applied which prevails in the case of larceny. That was the principle of the decision in *Regina* v. *Norton*, 8 C. & P. 196. In *Regina* v. *Mackarty*, 2 Ld. Raym, 1179, the indictment did not show to whom the goods, which were obtained, belonged: and in 2 Stark. Cr. Pl. 718, (2d ed.) there is an indictment for obtaining money by conspiracy, in which it is not expressly stated to whom the money belonged. Now in *Regina* v. *Mackarty*, the indictment was, not for a conspiracy, but for a fraud; and the fraud would not be complete till the goods were obtained: and, in that part of the indictment which stated the obtaining, it was only said that the prosecutor delivered "quandam quantitatem galerorum valentiæ," &c.: therefore the defect would have been fatal, if a statement of ownership had been necessary. In 2 Hal. Pl. Cr. p. 181, ch. xxv., the fourth head of requisites to the indictment is, "Touching the name of the person upon whom the offence is committed," and it is under this head that Lord HALE points out that *the goods, [*296 &c., must be shown to be the property of some one. That being the object of the rule, it is enough if, as here, the indictment show against whom the offence is committed. The parties could not be cheated and defrauded unless they had some interest in the goods and moneys. A conspiracy to rob A. B. if the conspirators could effect it would be indictable: so would a conspiracy to rob all whom the conspirators might thereafter be able to rob, if laid with proper overt acts. [PATTESON, J. In *Rex* v. ——, 1 Chitt. R. 698, the offence appears to have been described as a conspiracy to defraud J. W. "of divers goods," and the overt act as "defrauding him of divers goods," not showing whose the goods were.] The fourth count here resembles that indictment. [PATTESON, J. How does

it differ from the indictment in *Regina* v. *Peck*, 9 A. & E. 686.] The court there seems to have thought the names of the parties unnecessary to the indictment.

Humfrey, contrà. This case cannot be distinguished from that of an indictment for obtaining goods under false pretences. [Lord DENMAN, C. J. And there it would not be sufficient to follow the words of the statute.] *Rex* v. *Richardson*, 1 Moo. & Rob. 402, shows that the description of the conspiracy must be precise. Here the goods might be bona vacantia. In *Rex* v. *Martin*, 8 A. & E. 481, Lord DENMAN, C. J., pointed out that, although a man may commit an offence by obtaining his own goods under false pretences, the indictment in such a case ought to show the circumstances which rendered such an act an offence: and that, if, for instance,
*297] they were obtained *from a carrier, the possession would make them the carrier's goods; and the fact, that the defendant was the owner, would appear, not in the indictment, but in the evidence, and would be no defence to an indictment laying the property in the carrier. In *Regina* v. *Wickham*, 10 A. & E. 34, PATTESON, J., pointed out that the note, by which the defendant obtained money, might have been his own. In *Regina* v. *Peck*, 9 A. & E. 686, the offence was a conspiracy to defraud persons who should sell to the defendants: but a sale can be only of that in which the seller has some interest: therefore, perhaps, the allegation of property was virtually supplied. "The name of the owner cannot be dispensed with except in particular instances, which are exceptions from the necessity of the case:" 1 Stark. Cr. Pl. 201, (2d ed.) The whole indictment is not set out in *Rex* v. ——, 1 Chitt. R. 698; the point decided did not require more than is given in the report. In *Rex* v. *Gill*, 2 B. & Ald. 204, the ownership was stated: and that case is supposed to have gone as far, in permitting looseness of description, as the law can sanction. The defendants here, if acquitted, could not have the full benefit of the record on a plea of auterfois acquit to a second indictment.

Lord DENMAN, C. J. The first count states that the defendants conspired to obtain, from divers liege subjects named, divers goods and merchandise, and to cheat and defraud the said subjects of the said goods and merchandise; and, in pursuance of the said conspiracy, did obtain from the said subjects the goods and merchandise. Is that a good charge of conspiracy? Although weighty doubts may be stated as to the
*298] *propriety of requiring particularity in matters which do not affect the question of moral offence, yet it has always been held that the goods must be described as belonging to some party, or that some other description must be given of them, since otherwise the prosecutor might make an indefinite statement, and lie in wait for whatever might come out in the evidence. There is no precedent for such an imperfect description as this. It is urged that a person could not be defrauded of goods in which he had no interest: but the prosecutor ought to state the fact of that interest. The argument for the prosecutors here might be almost as well urged in support of an indictment charging a conspiracy to defraud generally. As to the fourth count, it is obvious that whatever objections apply to the earlier counts apply still more strongly to this. The most general form of indictment which has been held admissible was that in *Rex* v. *Gill*, 2 B. & Ald. 204: but if we allowed this to be a good indictment, we should go beyond any line which has hitherto been drawn.

PATTESON, J. It may be observed that this is a charge of conspiring to obtain, from persons named, divers goods and merchandise, *and* to cheat

and defraud them of the goods and merchandise,—not with intent to cheat and defraud; though perhaps that makes no real difference in the question. To conspire by false pretences to obtain divers goods and merchandise might not amount to any offence. As to the words "to cheat and defraud," Mr. Platt attributes too much force to them: his argument, if good, would show that the subject matter of conspiracy need not be stated at all.

*WILLIAMS, J. I believe *Rex* v. *Gill* is generally mentioned as the case of the greatest laxity; though I think that, still earlier, a [*299 count was framed in a very general form, and added to others for the sake of greater security. But in all cases, if goods were in question, they were laid as being the goods of certain persons.(*a*) A laxity in this respect might be treated with indulgence on account of the generality which has been permitted in alleging the false pretences: and perhaps it might have been enough here to say "the goods of divers persons." As to the argument, that property must be inferred from the words "cheat and defraud," it seems to me that it might be equally urged in cases of larceny and burglary; for the words "steal" and "burglary," it might be said, imply respectively that the goods taken belonged to somebody, and that the house was broken open in the night.

COLERIDGE, J., concurred. Rule absolute.

(*a*) The learned judge referred to a case of *Rex* v. *Browne and Roberts*, Easter term, 50 G. 3, (not reported,) in which the defendants were convicted of a conspiracy charged in very general terms: but his lordship stated that the ownership of the goods, which the defendants were charged with conspiring to obtain, was there stated.

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*HUNT and Another, Assignees, &c., v. ROBINS. [*300

W., as a security to L. for money payable on a certain day, bargained and sold goods to L. by indenture, with a covenant for payment by W. to L. at the day, and proviso that if such payment were made the indenture should cease, but in case of default L. should hold the goods to his own use for ever. Default was made; and L. took possession. Afterwards W. became an insolvent within stat. 1 & 2 Vict., c. 110, and went to prison; and, after the commencement of W.'s imprisonment, L. sold the goods.

Held, that such sale was not void as against the assignees; for that L. had not thereby availed himself of the bill of sale after the commencement of W.'s imprisonment, within the meaning of stat. 1 & 2 Vict., c. 110, s. 61.

TROVER by the assignees of Elizabeth Eliza Wilmot, an insolvent debtor, for furniture, &c.

3d Plea. That, by indenture made while E. E. Wilmot was possessed of the goods, and before she petitioned, and before the commencement of her imprisonment, viz., on, &c., between the said E. E. W. of the one part and George Luckin of the other part, after reciting that E. E. W. had requested G. Luckin to discount for her a bill of exchange of even date with the indenture, drawn by the said G. L. upon E. E. W., and accepted by her, for payment of 100*l.* one month after date, which G. L. had consented to do on having payment secured as after mentioned, the said E. E. W., in consideration of 100*l.* in hand paid, &c., did grant, bargain, sell, and confirm to G. L., his executors, &c., the goods in the declaration mentioned; habendum to him, his executors, &c.; with a proviso that, if E. E. W. should pay the bill when due, the said indenture should cease, &c.: covenant by E. E. W. to pay as aforesaid, and that, in case of default, G. L., his executors, &c., should peaceably and quietly have, &c., the

goods to his and their own use for ever. Averment that the bill became due before E. E. W. subscribed her petition, and before the commencement of her imprisonment, and before plaintiffs became assignees, to wit, on, &c., and that she did not pay the bill as and when the same became
*301] due, &c., but made default; *and thereupon G. L., afterwards, and before E. E. W. subscribed, &c., and before the commencement of her imprisonment, and before plaintiffs became assignees, to wit, on, &c., entered into the possession of and took and had the said goods to his own use under and by virtue of the indenture: Justification by defendant as the servant and by the command of G. L. Verification.

4th plea. That E. E. W., before she subscribed, &c., and before the commencement, &c., and before the time when, &c., to wit, on, &c., for a bonâ fide consideration, viz. 137*l*., to wit, on, &c., paid to her by defendant, bargained, sold, and assigned to defendant the said goods, and all her estate, right, &c., therein; and the same then were delivered to and possessed by defendant: wherefore defendant afterwards, at the time when, &c., committed the alleged grievance, as it was lawful, &c. Verification

Replication to plea 3. That, after the making of the indenture, and after the passing of a certain act, (1 & 2 Vict. c. 110,) and after 1st October, 1838, when that act came into operation, "and before any sale of the said goods and chattels in the said declaration mentioned, or of any of them, or of any part thereof, by the said G. L., under and by virtue of the said indenture," to wit, on, &c., the imprisonment of E. E. W. commenced, and from thence, until and at the time of the making of the vesting order after mentioned, the giving notice, and the sale of the said goods as after mentioned, continued. And that afterwards, to wit, &c., by a certain order, &c.: the replication then stated the order of the Insolvent Debtors' Court, vesting the estate of E. E. W. in the professional assignee, his successors, and assigns, for the benefit of the creditors, &c.; and that afterwards, to
*302] wit, &c., plaintiffs were *appointed assignees, &c. And that, before such appointment, to wit, on, &c., the provisional assignee gave notice to defendant that such imprisonment of E. E. W. had commenced and was continuing as aforesaid, and that she was then in prison, and had petitioned, &c. Nevertheless, defendant, after the commencement of the imprisonment, the petition, vesting of the estate, passing of the statute, and its coming into operation, and the giving of the said notice, to wit, on, &c., "in order to make the said bill of sale available, sold" the goods, &c., in the declaration mentioned, contrary to the form of the statute, &c.: which said sale is the conversion, &c. Verification.

Replication to plea 4. That the said bargain and sale therein mentioned were made by a certain indenture commonly called a bill of sale, made on a certain day, &c., between E. E. W. of the one part and defendant of the other part: (excuse of production, the instrument being in defendant's possession.) And that, after the making, &c., and after the passing of the said act, &c. (The statements which followed were the same in substance as those in the replication to the third plea.)

Demurrer, stating causes which, so far as they are material to the report, will appear sufficiently by the argument. Joinder in demurrer.

John Henderson for the defendant. The question arises on stat. 1 & 2 Vict. c. 110, s. 61, which enacts: "That in all cases where any prisoner whose estate shall have been vested in the said provisional assignee under this act shall have executed any warrant of attorney to confess judgment, or shall have given any cognovit actionem, or bill of sale, whether for a

valuable consideration or otherwise, no person shall, after the *commencement of the imprisonment of such prisoner, avail himself or [*303 herself of any execution issued or to be issued upon any judgment obtained or to be obtained upon such warrant of attorney or cognovit actionem, or of such bill of sale, either by seizure and sale of the property of such prisoner, or any part thereof, or by sale of such property theretofore seized, or any part thereof, but that any person or persons to whom any sum or sums of money shall be due in respect of any such warrant of attorney or cognovit actionem, or of such bill of sale, shall and may be a creditor or creditors for the same under this act." The clause does not apply to this case. Luckin was possessed of the goods as owner before the imprisonment. That he sold them after the imprisonment can make no difference, his right having been perfect before. If the insolvent had sold and delivered the goods without deed before going to prison, it could not have been contended now that the vendee was not absolutely entitled to sell: his having taken a bill of sale ought not to place him in a worse situation. If he had held the goods subject to a lien before the imprisonment, his lien would not have been affected by the vesting order. The bill of sale contemplated by the statute is one remaining as a security at the time of the insolvency: but this bill of sale had ceased to be a security; the right under it had become absolute. No one could stand in the situation of a "creditor" under it, within sect. 61. The decisions upon the words "creditor having security," in stat. 6 G. 4, c. 16, s. 108, show this; *Wymer* v. *Kemble*, 6 B. & C. 479; *Morland* v. *Pellatt*, 8 B. & C. 722. Reliance will perhaps be placed upon the words "avail himself" "of such bill of sale." [COLERIDGE, J. And the clause *says, "either by [*304 seizure and sale" "or by sale."](a) Luckin did not avail himself of the bill of sale to sell; he did not want it for that purpose. He sold in exercise of his possessory right, not of the powers given him by the indenture.

Petersdorff, contrà. The object of sect. 61 was to provide by legislative enactment against the vesting of property in the creditor under an execution or bill of sale, as against assignees, unless there should have been a levy completed, or a bill of sale carried into effect by actual sale, before imprisonment commenced. [COLERIDGE, J. If a party takes goods into his possession under a bill of sale but does not sell, are they not his goods before they are sold?] The effect of sect. 61 is that the assignees are entitled. To vest the property in the vendee as against them, the goods must have been turned into money before the insolvency: if they remain in specie with the vendee the title continues in the assignees. [PATTESON, J. There is no provision in sect. 61 that the property shall at any particular time pass to them. The words are that no person shall, after the commencement of the imprisonment, avail himself, &c., "either by seizure and sale" "or by sale of such property theretofore seized."] The alternative, as worded, may raise a difficulty; but some operation must be given to the clause; and it can have none but that ascribed to it by the plaintiffs. [Lord DENMAN, C. J. Can you say here that the defendant availed himself of the security by seizure and sale after the imprisonment commenced? He had a full right to sell at that time. The statute does not make the vendee in such a case a trustee. COLERIDGE, J. *For what sum could Luckin have [*305 been creditor after the bill of sale?] The same difficulty was suggested under sect. 108 of the bankrupt act, 6 G. 4, c. 16: but the words

(a) See *Squire* v. *Huetson*, 1 Q. B. 308.

there used are different from those of stat. 1 & 2 Vict., c. 110, s. 61. The intention of this latter clause was, that no bill of sale should be available where it could possibly be an instrument of fraud. If the goods were already sold when the imprisonment commenced, that could not be the case; if they were not, it might. It is argued that a transfer without deed under the present circumstances would have been unimpeachable; but there are many cases where a mere transfer in fact would be protected, but, if the same purpose be effected by a particular kind of security, the law places a watch over the transaction.

J. Henderson was not heard in reply.

Lord DENMAN, C. J. I am of opinion that this is not a case within sect. 61, though the words may at first appear to bear the construction suggested for the plaintiffs. The clause enacts that no person shall avail himself of any execution, &c., or "of such bill of sale, either by seizure and sale of the property" (which refers to the case of an execution), "or by sale of such property theretofore seized," but the person entitled under such bill of sale, &c., "shall and may be a creditor" under this act. A taking in execution does not apply to the present case; and, if seizure may signify merely taking possession under the bill of sale, the defendant here was possessed as absolute owner, long before the imprisonment. He had availed himself of the bill of sale by taking possession, and was holding the goods
*306] as *he held any other property of his own. The words prohibiting a sale cannot apply where the party has been in possession of the goods as absolute owner.

PATTESON, J. Whatever might be the case as to any other bill of sale under sect. 61, this bill is clearly not within the act. By the indenture, Luckin is to be entitled to the goods as a security for money which Elizabeth Wilmot covenants to pay; if she does pay, the indenture is to determine; if default is made, he is to hold the goods to his own use for ever. There is no power of sale. If there had been a covenant that, on default made, it should be lawful for Luckin to sell, paying over the residue, it might now have been said that he had availed himself of the indenture to sell. But, under this deed, the goods became his own on the default; he did not want the bill of sale, to give him the power of selling them. If sect. 61 had said that, notwithstanding the warrant of attorney, cognovit, or bill of sale, the property should vest in the assignees, a different case would have arisen. The defendant here has not availed himself of the bill of sale by selling these goods, and therefore is not brought within the clause.

WILLIAMS, J. I am of the same opinion. Mr. *Petersdorff* does not deny that if the goods had been sold and delivered without deed the transaction would have been valid. His argument might have had weight if the goods had been held, after the imprisonment commenced, as a security for performance of the contract. But here, on default made, the vendee entered upon and took the goods, and held them to his own use. Any thing like deposit as a security was at an end.

*307] COLERIDGE, J. Luckin held the goods as mortgagee till the bill of exchange was due: before that time he could neither seize nor sell. When the bill was due, and default made in payment, he was at liberty to take upon him the absolute ownership; and he did so before the imprisonment commenced. All that took place afterwards was by virtue of that ownership, and not of the bill of sale.

Judgment for defendant.

DOE on the demise of PYE v. BRAMWELL.

The lessor of the plaintiff, in an action of ejectment commenced before stat. 6 & 7 Vict. c. 85,(a) claimed land as lord of a manor, and, to show that the land in question was part of the manor, called tenants of the manor to prove that they, being entitled to common on the wastes, had exercised a right of common on the land in question.

***Held*, that they were incompetent from interest. Though their names were endorsed on the record, under stat. 3 & 4 W. 4, c. 42, ss. 26, 27.**

Ejectment for lands in Suffolk.

On the trial, before Bosanquet, J., at the Suffolk Spring Assizes, 1841, the case, as opened for the lessor of the plaintiff, was that he was lord of the manor of Lavenham, and entitled, in that character, to the wastes of the manor, of which it was contended the land in dispute (called Sayer's Green) formed a portion. The conveyance of the manor, with the rights, members and appurtenances, to the lessor of the plaintiff having been proved, he proposed to show that the land sought to be recovered was parcel of the wastes, by proving long and uninterrupted acts of ownership by the copyhold tenants of the manor feeding their horses and cattle upon it. For this purpose, witnesses were *called, who, on being examined on the voir dire, stated that they were themselves copyhold tenants of the manor of Lavenham, and entitled to feed their horses and cattle on all the wastes of the manor of which the land in dispute was alleged to be a part. The defendant's counsel objected that they had a direct interest in the result of the verdict. The learned judge admitted the evidence, the names of the witnesses being endorsed on the record under stat. 3 & 4 W. 4, c. 42, ss. 26, 27. Verdict for plaintiff. [*308

B. Andrews, in Easter term, 1841, obtained a rule nisi for a new trial, on the ground (besides others not material here) that this evidence had been improperly admitted.

Kelly and *Byles* now showed cause. The witnesses could not avail themselves of this verdict, if their right to use the common were disputed. The endorsement would prevent its being evidence for them. The utmost that can be said for the defendant is that they will be rather more conveniently circumstanced as to obtaining their rights, if one of the now litigant parties be possessor than if the other be so. Now mere balance of convenience is not enough to produce incompetency: there must be a legal advantage: but the verdict cannot alter the legal right of the witnesses: for, if the land in dispute be part of the waste, the witnesses have the right before the verdict, and, if it be not, they have not the right after the verdict. (They cited *Dodington* v. *Hudson*, 1 Bing. 257, recognised in *Adeane* v. *Mortlock*, 5 New Ca. 236; and *Doe dem. Nightingale* v. *Maisey*, 1 B. & Ad. 439.

B. Andrews, (with whom was *Gunning*,) contrà. This case is distinguishable from *Doe dem. Nightingale* v. *Maisey*, 1 B. & Ad. 439, and falls within the principle of *Doe dem. Cuthbert* v. *Bamford*, 11 A. & E. 786,(b) in which case it was held that a party is not a competent witness where the verdict, if given in conformity with his evidence, would facilitate the proof of a right claimed by him. (He was then stopped by the court.) [*309

Lord Denman, C. J. We are bound by the case last cited, which is the latest, and which cannot be distinguished from the present. In *Doe*

(a) Which (by sect. 1) removes incompetence on the ground of interest, (with certain exceptions,) in all proceedings not commenced (sect. 3) before the passing of the act, 22d August, 1843.

(b) And see *Parker* v. *Mitchell*, 11 A. & E. 788.

dem. Nightingale v. *Maisey* a new proceeding would have been necessary to give the proposed witness the right which she claimed. Here, if the lessor of the plaintiff succeed, the witnesses will go on enjoying the common as before.

PATTESON, J. This case is exactly the same as *Doe dem. Cuthbert* v. *Bamford*, except that the witness there was called, not to support, but to resist a change in possession, he being interested in the continuance of the possession.

WILLIAMS, J. I am of the same opinion. The case for the plaintiff is shaped on the supposition that the waste is part of the manor, that is, that it is ground on which the witnesses are entitled to put their cattle. It is consistent with all the cases that a witness is disqualified, not merely if the verdict will be evidence for him, but if it will increase a fund on which he has a claim.

*310] *COLERIDGE, J. We must look at the state of the case, and the opening. The lessor of the plaintiff seeks to recover, as lord of the manor, land which the witnesses would show to be part of the waste. Therefore they come to show that they are entitled. Suppose a witness, on the voir dire, were to say that the lessor of the plaintiff had promised to grant him a lease of the land in question: surely that would disqualify him.

Rule absolute.

The QUEEN *v.* The Justices of the West Riding of YORKSHIRE.

(KEIGHLEY *v.* WILSDEN.)

This case is reported, 2 Q. B. 331.

SALLY CATTERALL *v.* THOMAS KENYON, and JANE his Wife.

Bailiffs charged to execute process against the goods of J. S. wrongfully took plaintiff's cattle in execution, and lodged them in the stable of an inn kept by defendant K. Plaintiff demanded them of defendant's wife, he being absent; the wife said she would consider, and make inquiry; and, on a subsequent demand, told plaintiff that she was indemnified by the attorney who had issued the process, and that plaintiff need not apply again. The cattle were detained, and sold under the execution, K. continuing absent during the whole transaction. In trover against K. and his wife, *Held*, that the above facts were evidence on which a jury might find a conversion by the wife, for which trover lay against both defendants.

TROVER, in the Lancaster Court of Common Pleas, for cows. The declaration alleged that the cows came to the possession of Jane, then and still being the wife of Thomas, by finding, and that she, well knowing,
*311] *&c., did not, although requested, deliver them to plaintiff, but converted them to the use of Thomas. Pleas: Not guilty; and that plaintiff was not possessed, &c. Issues thereon. On the trial, before ROLFE, B., at the Lancaster Spring Assizes, 1841, it appeared that the defendant Thomas Kenyon kept the Golden Lion Inn, at Blackburn. The cows were taken under an execution against the goods of plaintiff's father, and were brought to the Golden Lion, where they remained in the stable several days, at the end of which they were sold to satisfy the execution. Thomas Kenyon was absent from home the whole time. While the cows were in the stable, the plaintiff, who alleged that they were not her father's property, but her own, went to the Golden Lion, and there saw the female defendant, who, on being asked whether she had the cows, admitted that

she had. Plaintiff then asked her if she would deliver them up. Defendant said she had nothing to do with delivering them up, and must inquire and consider about it: and, on a second application, made the next day, she said she could not deliver them. Being applied to a third time, on the next day but one, she said she did not care about giving them up if the party making the demand would get a paper, (which was understood to mean a written opinion,) from Backhouse, an attorney whom the plaintiff had consulted. A paper was accordingly obtained from Mr. Backhouse, and produced to the defendant; but she then said that she had been to Mr. Bell, (the attorney who issued the process,) and he would save her harmless; and that plaintiff need not come any more. Afterwards the sale took place. On this evidence the defendant's counsel contended that no proof appeared of a conversion by the wife, through *whom only the husband could be affected in this case. The learned judge left the case to the jury on this point, (as well as on the question of ownership,) expressing to them his opinion that Jane Kenyon had acted as on behalf of her husband, and that a conversion was proved: but he gave leave to move to enter a nonsuit. Verdict for plaintiff on both issues. [*312

Alexander, in the next term, moved according to the leave reserved, and relied upon *Verrall* v. *Robinson*, 2 Cro. M. & R. 495; S. C. 5 Tyr. 1069. *Smith* v. *Young*, 1 Camp. 439; *Alexander* v. *Southey*, 5 B. & Ald. 247, and *Wilson* v. *Anderton*, 1 B. & Ad. 450, were likewise referred to. The court granted a rule nisi.

Tomlinson now showed cause. First, according to the resolution of the judges mentioned in *Foster* v. *Jolly*, 1 Cro. M. & R. 703, 704, note (a), S. C. 5 Tyr. 249, 240, this motion, made under stat. 4 & 5 W. 4, c. 62, s. 26,(*a*) should have been addressed to the Court of Exchequer, where the judge who presided at the trial sits. [Lord DENMAN, C. J. If the point had occurred to us when the rule was applied for, I think we should have said, as in that case, that the motion "should be made" in the Court of Exchequer. But we shall not now refuse to go on with the case.] The question then is, whether there was any evidence for the jury of a conversion. This case differs from *Verrall* v. *Robinson*, because here the defendant Jane Kenyon ultimately took upon herself to forbid any future application, not waiting the result of any thing that was to take place, *but refusing to give up the cattle at all, and so making herself party with the bailiffs. This, if done by a person sui juris, would render him liable in trover. To assume the dominion over, and right to dispose of, another person's goods, though without touching them, is a conversion; *MCombie* v. *Davies*, 6 East, 538.(*b*) It makes no difference that the party actually doing wrong in this case was a married woman. Her conversion was her husband's; if an agency was necessary, she was sufficiently his agent for this purpose; but the ground of his liability is the intendment that a tort done by her is done by him. The declaration alleges that she converted to his use; but this averment is not essential: for the action of trover does not depend upon the acquisition of property by any person charged with the conversion; and on this ground a declaration stating that husband and wife converted "to their own use" was held sufficient after verdict, in *Keyworth* v. *Hill*, 3 B. & Ald. 685. Then the doctrine laid down in *Wilson* v. *Anderton* applies to this case, that, [*313

(*a*) "For improving the practice and proceedings in the Court of Common Pleas of the county palatine of Lancaster."

(*b*) *Baldwin* v. *Cole*, 6 Mod. 212, is there cited. See *White* v. *Teal*, 12 A. & E. 106.

where property is in the hands of a bailee, and the right is disputed, the bailee, if he "makes himself a party by retaining the goods for the bailor, must stand or fall by his title." [Lord DENMAN, C. J. I do not think any thing induced us to grant this rule but the case of *Verrall* v. *Robinson:* but there the defendant seems to have been passive; the female defendant here takes upon herself to decide.]

W. H. Watson, contrà. The cattle here were lodged in the stable of *314] an inn: the innkeeper's wife had no *power to give them up against the will of those who brought them. All the evidence of conversion amounts only to certain words of the female defendant. [Lord DENMAN, C. J. Coupled with the act of keeping the cattle.] In the cases where an exercise of disposing power over goods has been deemed a conversion, there has been something like an assumption of the right of property; a mere exercise of dominion for a temporary purpose, without either acquisition or destruction of the chattel, or change of its nature, is no conversion, as was held in *Fouldes* v. *Willoughby*, 8 M. & W. 540, where the complaint was that the defendant had driven the plaintiff's horses out of a ferry boat in which he was passenger. The present case is the same in principle with *Verrall* v. *Robinson*. There the plaintiff's chaise had been left with the defendant by a party who had no property in it, and attached on defendant's premises for a debt of that party. Defendant, when required to give it up, refused, on the ground, only, that it had been attached by legal process; and this was held no evidence of a conversion. Lord ABINGER, C. B., said: "There is nothing to show that the defendant ever intended to convert the chaise to his own use." "It was in the custody of the law, and the defendant had it not in his custody or power to deliver; and he says, on its being demanded, that it is in the custody of the law, and that he cannot deliver it." If it be said here that the cattle had been wrongfully seized, the same argument would have applied there. In *Alexander* v. *Southey*, the defendant, being the servant *315] of an insurance company, had goods of the plaintiff under his *charge, in a warehouse where they had been deposited by servants of the company after saving them from a fire. The plaintiff demanding them, defendant answered that he could not give them up without the company's order; and this was held no proof of a conversion. Here, in effect, the defendant makes the same answer; but the order for delivery cannot be obtained, and she does not give up the cattle. [PATTESON, J. In that case the defendant was a servant, and referred the parties to his master.]

Lord DENMAN, C. J. *Verrall* v. *Robinson*, 2 Cro. M. & R. 495; S. C. 5 Tyr. 1069, does not apply. The learned judges who decided that case thought that the chattel was in the custody of the law, and that the defendant was not at liberty to give it up. The particular article being attached by process, the defendant held it as servant of the law, and would not have been justified in surrendering it. Here, the officers, being authorized only to seize goods of A. B., had seized the goods of C. D.; the owner claimed them of the defendant; and she at first took time for consideration, but ultimately said, "I am told I shall be borne harmless, and I will keep them." That is sufficient to make the husband and wife liable in trover.

PATTESON, J. As my lord observes, in *Verrall* v. *Robinson*, particular goods had been attached in the defendant's hands: the law was to determine whose property those particular goods were; and the defendant ac-

cordingly detained them. Here, an officer, under process, takes goods of a wrong party and lodges them with the defendant; and, when asked for them, she *says, first, "I will consider of it," and then "I am told not to give them up; I am borne harmless, and you need not come any more." That is a very different case. The rule must be discharged. [*316

WILLIAMS and COLERIDGE, Js., concurred. Rule discharged.

ELIZABETH HEDLEY v. BAINBRIDGE, Gent., One, &c.

The implied authority of one partner to bind another by promissory note or bill of exchange is confined to partnerships for the purpose of trade.

One of two attorneys in partnership has no implied authority to bind his partner by a note in the name of the firm, though given for their debt. As, for money handed to the firm by a client to be laid out on mortgage.

Declaration on a promissory note, with a count on an account stated: Particular of demand, specifying that the action is brought to recover 555*l.* due on the note set forth in the first count, with interest from, &c., to the day of payment; and that plaintiff, for recovery thereof, will avail herself of the whole or any part of the declaration: *Held*, that the note, being invalid, was not, by this particular, made admissible evidence of the account stated.

ASSUMPSIT on a promissory note for 600*l.* made by defendant, payable to plaintiff on demand. Averment that, although part had been paid, defendant had not paid the residue. Counts for money lent, and on an account stated. Pleas: To the first count, that defendant did not make the said note; to the other counts, Non assumpsit. Issue thereon.

Particular of demand. "This action is brought to recover the sum of 555*l.* due on the promissory note mentioned and set forth in the first count of the declaration herein, with interest thereon from the 14th day of August, 1840, to the day of payment.

Above are the particulars of the plaintiff's demand in this action; for the recovery whereof she will avail herself of the whole or any part of the declaration. Dated," &c.

On the trial, before ROLFE, B., at the Durham Spring *Assizes, 1841, the facts appeared to be as follows: The defendant and Mr. Spurrier (who died before the commencement of this action) were attorneys in partnership. A Mr. Blagburn, brother-in-law of the plaintiff, and executor of a will under which she was a legatee, had advanced money of the plaintiff to Spurrier, who was acting on behalf of the firm, to be laid out on mortgage. Defendant and Spurrier were at that time employed as solicitors in the affairs of the executorship. A settlement of accounts afterwards took place, at which Blagburn, Spurrier, and others were present: the balance due in respect of the advances was found to be 723*l.*; and Spurrier, at that time, paid 123*l.* in cash, and drew and delivered a promissory note for the residue. The note was as follows: [*317

"600*l.* "*South Shields*, 14*th August*, 1839.

"On demand, we jointly and severally promise to pay to Mrs. Elizabeth Hedley, or order, the sum of 600*l.* for value received, with legal interest at 5*l.* per cent. per annum. "BAINBRIDGE and SPURRIER."

Spurrier afterwards paid interest on the note, and part of the principal. Defendant was not present at the making of this note; and it did not appear that he ever knew of it, or of the advances or any transaction relating to them, till he was called upon for payment of the note after Spurrier's death. The case on his behalf at the trial was, that Spurrier had

incurred the debt and given the security without any sanction from him, unless the partnership implied it: and it was contended that an attorney could not, without express sanction, bind his partner by a promissory note. The learned judge was of this opinion, and directed a nonsuit, giving leave
*318] to *move to enter a verdict for the plaintiff for 555*l.*, or such sum as the court should think fit.(*a*) *Alexander*, in Easter term, 1841, moved for a rule nisi accordingly, distinguishing this case from *Greenslade* v. *Dower*, 7 B. & C. 635, and citing *Gardiner* v. *Childs*, 8 Car. & P. 345. A rule nisi was granted.

W. H. Watson and *Otter* now showed cause.(*b*) An attorney cannot render his partner liable by a bill or note without express authority. Partners in a mercantile house may so bind each other; but it is not incident to the business of attorneys. Even if they were money scriveners it would not follow that they should deal in this manner. In all cases where a point like this has arisen between parties, the question has been whether the drawing of bills or notes to bind the firm was incident to the kind of partnership. In *Greenslade* v. *Dower* it was held that one of two parties jointly interested in a farm could not so bind the other, though for a debt due from both. In *Dickinson* v. *Valpy*, 10 B. & C. 128, the same decision was given as to members of a mining company, in the absence of any proof from which an authority so to bind could be inferred. *Bramah* v. *Roberts*, 3 New Ca. 963, and *Bult* v. *Morrell*, 12 A. & E. 745, are authorities on the same subject; and many others are collected in Chitty on Bills, 39—49, Part I. c. ii. 9th ed.(*c*) It is observable, too, that this security is, in form, a note; and LITTLEDALE, J., says, in *Dickinson* v. *Valpy*,
*319] "I think it *would require more evidence to show that the directors of such a company had power to bind the other members by promissory notes than by bills of exchange." The defendant here might be liable for the debt as a member of the firm: but it does not follow that his partner might bind him for it by a negotiable instrument. If the partner could issue a note in his name where he was indebted, the note might equally be issued, and bind him, though he owed nothing.

Knowles and *Hedley*, contrà. First, if this be not a valid note, it is evidence of an account stated; *Rhodes* v. *Gent*, 5 B. & Ald. 244; and the particular of demand gives notice that the plaintiff seeks to recover 555*l.*, and, if not successful on the special count, will resort to the common ones. This calls attention to the latter counts, and the defendant cannot have been misled: and, where that was so, a particular like this was held to let in evidence on a count not framed upon the bill, in *Hay* v. *Fisher*, 2 M. & W. 722, 729. [PATTESON, J. By the learned judge's report it seems that he thought the particular confined to the note, and reserved leave to move to enter a verdict only if the court should think the defendant liable on the note.] The doctrine as to the power of partners to bind each other by bills and notes has of late been laid down more narrowly than the leading cases warrant. In *Greenslade* v. *Dower*, no actual partnership had commenced; the partnership was yet to be founded, as appears by the language of BAYLEY, J.; and Coleman, the party refusing to be bound, seems to have advanced his share of the purchase money in cash before the bills
*320] were drawn. The cases *in which partners have been held incompetent to bind firms by bills or notes have been those of joint stock

(*a*) See the reference to the learned judge's report by Patteson, J., p. 319, post.
(*b*) Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.
(*c*) And see *Furze* v. *Sharwood*, 2 Q. B. 388.

companies, and chiefly companies for mining, the circumstances of which are peculiar. But in general the power so to bind is incident to the condition of a trading company, and would be useful to a firm of attorneys if they were also scriveners, which, in this instance at least, Spurrier and the defendant appear to have been. It was decided in *Willet* v. *Chambers*, 2 Cowp. 814, that, if persons are in partnership as attorneys and conveyancers, and either receives money to be laid out on mortgage, giving his separate receipt, both are liable: and in *Rapp* v. *Latham*, 2 B. & Ald. 795, the acknowledgment of one partner (in a trading firm) was held to bind his partner in the same manner, though the acknowledgment was untrue. Now, if attorneys receiving money to be laid out for their clients may separately give binding acknowledgments, it seems also fairly incident to such a course of dealing that they may separately give securities. But, further, it must be inferred here, from the relation of the parties and the other facts of the case, that Bainbridge was constructively present at the meetings attended by Spurrier. *Cur. adv. vult.*

Lord DENMAN, C. J., in the ensuing vacation, (June 25th,) delivered judgment as follows.

The defendant and a Mr. Spurrier were in partnership as attorneys. A sum of money was deposited with Mr. Spurrier by the plaintiff, a client of the firm, to be laid out on mortgage: and he gave the plaintiff the *promissory note of the firm for the amount. The question is, whether, [*321 under those circumstances, Spurrier had power to bind the firm by such note.

No doubt a debt was due from the firm: but it does not follow that one partner had authority to give a promissory note for that debt. Partners in trade have authority, as regards third persons, to bind the firm by bills of exchange, for it is in the usual course of mercantile transactions so to do; and this authority is by the custom and law of merchants, which is part of the general law of the land. But the same reason does not apply to other partnerships. There is no custom or usage that attorneys should be parties to negotiable instruments; nor is it necessary for the purposes of their business.

The point does not appear to have been expressly raised, except in the case of *Greenslade* v. *Dower*, and there it was not determined; for the bills were not accepted in the course of partnership transactions, but in the original formation of the partnership, and were drawn at different lengths of time from those agreed upon with the plaintiff.

Upon the whole, we think that the implied authority is confined to partners in trade, and that the nonsuit in this case was right.

It was urged that the plaintiff was entitled upon the account stated: but the form of the particulars excluded him from that count, if the note was not valid; and, besides, that point was not made at the trial.

Rule discharged.

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*DANIELS v. GOMPERTZ. [*322

It is irregular that a defendant should, without the plaintiff's authority, rule the sheriff to return a ca. sa. which has not been executed. Admitted. But

Held, That such proceeding is not, in itself, a contempt of process of the court.

Platt, in last Easter term, obtained a rule to show cause why an attachment should not issue against the defendant "for his contempt of the process of this court." The material facts were as follows.

The plaintiff, having recovered judgment against the defendant in this

court on a warrant of attorney, sued out a ca. sa., which was returned non est inventus, and then an alias ca. sa., which was delivered to an officer to be executed, January 29th, 1842. The defendant, on March 23d, obtained a judge's order, calling upon the sheriff to return the alias ca. sa., no execution of the writ having taken place, and no authority having been given by the plaintiff or his attorney to any person to rule the sheriff, or take out an order for that purpose. The sheriff returned the alias ca. sa. unexecuted. Defendant afterwards said, in conversation with plaintiff, "I have as much right to rule the sheriff as you have;" and referred to *France* v. *Clarkson*, 2 Dowl. P. C. 532: and he added, according to the plaintiff's affidavit, some expressions showing a disposition to defeat the process of the court in this and other instances; but these words the defendant, in his affidavit on showing cause, denied. Plaintiff deposed to his belief that defendant's object in obtaining the order was to determine the authority of the sheriff, and thereby prevent being taken in execution.

*323] *The defendant, in answer, deposed that he believed, when he obtained the order, and still did believe, that he was entitled to it, grounding that opinion on *France* v. *Clarkson;* that his object in ruling the sheriff was to ascertain what process the sheriff had in his hands against defendant, for reasons which the affidavit further stated; and that, as he believed, the object of this motion was to enforce the settlement with the plaintiff.

Erle and *Kelly* now showed cause. The language of *France* v. *Clarkson*, relied upon by the defendant, might induce an unprofessional person, at least, to suppose that a defendant might rule the sheriff to return a writ though not executed. [PATTESON, J. A rule nisi only was granted in that case: it does not appear what the result was.] In Watson's Treatise on the Office of Sheriff, p. 64, it is said in general terms, referring to *Edmunds* v. *Watson*, 7 Taunt. 5, that "either party may rule the sheriff to return the writ." [COLERIDGE, J. The same general words are used in 1 Chit. Archb. Pract. 410, 7th ed. PATTESON, J. *France* v. *Clarkson* is cited there, as authority for the position.] The defendant, as soon as an opportunity offered, pointed out to the plaintiff the authority on which he acted. It cannot be contended that his proceeding, though by means of a judge's order, was regular: but there is no ground for the charge of contempt, except some words which he, in his affidavit, denies having used. The object of this application is only to bring about a settlement with the plaintiff by an extraordinary compulsion.

*324] **Platt* and *G. Atkinson*, contrà. The defendant could have no pretence for supposing that he might rule the sheriff before execution of the writ, though he might have done so afterwards. The obtaining of a judge's order was a mere matter of form, and does not affect the question of contempt: the learned judge would suppose that the application was made by a proper party. [PATTESON, J. Persons often make experimental applications at chambers without a chance of success; but that is not a contempt of the court.] The defendant does not deny that he ruled the sheriff for the purpose of avoiding an arrest. He says that he thought he had a right to take such a step; but there is no room for speculating on the intent: the act itself is a contempt.

Lord DENMAN, C. J. I do not know where we should stop if we held this a contempt. It appears to me to be none. The rule must be discharged.

WILLIAMS and COLERIDGE, Js., concurred.(a)

Rule discharged without costs.

(a) Patteson, J., was not in court when judgment was given.

*The QUEEN v. The Poor Law Commissioners. [*325

In the Matter of the Parish of BRIGHTHELMSTON.

If guardians of the poor of a parish, when about to enlarge or rebuild their workhouse in execution of powers given them by a local act, are required by the Poor Law Commissioners to submit the plans and estimates to them, and refuse to do so, the commissioners may, under stat. 4 & 5 W. 4, c. 76, ss. 15, 21, make an order forbidding them to proceed in any alteration or addition to such workhouse, or apply, raise, or borrow any money for that purpose, till the plans and estimates be submitted to and approved by the commissioners.

THE directors and guardians of the poor of the parish of Brighthelmston, acting under the stat. 6 G. 4, c. clxxix., ("local and personal, public,")(a) appointed a committee "to consider the recommendation of the visiting committee relative to the erection of a new school room or the enlargement of the present one, and such further accommodation for the inmates of the workhouse as may be deemed expedient." The committee made a report, recommending that the girl's school should be enlarged, and a new school room erected for the boys, and that the building on the south side of the workhouse should be enlarged so as to afford greater accommodation, there not being sufficient room for the number generally received in the winter. They submitted plans and a model, with a surveyor's report, and recommended advertising for contracts, &c. The directors and guardians resolved that the report should be referred back to the committee to be carried into execution, with power to obtain the necessary specifications, and advertise for tenders. The committee were proceeding to carry the alterations and improvements into effect, and had advertised for tenders, when (December 6th, 1841) the Poor Law Commissioners transmitted to them the following order.

*The order bore date December 3d, 1841, and was addressed [*326 to the directors and guardians, the churchwardens and overseers, the clerk or clerks to the justices of the petty sessions held for the division or divisions in which the said parish is situate, and to all others whom it may concern. It recited stat. 4 & 5 W. 4, c. 76, s. 21, as far as the words "subject to the rules, orders, and regulations of the said commissioners," and then proceeded as follows. "And whereas we, the Poor Law Commissioners, have been informed that the directors and guardians of the poor of the parish of Brighthelmston propose to make certain alterations at or additions to the present workhouse of the parish of Brighthelmston, and have caused certain plans and estimates of expenditure to be made for such additions or alterations, and we have required the said directors and guardians to submit the same for our inspection and examination, so that we might express our judgment as to the necessity and propriety thereof, but the said directors and guardians have refused so to do: now, therefore, by virtue of the powers and authorities conferred upon us by the aforesaid act, we do hereby prohibit and forbid the said directors and guardians from proceeding to carry into effect any alteration or addition to the said workhouse, and from applying, raising, or borrowing any money for the purpose of providing for the expense of any such alteration or addition, until the plans and estimates of the expense thereof shall be submitted to the Poor Law Commissioners for inspection and examination, and until the same shall have been approved of by them.

"Given," &c., (signed by two Commissioners.)

(a) "For the better regulating," &c., "and managing the town of Brighthelmston, in the county of Sussex, and the poor thereof."

*327] The directors and guardians gave notice to the *commissioners (pursuant to the stat. 4 & 5 W. 4, c. 76, s. 106) that they should apply for a certiorari to remove the order into this court, on the following grounds.

"1. Because you, the Poor Law Commissioners, had no power, jurisdiction, or authority to make the said order, the said directors and guardians having been appointed under the provisions of the public local act, 6 G. 4, c. clxxix., and having the powers vested in them by that act. 2. Because the said order is bad on the face of it, and shows no jurisdiction on the part of you, the said commissioners, to make the same. 3. Because you, the said commissioners, had no power, jurisdiction, or authority to prohibit and forbid the said directors and guardians from proceeding to carry into effect any alteration or addition to the said workhouse, mentioned in the said order, and from applying, raising, or borrowing any money for the purpose of providing for the expense of any such alteration or addition until the plans and estimates of the expense thereof should be submitted to you, the said Poor Law Commissioners, for inspection and examination, and until the same should have been approved of by you.

"Dated," &c. (Signed by the attorney for the directors and guardians.)

Platt now moved (*a*) for the certiorari, on affidavits setting forth the facts and documents, and alleging the reasonableness of the proposed improvements.

Sir *F. Pollock*, Attorney General, and *Tomlinson*, showed cause in the first instance.(*b*) The order, by its form, shows all that is necessary to
*328] give the *commissioners jurisdiction, if they have power to require persons making alterations in workhouses under local acts to submit the plans to them, and may inhibit such persons from proceeding till such order is complied with. There is no doubt that the directors and guardians of the poor, appointed under stat. 6 G. 4, c. clxxix., s. 199, were competent, under sects. 204 and 205,(*c*) to cause the works in question to be done, if stat. 4 & 5 W. 4, c. 76, did not interpose. But the power of control given to the commissioners generally by sect. 15 of that act, and with reference to workhouses in particular by sect. 21, fully warrants the interference here exercised. Sect. 23 empowers them, with the consent of a majority of the guardians or of the rate-payers, to order a workhouse to be built or purchased, or another building to be purchased or hired for the purpose of being converted into a workhouse, and such building, or the existing workhouse, to be enlarged or altered as the commissioners shall deem most proper, or an additional workhouse, building, &c., to be built, hired, or purchased, or land to be hired or purchased for building such additional workhouse thereon, "of such size and description, and according to such plan, and in such manner as the said commissioners
*329] shall deem most proper:" so that, in this case, a control by them is *contemplated, extending to the minutest directions.

(*a*) Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.

(*b*) See stat. 4 & 5 W. 4, c. 76, s. 106.

(*c*) Sect. 204 enacts, "That it shall and may be lawful for the directors and guardians to be appointed by virtue of this act from time to time, when and as they shall find it necessary to alter, enlarge, extend, and repair the house already erected for the use of the poor of the said parish of Brighthelmston, or to erect such other houses or buildings for the better receiving, employing, and maintaining such poor, and to pay for the same out of the rates to be from time to time raised for the relief of the poor of the said parish." Sect. 205 provides for the purchase of lands by the guardians for the above purposes

Sect. 25 gives a similar power of direction without consent, for the purpose of enlarging or altering, where the expense will not exceed a certain amount. A power in the commissioners to interfere in and to regulate other matters is contemplated by the provision of sect. 15, referred to in sect. 109, for making general rules; by the enactments of sects. 18, 20, with respect to particular rules and orders; by sect. 21, which gives a power of regulating the management of workhouses, and of the poor, even in the minutest details; and by sect. 22, which suspends the operation of additional rules to be made under stat. 22 G. 3, c. 83, s. 34, for the government of workhouses, till they shall have been approved by the commissioners. The whole question is, whether the power of the directors and guardians, under the local act, be not overridden by these provisions of a subsequent general statute. The object of that act was to introduce as much uniformity of regulation as was consistent with the non-repeal of local acts: and the only mode of enforcing that object is to suspend the proceedings of the local authority so long as it refuses attention to the order of the commissioners. *Rex* v. *The Poor Law Commissioners*, *In the Matter of the Parish of St. Pancras*, 6 A. & E. 1, decided only that the commissioners could not constitute a new board of guardians in a parish already having directors of the poor under a local act. That did not imply that the commissioners might not control such directors in the exercise of their functions. The learned judges differed in opinion; and, in a subsequent case,(a) they held that the commissioners *might, in forming a poor law union, incorporate a district having a governing body, established under a local act, for the maintenance of its own poor. [*330

Platt and *Kelly*, contrà. The commissioners have a power of control: but it does not follow that they can indefinitely prohibit intended proceedings of the guardians, in the manner here attempted, which would enable commissioners to suspend the whole business of managing the poor, in the various particulars enumerated in stat. 4 & 5 W. 4, c. 76, s. 15. They may, by sect. 21, attend at every parochial board and take part in the discussions, and, in this way, but not by direct prohibition, counteract any proceeding likely to be injurious. Where it is intended that they should exercise a more absolute authority as to workhouses, that power is expressly given them by sects. 23 and 25, which, however, do not apply to the present case. Again, as to workhouse regulations, where it is meant that the commissioners shall have a suspending power, it is directly given by sect. 22, which enacts that no such regulations, under stat. 22 G. 3, c. 83, or any other act for the management of workhouses, &c., shall be made until submitted to and confirmed by the commissioners; a clause evidently unnecessary if they already possessed the general authority supposed on the other side. It does not appear on affidavit, though the order so recites, that the commissioners have in fact called for the plans and estimates. If such documents are demanded and refused, and there is danger that directors or guardians will take some mischievous course while they are withheld, the commissioners can always apply for a mandamus or an injunction; there is no necessity, therefore, that they *should be empowered to issue an order of their own, equivalent to an injunction. [COLERIDGE, J. Suppose the plans were sent to them, and the commissioners disapproved of the plans, and said that no money ought to be raised for carrying them into effect, should you call that a control or pro- [*331

(a) *Rex* v. *The Poor Law Commissioners*, *In the Matter of the Whitechapel Union*, 6 A. & E. 34.

hibition?] They might object to the particular plan, as, for instance, in respect of the size or form of the building; but they cannot prohibit the work being done at all till plans are produced. The word "control" in sect. 15 does not enable them to prevent the execution of the local act altogether. [Lord DENMAN, C. J. Must they suffer a building to be erected, only that it may be pulled down again?] No; but they cannot enforce obedience by a prohibitory order like this: they must adopt other means, at law or in equity. *Cur. adv. vult.*

Lord DENMAN, C. J., in this term, (June 8th,) delivered the judgment of the court.

In this case we think that the order of the commissioners is good, and that there is no ground for quashing it if brought up by certiorari. It was suggested in argument that, if the order to submit plans were disobeyed, the commissioners must be left to their remedy by mandamus or injunction: but we think that neither course is contemplated by the poor law amendment act, and that the case is not one in which the law imposes the necessity of either. The rule, therefore, must be discharged.

Rule discharged.

*332] *The QUEEN *v.* The LONDON and SOUTH WESTERN Railway Company.

This case is reported, 1 Q. B. 558.

The QUEEN *v.* The Inhabitants of OLD STRATFORD.

Reported, 2 Q. B. 513.

The QUEEN *v.* The Inhabitants of MILDENHALL.

Reported, 2 Q. B. 517.

*333] *The QUEEN *v.* The GREAT WESTERN Railway Company.

By inquisition taken by the coroner of the borough of R., on the oaths of jurors of R., in R., upon a body lying dead in the borough of R., it appeared that the death was caused accidentally by the deceased falling, in the county of B., from a carriage, and that he died in R.; and the jury found the death to have happened accidentally, and laid a deodand on the carriage.

This court (before stat. 6 & 7 Vict. c. 12)(a) quashed the inquisition, on the ground that the coroner of R. had no jurisdiction to inquire, in the case of death occasioned by an accident happening out of R.

Talbot, in last term, obtained a rule calling on the coroner of the borough of Reading, and the solicitor for the treasury, to show cause why an inquisition brought up by certiorari should not be quashed. The inquisition was as follows:

"Borough of Reading, to wit. An inquisition indented, taken for our Sovereign Lady the Queen, at the Royal Berkshire Hospital, in the parish of St. Giles, in the said borough of Reading, and from thence continued by adjournment to the public office in the parish of St. Lawrence, in the

(a) Sect. 1 of that statute gives the jurisdiction, in all cases where the body is found dead on land, to "the coroner only within whose jurisdiction the body" lies.

See, further. stat. 6 & 7 Vict. c. 83, s. 2, as to technical defects.

said borough, on the 3d day of December, in the fifth year," &c., "before John Jackson Blandy, Esquire, one of the coroners of our said Lady the Queen for the said borough, on view of the body of Richard Woolley, now in the parish of St. Giles, in the borough aforesaid, lying dead, upon the oaths of William Ferguson," &c., "the several persons whose names are hereunder written and seals affixed, good and lawful men of the said borough, duly chosen, and who, being then and there duly sworn and charged to inquire, for our said Lady the Queen, when, how, and by what means the said Richard Woolley came to his death, do, upon their oaths, say that, the said Richard Woolley, on the 24th day of December in the year aforesaid, at the parish *of Sonning, in the county of Berks, then and there being in a certain carriage then and there attached [*334 to a certain engine then and there drawing the same, it so happened that the said Richard Woolley was then and there casually, accidentally, and by misfortune overturned and violently thrown out of the said carriage to and against the ground; by means whereof the said Richard Woolley did then and there receive one mortal fracture in and upon the hinder part of the head of him, the said Richard Woolley: of which said mortal fracture the said Richard Woolley from the said 24th day of December in the year aforesaid until the 29th day of December in the same year, at the parish and county last aforesaid, and also at the parish of St. Giles in the said borough of Reading, to wit, in a certain hospital there, called the Royal Berkshire Hospital, did languish, and languishing did live; on which said 29th day of December, in the year aforesaid, in the hospital aforesaid, at the parish last aforesaid, in the borough aforesaid, the said Richard Woolley, of the mortal fracture aforesaid, did die. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Richard Woolley, in manner and by the means aforesaid, accidentally, casually, and by misfortune, came to his death, and not otherwise; and that the said carriage and engine were moving to the death of the said Richard Woolley, and are of the value of 100*l.*, and are the goods and chattels, and in the possession of the Great Western Railway Company.(*a*) In witness," &c.

In last Easter term,(*b*)

**Waddington* showed cause, *Kelly* argued in support of the [*335 rule, and *Waddington* was heard in reply. The course of the argument will sufficiently appear from the judgment.(*c*) *Cur. adv. vult.*

Lord DENMAN, C. J., in this term, (May 28th,) delivered the judgment of the court.

The first and principal objection to this inquisition is, that it appears to be taken before the coroner of the borough of Reading upon the view of a body lying dead within that borough, and upon the oaths of men of that borough, but, upon the face of the inquisition itself, it is found that the accident which occasioned the death occurred in the parish of Sonning, in the county of Berks, (not saying within the borough of Reading;) yet the

(*a*) See *Regina* v. *West*, 1 Q. B. 826.

(*b*) April 30th, 1842. Before Lord Denman, C. J., Patteson, Williams, and Wightman, Js.

(*c*) The following authorities were referred to, besides those mentioned in the judgment. Stat. (West. 1) 3 Ed. 1, cc. 9, 10; 3 stat. (Articuli super Chartas) 28 Ed. 1, c. 3 stat. 33 H. 8, c. 12; stat. 5 & 6 W. 4, c. 76, s. 62; 2 Inst. 550; 2 Hal. Pl. Cr. 55; 2 Chit. Cr. L. 256 (2d ed.); *Regina* v. *Clerk*, 1 Salk. 377; *Rex* v. *Evett*, 6 B. & C. 247; *Regina* v. *Brownlow*, 11 A. & E. 119; *Regina* v. *The Grand Junction Railway Company*, note (*a*) to 11 A. & E. 128.

Other authorities were also cited on points discussed in the argument, as to which it became unnecessary for the court to pronounce any judgment.

jury have found the cause of the death, and that a certain carriage and engine were moving to the death, and have found their value to be 100*l*.

For the company it is urged that, on the face of the inquisition, a want of jurisdiction appears. For the crown it is contended that there is no such want, and that on two grounds: first, that at common law the coroner of the place where a dead body is lying has jurisdiction to inquire into the
*336] death and the cause of *it, though both the one and the other should have happened out of his jurisdiction; secondly, that, at all events, such jurisdiction is given by the statutes, 2 stat. 4 Ed. 1, De Officio Coronatoris, and stat. 2 & 3 Ed. 6, c. 24.

It may be convenient to examine the second ground in the first place.

The 2 stat. 4 Ed. 1 is said by Serjeant Hawkins, book 2, c. 9, s. 21,(*a*) to be "wholly directory and in affirmance of the common law." It contains no provision whatever respecting the jurisdiction of the coroner, as regards place, nor any expression which can be construed into an extension of his power.

The statute 2 & 3 Ed. 6, c. 24, s. 2, does not expressly provide "that where any person or persons hereafter shall be *feloniously* stricken or poisoned in one county, and die of the same stroke or poisoning in another county, that then an indictment thereof founden by jurors of the county where the death shall happen, whether it shall be founden before the coroner upon the sight of such dead body, or before the justices of peace, or other justices or commissioners which shall have authority to inquire of such *offences*, shall be as good and effectual in the law, as if the stroke or poisoning had been committed and done in the same county where the party shall die, or where such indictment shall be so founden." The statute then contains similar provisions respecting appeals of murder, and the trial of accessaries, as well in murder as other felonies. The words of the second section are confined to cases of *felonious* killing: and the preamble
*337] of the act, and all *the other sections in it, plainly show that the mischief intended to be remedied was the escape of felons from want of jurisdiction, and nothing else.

But it is said that, as the jury must determine whether there has been a felonious killing, and as in all cases of violent death such felonious killing may exist, the statute incidentally gives power to the coroner to pursue an inquiry into the cause of death in all cases where he has once begun it. This argument justly applies where there is any suspicion and charge of felony before the coroner, upon which the jury would have to exercise their judgment; but it is observable that the act of parliament seems to assume the existence of the felony; for it makes good an indictment for felonious striking or poisoning, but is silent entirely as to what is to be done by coroner or jury if no such indictment be found. The effect of any other finding seems to be left entirely as it stood at common law.

It is further objected that stat. 2 & 3 Ed. 6, c. 24, speaks only of counties, and that, however it may empower the coroner of the *county* in which a dead body lies to inquire into the cause of death arising in another county, it does not empower the coroner of a *borough*, or other limited jurisdiction, so to do. In support of this objection, the case of *Rex* v. *Welsh*, 1 Moo. Cr. Ca. 175, is cited, where the judges held that stat. 7 G. 4, c. 64, s. 12, giving jurisdiction in cases of offences committed within 500 yards of the border of a county, does not extend to offences committed within 500 yards of a borough. The language of the two acts is very similar in the

(*a*) 3 Hawk. Pl. Cr. 109, (ed. 7.)

*use of the word "county:" and we see no reason for putting a different sense upon it, in this case, from that which the judges adopted in the case cited. [*338

For this reason, therefore, as well as the other above mentioned, we think that stat. 2 & 3 Ed. 6, c. 24, does not apply.

It remains to consider what jurisdiction the coroner had at common law. It is laid down in 1 Hale's P. C. 426, that "at common law, if a man had been stricken in one county and died in another, it was doubtful whether he were indictable or triable in either, but the more common opinion was that he might be indicted where the stroke was given, for the death is but a consequent, and might be found though in another county." And he cites 9 E. 4, 48,(*a*) and 7 H. 7, 8. (*b*) "And if the party died in another county, the body was removed into the county where the stroke was given, for the coroner to take an inquest *super visum corporis*, 6 H. 7, 10,(*c*) but now by the statute of 2 & 3 E. 6, cap. 24, the justices or coroner of the county, where the party died, shall inquire and proceed, as if the stroke had been in the same county where the party died." Again in 2 Hal. Pl. Cr. 66, it is said: "And therefore in ancient times if a man were hurt in the county of A. and died in the county of B., the coroner of the county of B. could not take an inquisition of his death, because the stroke was not given in that county, nor could the coroner of the county of A. take an inquisition, because the body was in the county of B., but they used to remove the body into the county of A., and there the coroner of that county *to take the inquisition." And he cites Yearb. Mich. 6 H. 7, fol. 10, A. pl. 7, as before. [*339

Again, stat. 2 & 3 Ed. 6, c. 24, in the preamble, distinctly states, sect. 2, that in such case, "it hath not been founden by the laws or customs of this realm, that any sufficient indictment thereof can be taken in any of the said two counties, for that by the custom of this realm the jurors of the county where such party died of such stroke, can take no knowledge of the said stroke being in a foreign county, although the same two counties and places adjoin very near together; ne the jurors of the county where the stroke was given cannot take knowledge of the death in another county, although such death most apparently come of the same stroke."

The same law is laid down very pointedly in 1 Hal. Pl. Cr. 426, as to the jurisdiction of the Admiralty and common law in such cases: "If a mortal stroke be given on the high sea, and the party comes to land in England and die, the Admiral shall not have jurisdiction in this case to try the felon, because the death that consummated the felony happened upon the land, nor the common law shall not try him, because the stroke, that made the offence, was not infra corpus comitatûs," and he cites *Constable's Case*, 5 Rep. 106 a, 106 b, *Bingham's Case*, 2 Rep. 82 b, 93 a, and *Lacy's Case*, 2 Rep. 93 a, cited in the latter case.

After these authorities, it is startling to hear it asserted broadly at the bar, that, if a mortal stroke be given in county A., and the party go to and die in county B., and the body after death be taken into county C., the coroner of county C. may hold an inquest and inquire into the whole matter, and that by the common *law. No authority is cited for such assertion; and in truth there is no foundation for it. [*340

The mere fact of a body lying dead does not give the coroner jurisdiction, nor even the circumstance that the death was sudden: there ought

(*a*) The reference seems to be to Yearb. Hil. 9 E. 4, fol. 48 A. pl. 1.
(*b*) Yearb. Hil. 7 H. 7, fol. 8 B. pl. 1. (*c*) Yearb. Mich. 6 H. 7, fol. 10 A. pl. 7

to be a reasonable suspicion that the party came to his death by violent or unnatural means: 1 East's Pl. Cr. 382, citing three MS. cases; and see also *Rex* v. *the Justices of Kent*, 1 East, 229, and *Rex* v. *the Justices of Norfolk*, Nol. Ca. Just. P. 141, which is one of the cases cited in 1 East's Pl. Cr. 382. The coroner must therefore, before he summons a jury, make some inquiry; and, if on that inquiry he finds that the circumstances which occasioned the death happened out of his jurisdiction, and that there is no reasonable suspicion of murder or manslaughter, he ought to abstain from summoning a jury, and the body, in order to an inquest, must be removed into the county where the circumstance took place. If, however, the coroner has reason to suspect murder or manslaughter to have been committed, or if it does not appear on inquiry by him that the circumstances occurred out of his jurisdiction, he is bound to summon a jury; and then, if in the course of evidence it should appear that the circumstances occurred out of his jurisdiction, and no murder or manslaughter is suspected, the coroner must stop the proceedings and discharge the jury. This is what he would have been obliged to do, before stat. 2 & 3 Ed. 6, c. 24, *in all* cases where such circumstances appeared: and this he must do still unless it be a supposed case of murder or manslaughter, when
*341] he must proceed till the jury find their verdict. If the *verdict be death by the visitation of God, nothing more is done; for in truth it appears that there was no occasion for an inquest. If the verdict be murder or manslaughter, then the want of jurisdiction at common law (if any) is cured by stat. 2 & 3 Ed. 6, c. 24. If the verdict be per infortunium, then the coroner (that is by the jury) is "to inquire of the deodand, and the value, and in whose hands, and to seize and deliver the same to the township to be answerable for the same to the King, by the statute of 4 Ed. 1, De Officio Coronatoris;" 2 Hal. Pl. Cr. 62: but this supposes that the circumstances which occasioned the death happened within his jurisdiction, and that the deodand to be seized is also within it. If the facts be otherwise, as in this case, then the finding of the deodand at all events is merely void; but, as a want of jurisdiction appears upon the face of the proceedings, we are of opinion that the whole inquisition is void.

We do not enter into any question as to the validity of the inquisition in other respects; but on the ground of want of jurisdiction the rule to quash it must be made absolute. Rule absolute.

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*342] The QUEEN *v.* The Directors, Guardians, and Assistant Overseer of the Poor of the Parish of BRIGHTHELMSTON.

After the actual removal of a pauper to a parish, the parish entered and respited an appeal at the next (Mid-summer) sessions; on 1st October they gave notice of trying the appeal at the ensuing October sessions: on 4th October the order of removal was superseded by the justices who had made it; on 8th October the respondents served the appellants with a copy of the supersedeas and a notice of abandonment of the order. The sessions commenced on the 18th, when the court quashed the order, though evidence of the supersedeas and abandonment was offered.

Held, that the sessions had jurisdiction to quash: and this court refused to quash the order of sessions or certiorari.

Two justices, by order of 17th May, 1841, removed Elizabeth Lish, widow, and four children, forming part of her family, from the parish of Brighthelmston to the parish of Henfield, both in Sussex. The actual removal was made in June, 1841: and, on June 28th, an appeal was entered at the sessions, and respited to the October sessions. On 1st October,

1841, the appellants served notice of trial for the ensuing October sessions. On 4th October, the above mentioned justices made another order, reciting the original order, and proceeding as follows. "And whereas it hath been since duly made appear unto us, the said justices, that the said examination of the premises upon oath, as aforesaid, was insufficient and grounded in mistake, therefore we, the said justices, upon the application of the said directors and guardians," &c., "of the parish of Brighthelmston, do hereby supersede, annul, vacate and set aside the said order, and do command the directors," &c., "of the said parish of Brighthelmston, and the churchwardens and overseers of the said parish of Henfield, to give up and return the said orders, or any copy or copies thereof, to us, that the same may be cancelled: and we do also require you, the said directors," &c., "of the said parish of Brighthelmston, to maintain and provide for the said Elizabeth," &c., "until they, (*sic*) *can free themselves from the charge thereof by due course of law. Given," &c. [*343
On 8th October, 1841, the respondents served the appellants with the copy of this order, and a notice of abandonment of the original order of removal.

The sessions commenced 18th October. On 19th October the appeal was called on, and notice of trial proved; when the respondents offered evidence of the supersedeas and abandonment, which the appellants objected to. The sessions, after argument, and without hearing this evidence, quashed the order of removal, and refused to grant a special case. The order of sessions concluded as follows. "And it is further ordered by this court that the directors," &c., "of the said parish of Brighthelmston, some or one of them, do forthwith, upon being served with this order, or a true copy hereof, together with a certificate of the amount of the costs and expenses hereunder stated, pay or cause to be paid to the churchwardens and overseers of the poor of the said parish of Henfield, some or one of them, the sum of," &c., (9*l*. 19*s*. 8*d*., costs of appeal, and 7*l*. 16*s*. 6*d*., costs of relief and maintenance from the time of removal until the sessions.)(*a*)

The order of sessions was brought up by certiorari; and a rule nisi was obtained for quashing it. The facts above stated appeared on the affidavits in support of and against the rule.

Sir *F. Pollock*, Attorney General, and *Creasy*, now showed cause. This must be merely a question of jurisdiction. The supersedeas could not take the appeal out of the jurisdiction of the sessions after it was once *entered; still less could the respondents themselves get rid of the appeal by abandonment of the order. *Regina* v. *The Justices of Middlesex*, 11 A. & E. 809, shows that the appellants had a right to insist on the appeal being heard, and might have compelled the sessions by mandamus to hear it. There Coleridge, J., pointed out the difference between refusing to enter, and refusing to hear when entered. The appeal, when entered, must be got rid of; *Rex* v. *The Justices of Cambridge*, 2 A. & E. 370. [Coleridge, J. Supposing the sessions here to have jurisdiction, it seems strange that they should refuse to receive evidence of the supersedeas.] The decision of the sessions no doubt was, substantially, that they would hear the appeal in spite of the supersedeas. *Regina* v. *The Justices of the West Riding*, 2 Q. B. 705, will be cited; but there the supersedeas was obtained before the appeal was entered. Here the respondents take their chance of the order not being appealed against, [*344

(*a*) The order was objected to on a point of form, as to which the court pronounced no opinion.

and then try to get rid of it by abandonment. [WILLIAMS, J. I do not see that the supersedeas does any thing which the mere abandonment would not do.] It may perhaps show to the sessions that there has been good faith, and so influence them in their discretion as to the costs. But here no offer has been made to pay the costs. Besides, the costs are merely a matter for the discretion of the sessions, which cannot be examined into on certiorari.

Platt and *Dowling*, contrà. The defect in the order of removal was pointed out no earlier than the 1st of October.(a) Then the respondents, *345] in accordance with *suggestions more than once thrown out by this court,(b) abandoned the order of removal. This practice has become the more necessary on account of the strictness with which orders are now construed. The effect of upholding the practice here pursued by the sessions will be to fix the respondents, as between themselves and the appellants, by a mere formal objection. [Lord DENMAN, C. J. There may be a special entry made at sessions.] That would merely facilitate evidence. The entry of the appeal is insisted upon; but that is made without the privity of the respondents. The principle of *Regina* v. *The Justices of the West Riding* was, that a party shall be allowed to abandon the order, if he do so promptly on receiving notice of the objection.

Lord DENMAN, C. J. It would have been very odd if the sessions had stopped the evidence without deciding: they clearly meant to decide that the supersedeas had no effect. The only apparent authority against their jurisdiction is *Regina* v. *The Justices of the West Riding*, which has been satisfactorily distinguished. Whether the sessions exercised their discretion rightly or otherwise, we are not to inquire.

PATTESON, J. It is impossible, in such a case, to get rid of the jurisdiction by supersedeas and abandonment: those proceedings, in the present instance, could affect only the merits as to costs.

*346] *WILLIAMS, J. I am clearly of opinion that *Regina* v. *The Justices of the West Riding* was properly decided. The respondents there did all that they could do; and why should the matter have gone to sessions afterwards? But that decision is not applicable to the present case. The appellants were entitled to enter and respite the appeal, since otherwise the order of removal would have been final. And, though the respondents afterwards abandoned the order, yet the appellants were entitled, as things then stood, to get rid of it. It does not appear that expense has been incurred after the notice of abandonment: if any was incurred, that might have been shown: but reliance is placed entirely on the supersedeas and abandonment.

COLERIDGE, J. Mr. *Creasy* is quite right in putting this as a mere question of jurisdiction: and, on that question, *Regina* v. *the Justices of Middlesex* is in point. It is said that there will be a hardship upon the respondents, but they are really the party in fault. The appeal was entered; and, the order being assumed to be bad, no question remained, except as to costs, and the terms on which the order was to be quashed. It is perfectly well known that parties, if they cannot agree, must come to the sessions to settle the costs. Then they are to say to the sessions, "We agree that the order is to be discharged: give us a special entry; and

(a) Nothing as to this appeared in the affidavits, beyond the fact that notice of trial of the appeal was given on 1st October.

(b) See *Regina* v. *Ecclesall Bierlow*, 11 A. & E. 607, 614; *Regina* v. *Lydeard St. Lawrence*, 11 A. & E. 616, 627; *Regina* v. *Rishworth*, 2 Q. B. 476, 485.

determine what costs have been unreasonably incurred." That application would have been complied with; and no injustice would have resulted. Rule discharged.(a)

(a) See the cases next following, to p. 406.

*The following cases may conveniently be added here. [*347

The QUEEN v. The Inhabitants of the Parish of St. PANCRAS.

Parish G. obtained an order removing a pauper to parish P., which order was served on P., with notice of chargeability. Before removal, and before the expiration of twenty-one days from the notice (4 & 5 W. 4, c. 76, s. 79,) and before any appeal, the officers of G., having discovered that a date in the examination was incorrect, obtained a fresh order of removal to P., on a correct examination, and served the order on P., with a notice of chargeability and of abandonment of the first order. The two orders were made by different justices. P. having appealed against the second order, on the ground that it was made without jurisdiction while the first was not superseded: *Held*, that there was jurisdiction, and the order was rightly made.

ON appeal against an order of a justice, (Mr. Maltby, a police magistrate, &c.,)(a) whereby Eliza Henson and her bastard child were removed from the parish of St. Giles in the Fields to the parish of St. Pancras, both in Middlesex, the sessions confirmed the order subject to the opinion of this court on the following case.

On 27th May, 1842, the appellants received an original order, dated 26th May, 1842, under the hand and seal of John Hardwick, Esq., one of the justices of the metropolitan police district and county of Middlesex. The case set out the order, which was in the common form, for removing the paupers from St. Giles in the Fields to St. Pancras. Annexed to the order received was a notice of chargeability, signed by three directors of the poor of the parishes of St. Giles in the Fields and St. George Bloomsbury, and stating that, in default of due notice of appeal within twenty-one days, the paupers would be removed. The examination, dated 26th May, 1842, upon which the order was founded, accompanied the order and notices.

No notice of appeal was given on, before, or since, *the 14th of June ensuing. On that day an order, dated 13th June, 1842, [*348 under the hand and seal of E. H. Maltby, Esq., a justice of Middlesex and police magistrate, &c., was received by the appellants. The case set out this order, which corresponded in all respects, except the date, with the order of 26th May. Annexed to this second order was a notice of chargeability, in substance the same as the preceding, bearing even date with the order, and also the examination on which the last mentioned order was founded: and the only variance between the two examinations was, that in the first the service, through which a settlement was claimed, was said to have expired in October, 1832, while in the latter it was correctly stated to have expired in October, 1833; in all other respects the parties removed, the orders and examinations, were exactly alike. Below the latter examination was the following notice, signed by three churchwardens and overseers of the parish of St. Giles.

"To the churchwardens and overseers of the parish of St. Pancras, in," &c. "Order of removal of Eliza Henson and child, dated 26th May, 1842. It appearing to us that the examination, upon which the former order of removal above mentioned in the case of Eliza Henson and child was made, in some respects was erroneous, we do hereby forego and abandon the

(a) Stat. 2 & 3 Vict. c. 71, s. 14.

said order of removal, bearing date the 26th May, 1832, and shall abstain from the execution thereof. Given," &c.

No notice relating to the first mentioned order of 26th May, 1842, except the notice above stated, was given to the appellants previously to the
*349] making of *the second order of 13th June, 1842. The same two paupers are the subjects of both orders, and have been removed to the appellant parish. Against the second order of removal a notice of appeal was, on 1st October following, duly served on the respondents; and amongst other grounds of appeal were the following. "That at the time of the making of the said order, namely, on the 13th June, 1842, there was subsisting an order," &c., (stating Mr. Hardwick's order of May 26th,) "of which said last mentioned order a counterpart was received by post by the overseers of the said parish of St. Pancras on 27th May last, together with a copy of the examination," &c., "and a notice of the chargeability," &c., "bearing even date with the said order, under the hands of three of the guardians," &c.

It was contended by the appellants that, at the time of making the second order, the first order was a good, valid, and subsisting order: that, unless and until the first order was discharged, countermanded or abandoned, either by notice to that effect actually given to the parish affected, or by supersedeas, the second magistrate had no jurisdiction to make the second order; and that the second order, having been made before the abandonment of the first, was made without jurisdiction and ought to be quashed. The respondents contended that they had taken no steps for the execution of the first order; and that, until the execution of the first order, a second order as in this case might be made.

The question for the opinion of this court was, whether the second magistrate had jurisdiction to make, and did make, a valid order on 13th June, 1842.

*350] If the court should be of opinion that he had such *jurisdiction, and that the order of 13th June, 1842, was valid, such order and the order of sessions were to be confirmed: otherwise, the appeal to be allowed.

The case was argued in Hilary term, 1843.(a)

Adolphus, in support of the order of sessions. It is objected that the magistrate who made the second order had no jurisdiction. But the former order did not prevent his making a new order of removal. The respondents, having discovered the mistake in the examination, acted properly in abandoning an order which must have failed from an objection to the examination not affecting the merits, and in proceeding on a new and correct examination. No step has been taken which could injure the appellants; and notice has been given promptly. An order has no analogy to an action pending. Even if the second order were objectionable, it could be so only on the ground that the first order was good.

Prendergast and *Howorth*, contrà. The court has indeed held that, where an order has been both superseded and abandoned, the removing parish may obtain a fresh order.(b) [COLERIDGE, J. That was where there had been no previous appeal.(c) WIGHTMAN, J. What harm does the second order do?] Here the first order has never been superseded, and was not abandoned when the second was made. The appellants were

(a) January 25th. Before Lord Denman, C, J., Patteson, Coleridge, and Wightman, Js.
(b) *Regina* v. *The Justices of the West Riding*, 2 Q. B. 705.
(c) See *Regina* v. *The Justices of Middlesex*, 11 A. & E. 809.

entitled to appeal against the first order, if it had been *executed. The second order is made before the expiration of the twenty-one days. An abandonment by the party, without a supersedeas, cannot annul the former order: if it could, a removal might be made to another parish. "If two appointments," "each being of a sufficient number of overseers, are made on the same day, that which is prior in time is good, and the second void:" 1 Nolan's P. L. 55, 56, (4th ed.) (a) *Cur. adv. vult.* [*351

Lord Denman, C. J., now delivered the judgment of the court.

An order of removal of certain paupers was made by Mr. Hardwick, the police magistrate, and was served by the officers of the respondent parish upon those of the appellant parish. No notice of appeal was given: but the respondents, having afterwards discovered a defect in the examinations, brought the pauper and the witnesses before another justice of peace, Mr. Maltby; and, after taking examinations, Mr. Maltby made his order of removal. The respondents then gave the appellants notice that they should abandon the former order, and served them with the latter. Against this order the appeal was brought, on the single ground that the former was in force, neither superseded nor discharged nor abandoned at the time of making the latter.

On the argument, we were pressed with the observation that it could not be lawful to remove the pauper to one parish while another order was actually in force for removing him to a different parish. We believe *this objection to be entirely new; and it was supported by no authority. On consideration, we cannot consider that it is entitled to any weight. An order of removal is merely a warrant to parish officers to take the pauper to the parish indicated; and, though it is founded on ex parte examinations of witnesses, that parish may at their discretion abstain from carrying it into execution, because they may either obtain a more accurate knowledge of material facts, or discover some technical defect in the order or the examination on which it issued, or for any other reason. [*352

If the appellants' doctrine is true, the existence of any former order served on any other parish would compel the court to set aside any posterior order for the removal of the same pauper, even if the orders were inconsistent. We are not prepared to go this length: and, in the present case, where the first order is exactly the same as the second, and even the first examination in no degree inconsistent with the second, the only difference being that it supplies one fact which had been omitted, we are of opinion that such second order of removal was justified by such more perfect examination, and that the sessions had no further inquiry to make.

We have frequently recommended, from this place, that an objectionable order should be abandoned by those who obtained it, and another free from objection applied for. These respondents would have acted better, and more in the spirit of our recommendation, if they had given notice of the fact and the motive of such abandonment, both to the appellant parish and to the justice who made the order, *before* they applied to another justice of the peace for a second order, and had also mentioned it to the justice of the peace secondly *applied to. But their neglect to do this cannot deprive the justice of the peace of his jurisdiction: and nothing but want of jurisdiction could have justified him in refusing to act, or could have authorized the sessions to quash the order. [*353

Order of sessions confirmed.(b)

(a) Citing *Rex* v. *Searle*, Bott's P. L. 18, pl. 32, (6th ed.)
(b) See the preceding case, and those next following, to p. 406.

The QUEEN v. The Inhabitants of OUNDLE.

On the trial of an appeal against an order of removal, it appeared that the appellants had given no statement of grounds of appeal: and the sessions thereupon dismissed the appeal, subject to a case. Afterwards, at the same session, (which was the first after the order,) an appeal was entered and respited. No case was drawn up: and, on the second appeal coming on to be tried at the following sessions, the court, finding that the order now appealed against was that which had been the subject of the former appeal, dismissed it, without further hearing. *Held*, that the dismissal was proper.

On appeal against an order of two justices, (dated 30th November, 1840,) removing Jane Peers, widow, and her children, from the parish of Titchmarsh to the parish of Oundle, both in Northamptonshire, the sessions quashed the order, subject to a case, substantially as follows:

The inhabitants of Oundle entered an appeal against the order at the Quarter Sessions held January 7th, 1841. The court, at the same sessions, made an order, of which (excepting the formal parts) the following is a copy:

"And, whereas the inhabitants of the said parish of Oundle did, at this sessions, by Mr. Croxton, their attorney or solicitor, pray this court that they might be permitted and allowed to enter their appeal against the above recited order to the judgment of this court, to be tried at this present general Quarter Sessions of the Peace, holden," &c., "now, upon," &c., (hearing of counsel on each side,) "and it appearing that notice of the grounds of the said appeal had not been given by the appellants to the respondents as required by the act of parliament in that case," &c.: "This court doth refuse to hear or respite the said appeal, and doth thereby order that the said order of the said justices be ratified and confirmed, subject, nevertheless, to the opinion of the Court of Queen's Bench on a special case now stated and agreed upon between the parties appellant and respondent and their counsel, if the said appellants shall think proper to remove the same by a writ of certiorari into that court. And which is as follows (that is to say):

"And the said order is hereby ratified and confirmed, subject as aforesaid, accordingly."

Subsequently, at the same January sessions, the court made another order, for entering an appeal against the same order of removal, and respiting it to the next sessions.

The last appeal came on to be heard at the April sessions. It did not appear at this time that any case had been tendered by the appellants to the respondents in pursuance of the first-mentioned order of Quarter Sessions. On the trial of this appeal, the only evidence given by the *respondents was the entry in the clerk of the peace's *354] book of the first-mentioned order of sessions. The order of sessions secondly before mentioned was also read: and it appeared to the court therefrom (as the fact was) that the order of justices now appealed against was the same as that referred to in the first order of the January sessions. The court considered that the said order of justices had been absolutely confirmed by the judgment of the previous sessions, and that such judgment was still in full force, &c., and in no wise revoked, &c., by the second order of the said previous sessions, and therefore refused to hear any evidence on the part of the appellants, although required so to do, and dismissed the appeal with costs.

The order of sessions, after reciting the order of justices and the entry and respite of the second appeal, proceeded as follows: "Now, upon opening the matter, &c. (hearing of counsel on each side, stated as before): "This court doth order that the said appeal be dismissed, subject as hereinafter mentioned: and this court doth further award and order that the churchwardens and overseers of the poor of the said parish of Oundle," &c. (order that the appellants should pay costs to the respondents): "subject, nevertheless, to the opinion of the Court of Queen's Bench on a special case now stated and agreed to by the parties appellant and respondent and their counsel, if the said appellants shall think proper to remove the proceedings by writ of certiorari into that court: which case is as follows, viz.," &c.

The question for the opinion of this court was, "whether the sessions were right in considering the order of justices as absolutely confirmed, and in dismissing the appeal. If the Court of Queen's Bench should be of opinion that the said Court of Quarter Sessions was right, under the circumstances hereinbefore mentioned, then the said order dismissing the said appeal is to be confirmed. If otherwise, the said order, and the said order of the said two justices, are to be quashed.

Sir *F. Pollock*, Attorney General, *Miller*, and *Wing*, now showed cause. The conclusion of the case is improper: if the sessions were wrong, the court would send the case back

But the sessions have acted rightly. The second entry of the appeal was merely an ex parte proceeding. After the confirmation of the order upon the first hearing, the sessions had no power to try a second appeal; *Rex* v. *The Justices of the West Riding of Yorkshire*, 3 T. R. 776. The confirmation would have been conclusive even against a fresh order. Whether or not the court did right in confirming the order in the first instance is not the present question: the counsel for the appellants might perhaps have properly applied for an adjournment: but the adjournment was a matter for the discretion of the sessions; *Rex* v. *Kimbolton*, 6 A. & E. 603: and, at any rate, if the sessions had refused to adjourn, the propriety of the whole proceeding might have been brought before this court by an application for a *mandamus. But, as the matter now [*355 stands, the appellants having neglected the opportunity which was given them of obtaining the opinion of this court by a case, the order remains simply confirmed. The subsequent entry and respite did not bind the sessions: when, upon the appeal afterwards coming on at the Easter sessions, it appeared for the first time to be that which had been previously disposed of, the sessions were right in dismissing it. Otherwise, there might be an endless series of appeals. In 2 Nol. P. L. 549, (4th edit.) it is said: "The sessions being in contemplation of law accounted but as one day, the justices may alter their judgment at any time while it continues. They may, therefore, make an order to vacate a former one made during the same sessions." (For which *St. Andrew's, Holborn*, v. *St. Clement Danes*, 2 Salk. 494, is cited.) Thus, after quashing an order of removal, they may supersede their first order, and make a new one to confirm the original order. But, in such a case, they ought to set the first wholly aside, and enter up the last as the only order. For the effect of the court's setting aside the first is, that it ceases to be an order, and consequently ought not to be returned to the Court of King's Bench as an order vacated by another order, but should be annulled and made nothing. The justices' power expires with the sessions, unless continued to the next by adjournment."

Kelly, *Flood*, and *P. B. Barlow*, contrà. The order was not conclusively confirmed at the January sessions, but was made subject to a case: whereas in *Rex* v. *The Justices of the West Riding of Yorkshire*, 3 T. R. 776, the appeal was dismissed absolutely. Therefore the question which the sessions have left to the court, whether they "were right in considering the order of justices as absolutely confirmed," must be answered in the negative. *Rex* v. *The Justices of Suffolk*, 1 Dowl. P. C. 163, shows that, if an order be confirmed, subject to a case, the sessions cannot, though no case be sent, treat this as a decision, but will be compelled by mandamus to hear the appeal. When an order is confirmed, subject to a case, "that is no confirmation, unless a case be stated:" per Lord Tenterden in *Rex* v. *The Justices of Pembrokeshire*, 2 B. & Ad. 391. A confirmation, without hearing, is unwarranted. It was therefore proper to re-enter the case. *Read* v. *North Bradley*, 2 Str. 1168, shows that the court will go far in making intendments to correct errors in cases of this kind. The court may consider the second order of the January sessions to have vacated the first by implication, as in *Rex* v. *Hartfield*, Carth. 222. The sessions must be held to be cognisant of their own acts. If not, they are now asking the court what their own intention was; then, even if the court will not hold that the sessions did wrong, the case must go back to be reheard.

Lord Denman, C. J. The question is certainly rather confused: and Mr. *Barlow* may perhaps be right in saying that the sessions are asking *us what they themselves meant. We must, however, take it that the question for the court is now, what is the effect of [*356 the whole proceedings. The appellants fail to serve a statement of grounds of appeal. Then the order is confirmed, subject to a case, which it was intended to draw up. Pending that, an ex parte proceeding takes place, and, inconsistently with what has been done, an appeal is entered. That could be properly done only by consent of both parties: but the appellants do it in order that they may abandon the position in which they are placed, and substitute a new proceeding. They had no right to take this course. At the next sessions, when the court found that the appeal before them was one which they had already disposed of, what were they to do? They do not find that the original appeal was re-entered, or that there has been any consent to the entry of the new appeal. They construe their own previous acts. They say they dismissed the original appeal, subject to a privilege of which the appellant has not thought fit to avail himself. That they treat as a confirmation of the order of removal: but really that is an unimportant point. They have clearly done right in dismissing the second appeal.

Patteson, J. If the sessions were satisfied that the order for entering and respiting the second appeal was not authorized, they were right in dismissing it. It clearly was not authorized. *Rex* v. *Kimbolton*, 6 A. & E. 603, shows that the sessions were not compelled by stat. 9 G. 1, c. 7, s. 8, to respite the appeal because no statement of grounds of appeal had been served. The appeal was heard; not indeed on the merits, for there was nothing to hear. But then it is argued that there was no final hearing, no case having been stated. That did not make it necessary to rehear the case on the second ap

peal. The entry of the second appeal was highly irregular, after the first had been disposed of. Then the sessions say that this has been done without authority, and that they do not recognise the proceeding. In that they are quite right. Whether the first order can properly be said to have been confirmed, no case having been sent, is a question which we have now to consider.

[WILLIAMS, J., was absent.]

WIGHTMAN, J. I am of the same opinion. It is quite unimportant whether the sessions were right or not in holding that the first order was confirmed. The question is, whether they were right in dismissing the second appeal; and they clearly were so, for the reasons which have been given.

Order of sessions confirmed.

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*357] *The QUEEN v. The Inhabitants of TOWNSTAL.
The QUEEN v. The Inhabitants of STAYLEY.

THESE two cases standing in the crown paper, the court, after argument on the first, deferred giving judgment till the close of the argument on the second.

The QUEEN v. The Inhabitants of TOWNSTAL.

An order was obtained removing a pauper from parish T. to parish S.: S. gave notice of appeal. Afterwards, T. gave notice to S. of abandoning the order, and that T. was ready to pay all such lawful and reasonable costs as S. might have incurred in consequence of such order. The pauper had never been removed. S. refused to consent, and entered the appeal; on the trial of which the sessions quashed the order.

Held, that the sessions were right in trying the appeal.

So, in a similar case, where there had been no offer as to costs.

A supersedeas of the order of removal does not give the party who abandons an order any right as to the trial or withdrawing of the appeal which he would not have upon the mere abandonment.

The appeal, in the second case above-mentioned, being called on, the respondents objected that the sessions could not quash it without proof of the original order. The rule of the sessions was that appellants must file a copy of the order with the clerk of the peace; and this had been done.

Held that, under these circumstances, the sessions might be justified in quashing the appeal, though no notice had been given to produce the original order.

ON appeal against an order of two justices, whereby James Tucker and his children were removed from the parish of Townstal, in the borough of Clifton Dartmouth Hardness, in Devonshire, to the parish of Stoke Fleming in the same county, the sessions quashed the order, subject to the opinion of this court upon the following case.

On 23d September, 1842, an order of two justices was obtained for the removal of the paupers from Townstal to Stoke Fleming. On 6th October following, Stoke Fleming served notice of appeal, and, at the same time, delivered grounds of appeal. On 8th October, the respondents' attorney informed the attorney for the appellants that the respondents would abandon their order, and were ready to pay the costs of the appellants: to
*358] which no *consent was given. On 11th October, the following notice was served by the respondents on the overseers of Stoke Fleming, "In the Matter of James Tucker, a pauper," &c., "To the churchwardens," &c., "of the parish of Stoke Fleming, in," &c. "Take notice that we, the churchwardens and overseers of the poor of the parish of Townstal, within the borough," &c., "do hereby abandon a certain order, bearing date," &c., "and purporting to be an order," &c., "concerning the removal of," &c. (the paupers) "from our said parish of Townstal to your said parish of Stoke Fleming: and take notice that we are ready to pay all such lawful and reasonable costs as you may have incurred in consequence of such order; and that we shall immediately hereafter proceed to obtain a fresh

order, under the hands and seals of two of her Majesty's justices," &c., "for the removal of," &c. (the paupers) "from and out of our said parish of Townstal to your said parish of Stoke Fleming." Dated 10th October, 1842.

The notice was signed by a majority of the overseers of Townstal. The appellants would not consent to the abandonment of the order; and, on 12th October, entered an appeal for trial at the then following sessions, which were held on 27th October. At the sessions, the respondents insisted that, the order having been abandoned, the appeal should be dismissed. The court overruled the objection, on the ground that, without the consent of the appellant parish, or a supersedeas, the abandonment was ineffectual. The court then heard the appeal, and quashed the order of removal.

If this court should be of opinion that the order of removal had been effectually abandoned, the appeal *was to be dismissed: if otherwise, the order to stand quashed. [*359

Elliott in support of the order of sessions. Here was notice of abandonment only, without a supersedeas. That was so in *Rex* v. *Llanrhydd*, Bur. S. C. 658: but there the other parish seems to have consented, (which is not the case here, and the question was, not whether the appeal should be tried, but whether the abandoned order was conclusive in a question with a third parish. In *Rex* v. *Diddlebury*, 12 East, 359, the question arose in the same way. In *Rex* v. *The Justices of Norfolk*, 5 B. & Ald. 484, there was a supersedeas: and there it was decided only that the sessions might, if they pleased, refuse to enter the appeal. In *Regina* v. *The Justices of Middlesex*, 11 A. & E. 809, it was held that they could not refuse to hear an appeal which had been entered before the supersedeas. In *Regina* v. *The Justices of the West Riding*, 2 Q. B. 705, it was held that the sessions ought not to enter an appeal after there has been a supersedeas and notice of abandonment, and an allowance made for costs: that case is inapplicable here, no supersedeas having taken place. In *Regina* v. *St. Pancras*, Antè, p. 347, it was decided that, after an order has been made, the removing parish may obtain a second: but it does not follow that the parish against which the first order is made cannot get rid of it by appeal.

Montague Smith, contrà. There was no pretext for entering this appeal. The order was abandoned before any actual removal of the pauper; and an offer was *made to pay all costs: all which was done before the appeal was entered. No supersedeas was necessary to give effect to this abandonment. [*360 In *Regina* v. *The Justices of the West Riding*, 2 Q. B. 705, 714, Patteson, J., stated that, after consideration, he maintained the opinion that a parish, finding its order of removal liable to objection, is entitled to abandon it and procure another: and he said, "If such a case arises again, where an order of removal is made upon a bad examination, notice of appeal is given, stating the ground, the removing parish, finding that they cannot sustain the order, give notice of abandoning it, and then the other party carry their appeal to the sessions, I hope no court of quarter sessions will entertain the appeal." Here the sessions have entertained it, though the notice of abandonment, with offer of costs, was made before the appeal was entered. [Lord Denman, C. J. How were the appellants to get their costs?] They had only to accept the offer of the respondents: the case shows no dispute on that point. The sessions have exercised no discretion, thinking they possessed none.

The QUEEN v. The Inhabitants of STAYLEY.

On appeal against an order of two justices, whereby Benjamin Johnson was removed from the township of Stayley, in Cheshire, to the parish, township or place of Wooldale, in Yorkshire, the order was, by the sessions, "repealed for want of form," subject to the following case.

This was an appeal against an order, under the hands, &c., bearing date
*361] 23d May, 1842, for the removal of *Benjamin Johnson, &c. Copies of the order of removal and examination, together with a notice of chargeability, were sent by post to the overseers of the appellant township. Notice of appeal, stating as the grounds of appeal several objections to the examination, was served fourteen days before the next sessions: but the pauper was not removed. On 23d June, and in time to prevent the incurring of any further expenses by the appellants going to the sessions, the respondents gave them notice of abandonment of the order, on the ground that they had discovered that it could not be supported, by reason of the examination being inaccurate as to certain dates and other matters which did not affect the settlement of the pauper; but that the respondents still insisted that the pauper was settled in Wooldale, and that, if he should continue chargeable to their township, they would immediately apply for another order to remove him to Wooldale. There was no mention made of paying the costs already incurred by the appellants in preparing notice of appeal, in subpœnas, journeys to examine pauper, preparation of brief for counsel, and many other expenses; nor, in fact, were any of these expenses paid before the appellants had entered their appeal and obtained the adjudication of the court of quarter sessions; nor had any application for such costs been made, nor notice of any intended application been given, until the appellants' counsel moved for them in court.

Notwithstanding the service of this notice of the abandonment, the appellants, at the sessions holden for the county of Chester on 27th June, 1842, and without giving the respondents any further notice, entered their
*362] appeal for trial, having filed with the clerk of the peace a copy *only of the order of removal, together with a copy of the examinations, and with the notice of chargeability. When the appeal was called on in due course, the appellants by their counsel moved to quash the order, which the respondents did not appear to support, and for the costs of the appeal. This application was resisted by the respondents, who were attending the sessions upon other business, on the grounds that the court had no jurisdiction in the matter, inasmuch as no original order was before it, and no notice to produce such original had been given; that the paper filed as a copy could not be used; and that, after the order had been abandoned for want of sufficiency in the examination, and, as the notice of abandonment expressly stated, on no other account whatsoever, it could not entertain the appeal for the purpose of quashing the order which had been already abandoned as before stated. The appellants cited the orders of the quarter sessions for the county, relating to the practice of the court, by which it was ordered that all appeals intended to be tried at any quarter sessions, whether the same shall have been lodged at a prior sessions or not, are to be entered with the clerk of the peace at the opening of the court at the sessions or adjournment at which the same are to be heard, when the order or proceeding appealed against, or a copy thereof, is to be delivered to him; and no appeal shall be called on for trial which shall not have been so entered. The appellants submitted that they had complied with the rules and practice of the court in giving a copy of the order to the clerk of the peace. And

they also contended that the respondents were too late in their notice, the rules of the quarter sessions requiring that notice of countermand of trial of either traverse *or appeal is to be given six clear days before the commencement of each sessions, and that all other notices are to be given ten clear days before the first day of the sessions. [*363

The court quashed the order for want of form, and granted full costs to the appellants, subject to the opinion of this court upon the facts above stated.

If the sessions had jurisdiction, and were justified in quashing the order appealed against, for want of form, with costs, the order of sessions was to stand: if not, to be set aside.

The case was argued on the same day as *Regina* v. *Townstal.*

Townsend, in support of the order of sessions. No offer has been made to pay the costs incurred by the appellants: and, if they could not insist on a decision on this appeal, there would be no means of obtaining the costs. In *Rex* v. *The Justices of Norfolk*, the magistrates had formally superseded their own order, at the instance of the respondents: and it was held that the sessions were not bound to hear the appeal: but even there it was not considered that they were precluded from doing so: BAYLEY, J., said: "I think, that in cases like this, the sessions may exercise a discretion, and enter the appeal or not, so as best to answer the purposes of justice." Here it does not even appear that the abandonment was in writing. [PATTESON, J. The case speaks of "the service of this notice of the abandonment."] In *Regina* v. *The Justices of the West Riding* there had been a supersedeas, as in *Rex* v. *The *Justices of Norfolk*. An overseer might recede from his proposal to abandon, unless there was a supersedeas. [PATTESON, J. I do not see how that assists you: the party obtaining the supersedeas might keep it in his pocket. Lord DENMAN, C. J. There was no supersedeas in *Rex* v. *Llanrhydd.*] In *Regina* v. *Directors of Brighthelmston Poor*, antè, p. 342, the sessions heard the appeal, though it had been superseded and abandoned. In *Rex* v. *Diddlebury*, 12 East, 359, 361, Lord ELLENBOROUGH mentions, as one of two ways of getting rid of an order, "consent of the parish in whose favour it is made to abandon it:" but he does not state what machinery he considers necessary for this. As to the points of practice, the rule of sessions has been complied with sufficiently to give this court possession of the appeal: on the other hand, the notice, which was to countermand the trial, came too late. [*364

Pashley, contrà. *Rex* v. *Llanrhydd* shows that a supersedeas was not requisite to the abandonment. In *Regina* v. *St. Pancras* there was no supersedeas; yet a second order was made, and held to be good. [Lord DENMAN, C. J. There was a supersedeas in *Pancras* v. *Rumbald*, 1 Sess. Ca. 106, (2d ed.,) S. C. 1 Stra. 6; but that case only decided what magistrates could do; and BAYLEY, J., commenting on it in *Rex* v. *The Justices of Norfolk*, seems to be of opinion that the consent of the parish is enough without a supersedeas. I do not believe that any judge ever considered a supersedeas necessary. But I think Mr. *Townsend* does not want this point.] Then the question *is simply, whether the appellants were entitled to enter their appeal because there had been no offer of costs. In *Regina* v. *The Justices of the West Riding*, the respondents offered only the costs of maintenance; yet it was held that the appeal ought not to be heard; and Lord DENMAN, C. J., there refers to the words of BAYLE., J., in *Rex* v. *The Justices of Norfolk*, which apply to costs of maintenance only. Here no costs of maintenance were incurred by [*365

the appellants, there having been no removal. The legislature, in sect. 84 of stat. 4 & 5 W. 4, c. 76, appears to look to the costs of maintenance only. In *Regina* v. *Directors of Brighthelmston Poor* the appeal was entered before the abandonment. The doctrine, that, in such cases, the sessions have an option, cannot be supported: if they had wrongfully refused to hear the appeal, a mandamus would have issued. This court has holden that a right of appeal can be given by express words only; *Regina* v. *Stock*, 8 A. & E. 405: that is inconsistent with the notion of a discretion as to entertaining it. Then, as to the practice. In *Regina* v. *The Justices of Sussex*, 9 Dowl. P. C. 125, it was held that the original order should be produced, and that the appellants, not having given notice to produce, could not give in evidence the copy served on themselves and filed with the clerk of the peace. [*Townsend*. There the sessions refused to entertain the appeal, because the original was not produced; and this court would not interfere: here they held the copy filed with them sufficient to satisfy the rule, according to their own practice.] The sessions
*366] could not order the original to be filed: nothing was *filed but the copy: it is the copy or counterpart only which is required to be sent by sect. 79 of stat. 4 & 5 W. 4, c. 76. It was not shown that the copy was correct, nor that it was in any way connected with the respondents. The rule as to a countermand of notice of trial has nothing to do with the case of an abandoned order.

Lord DENMAN, C. J. It is much to be lamented that there is no power to secure costs where a party having obtained an order which he cannot support desires to abandon it. This has been often recommended; but no method for doing so has been provided. I fear, therefore, we must hold, in these cases, that the appellants, notwithstanding the notice of abandonment, are entitled to go to the sessions to get costs. It is certainly what they ought not to do, if they can obtain the costs without it; but, when we are deciding the question of strict legal right, we must hold that they can do so if they choose. As to *Regina* v. *The Justices of Sussex*, I do not think it affects the point for which it has been cited in *Regina* v. *The Inhabitants of Stayley*: it was properly explained in the course of the argument.

PATTESON, J. I should be glad to assist in enabling parties to abandon that which they cannot support. In *Regina* v. *The Inhabitants of Townstal* the party abandoning actually offered to pay the costs. But no specific sum was tendered; the offer was only to pay what had been incurred. Now who can say how much has been incurred, if the parties cannot agree without going to the sessions?

*367] *WILLIAMS, J. That is the difficulty in *Regina* v. *The Inhabitants of Townstal*. Suppose even that the appellants had agreed to receive "all" "reasonable costs:" who was to say what were reasonable? (a)

Orders of sessions affirmed in both cases. (b)

(a) Coleridge, J., was absent, in consequence of a domestic affliction.
(b) See preceding and next following cases, pp. 342 to 406. And *Regina* v *The Justices of Anglesea*, 3 Dowl. P. C., N. S. 170.

The QUEEN v. The Justices of LANCASHIRE.

When the quarter sessions, on appeal, have quashed an order of removal generally, this court will not compel them by mandamus to enter their reasons on the order to quash, though it appear by affidavit that the justices in sessions made their order on

the ground of informality, but refused a special entry for the purpose of preventing a second removal.

ON the removal of James Mitchell and his family by order of justices from the township of Heaton Norris to the parish of Preston, both in the county of Lancaster, the overseers of Preston gave notice of appeal, stating as one ground, that the order and the examinations upon which it was made were bad upon the faces thereof; and, as another, that at the time of making the said order there was no legal evidence before the justices of the place of settlement. The appeal had already been entered and respited. The officers of Heaton Norris, finding the objections not surmountable, obtained and served a supersedeas, but, being unable to agree with the officers of Preston as to terms of abandonment, they attended the sessions at which the appeal came on for hearing, and there moved to quash the order for informality and want of form, and incorrect evidence, and for badness of the examinations, according to the objections stated in the notice of appeal, and to have a special entry made of the reason of quashing the said order. The appellants resisted the motion in order to obtain their costs, and urged that, the justices in *sessions having in a previous case that day expressed their determination to put an end to frivolous removals, they should not enable [*368] the respondents to remove again by quashing this order as for mere informality. The justices refused a special entry, and quashed the order generally, saying they believed that by doing so they pursued a course which would put an end to unnecessary litigation. They, however, offered to grant a case if it were applied for; but the respondents' counsel declined making such application; and, in Michaelmas term, 1842, the respondents obtained a rule nisi for a mandamus to the justices to enter on the order of sessions their reason for making it. *Beaton* v. *Southgatebury*, 1 Sess. Ca. 4,(a) was cited. The facts above stated appeared on affidavit for and against the rule.

Cowling now showed cause. No case can be cited in which the sessions have been called upon to state, in their order for quashing, the reasons for which they quash. Those can be examined only when a case is granted. In *Regina* v. *The Justices of the West Riding*, (*In re Barstow*,) 1 Q. B. 624, 629, on motion for a mandamus to justices in petty sessions to review their allowance of a surveyor's account, Lord DENMAN, C. J., said, "We think we have no power to issue this mandamus to two justices to hear and decide on the allowance of accounts, they having already done so, though under a mistaken notion that an appeal lay to the sessions, and though they are now anxious to enter upon the merits of the case. To unravel the grounds and motives which may have led to the determination of a question once settled by the jurisdiction to which *the law has referred it, would be [*369] extremely dangerous: but many authorities prove that it is beyond our own competency; and there is none to the opposite effect." It is unnecessary to inquire whether, after an order in the present form, a new order may be made, and the reasons of the former one given in evidence on appeal. But if this question were gone into, *Rex* v. *Wheelock*, 5 B. & C. 511, is in point. This court, there, refused a mandamus to make a special entry, on the ground that the respondents were not concluded by the order of sessions, but might remove again, and, on appeal, show by evidence the grounds of the former judgment at sessions. That case was recognised in *Rex* v. *Wick St. Lawrence*, 5 B. & Ad. 526, where *Osgathorpe* v. *Diseworth*, 2 Stra.

(a) See *South Cadbury* v. *Braddon*, 2 Salk. 607.

1256, S. C. as *Rex* v. *Osgathorpe*, Burr. S. C. 261, was also relied upon.

Jervis, contrà. *Beaton* v. *Southgatebury*, 1 Sess. Ca. 4, cited in moving for this rule, is directly in favour of the application, and shows that there may be that power, which has been said not to exist, of examining the grounds on which justices have come to their decision. In *Regina* v. *Directors of Brighthelmston Poor*, antè, p. 342, Lord DENMAN, C. J., and COLERIDGE, J., pointed out a special entry as the desirable proceedings in a case like the present. And much difficulty and expense may be saved by that course, where the order is quashed merely for informality. The sessions here offered a case; but they cannot, by stating a case, call upon this court to regulate the sessions' practice. [WILLIAMS, J. That might be an argument against the application for a mandamus.] The special entry, if the court can compel it, is clearly expedient.

*370] *Lord DENMAN, C. J. Mr. *Jervis* had said enough to justify our having granted the rule nisi: but there appears now to be no doubt on the point. The mandamus, if granted, would go to a court of quarter sessions perhaps differently composed from that which made the order, and therefore not able to judge of the reasons: and at all events the sessions may exercise their own discretion as to stating them. The rule must be discharged.

PATTESON, J. I regret that we cannot order this entry to be made; but we have no power to do so, according to the decision in *Rex* v. *Wheelock*, 5 B. & C. 511.

WILLIAMS and WIGHTMAN, Js., concurred. Rule discharged. (a)

(a) See the preceding and following cases, pp. 342 to 406.

The QUEEN *v.* The Inhabitants of EVENWOOD and BARONY.

On appeal against a removal from H. to M., the ground of appeal stated was a subsequent settlement in a third township, E., by renting a tenement; but, the notice of grounds stating no residence in E., the sessions confirmed the order. Afterwards, the pauper was removed from M. to E., on the same ground of settlement properly stated. E. appealed, stating, as a ground, the confirmation of the former order. *Held*, that this was conclusive against M.

And, the sessions having confirmed the order of removal to E., considering the former decision not to have been on the merits, this court quashed such order of confirmation, holding the former decision to have been on the merits.

ON appeal against an order of two justices, by which Margaret Robinson, widow, and her five children, were removed from the township of Middlestone to the township of Evenwood and Barony, both in the county of Durham, the sessions "ordered that the said appeal shall be, and the same is,

*371] hereby disallowed, and the order *confirmed, after hearing the case on the merits; the court being of opinion that the appellants were not concluded by the order of last Easter sessions: but with liberty for the appellants to state a case for the opinion of her Majesty's Court of Queen's Bench, as to whether the order was conclusive or not." The case stated was substantially as follows.

The paupers were removed on an examination taken on 18th August, 1842, which set forth a settlement of the paupers in Evenwood and Barony, derived from William Robinson deceased, the late husband of the pauper Margaret, and the father of her five children, he having been settled in the said township by renting and occupying a farm from May day, 1824, to May

day, 1827, payment of 50*l.* a year rent, and residence. Notice of appeal was given; and, in the grounds of appeal, after putting in issue the alleged settlement of W. Robinson, the further objections to the order of removal were stated to be, "that by an order of justices, dated 16th September, 1841, the said Margaret Robinson and her said five children were ordered to be removed from the township of St. Helen's, Auckland, in the county of Durham, to the said township of Middlestone, and their settlement adjudged to be in the latter township; and that the said order of removal was, on 5th April in this year, at the general quarter sessions for the county of Durham, confirmed on appeal, subject to a case, which case had been since abandoned by Middlestone; and therefore the judgment of quarter sessions remained unreversed, and was in full force and effect. And that, no settlement having been gained by the paupers in the appellant township since the last mentioned order of removal, nor any such subsequent settlement being *alleged in the order and examinations now appealed against, [*372] it was not lawful to remove the said paupers, or any of them, from Middlestone to," &c.; but their settlement "must be taken conclusively still to be, and now is, in your said township of Middlestone. And that the settlement of the said Margaret Robinson and her said five children, and every of them, was, at the general quarter sessions of the peace in and for the said county of Durham, holden," &c., (4th April, 1842,) "adjudged, on appeal, by the said court of general quarter sessions, to be in your said township: which said finding and adjudication remains unreversed," &c.: allegation, that the paupers had gained no settlement in the appellant township "subsequently to the settlement then and there found and adjudged to be in your said township."

On the trial of the appeal, the respondents called witnesses, who proved all the facts necessary to support the settlements of William Robinson and the paupers, as stated in the examination. On the conclusion of the respondents' case, the appellants, in the first instance, contended that the judgment of the Easter quarter sessions was conclusive proof of the paupers being then settled in Middlestone, as stated in the grounds of appeal: the circumstances of which judgment were as follows.

By order of justices of 16th September, 1841, the said Margaret and her said five children were removed from St. Helen's, Auckland, to Middlestone, on an examination setting forth a derivative settlement of the paupers in Middlestone, by reason of a settlement having been obtained by William Robinson in that township by hiring and service, whilst unmarried, in the year 1822. *Middlestone appealed. The grounds [*373] of appeal admitted the settlement of W. Robinson by hiring and service, but alleged "that, after the hiring and service of the said W. R. to Thomas Dodgson, as stated in the examination in this case, to wit, in the year 1824, he rented a farm and premises, situate at or near Tofthill, in the township of Evenwood and Barony, in the said county, from Mr. Thomas Dickenson and others, at the rent of 50*l.* or thereabouts, and occupied the same, under such renting, from the 13th day of May, 1824, to the 13th day of May, 1825, and paid the rent for the same, and the said W. R. also rented and occupied the said farm from 13th May, 1825, to 13th May, 1827, and paid the rent, and was also assessed to and paid the poor rate due for the same farm, during the whole of the time he rented such farm as aforesaid. This appeal between Middlestone and St. Helen's, Auckland, came on for trial at the Durham quarter sessions, Easter, 1842, when, the settlement alleged by the respondents being admitted, they objected to the

grounds of appeal, that they were defective in not stating any residence by William Robinson in respect of the settlement alleged to have been gained by him, by renting, &c., in Evenwood and Barony; and, therefore, that the appellants could not be heard in support of that alleged settlement. The sessions, after argument by counsel, being of this opinion, confirmed the order of removal, with leave to the then appellants to state a case. But they, instead of proceeding with the case, notified the abandonment thereof to St. Helen's, Auckland, and obtained the first mentioned order of removal to Evenwood and Barony.

The sessions were of opinion that their judgment of the preceding Easter sessions, confirming the order of *removal from St. Helen's, Auckland, to Middlestone, was not a judgment on the merits, and that the respondents on the present appeal were not concluded thereby. The appellants, thereupon, called witnesses to rebut the alleged settlement of W. Robinson in their township. The evidence being closed on both sides, the sessions confirmed the order, but granted the appellants a case upon the point, whether the court were right in holding that their judgment of the preceding Easter sessions was not conclusive proof, in the present appeal, against the order of removal of the same paupers from Middlestone to Evenwood and Barony, and of their settlement being in Middlestone at the date of the said order for their removal to that township from St. Helen's, Auckland.

*374]

If the court should be of opinion that the sessions were right in holding that their said judgment was not conclusive, the order of sessions was to be confirmed; otherwise the order of removal now appealed against, to be quashed.

Granger, in support of the order of sessions. The first appeal was decided, not on the merits, but on a formal defect in the statement of grounds of appeal. The rule as to this is the same, whether the order be quashed for a formal defect in the examination, or the appeal be dismissed for such a defect in the statement of grounds: the only distinction between the effects of decisions quashing or confirming the orders is as to the parties who are bound, when such decisions are binding at all. An order discharged because the paupers are not chargeable will not bind, even as between the two parishes, after chargeability has accrued and a fresh *order has been obtained; *Rex* v. *Osgathorpe*, Bur. S. C. 261; S. C. 2 Stra. 1256; *Rex* v. *Wheelock*, 5 B. & C. 511. So if an order be quashed for form only; *Rex* v. *St. Andrew's Holborn*, 6 T. & R. 613. So an order not showing jurisdiction does not bind, though acquiesced in; *Rex* v. *Chilverscoton*, 8 T. R. 178. These cases were before stat. 4 & 5 W. 4, c. 76. Since that statute it was decided, in *Regina* v. *The Justices of Carnarvonshire*, 2 Q. B. 325, that this court will compel the sessions to hear an appeal which they have refused to hear on a preliminary objection to the statement of grounds, if the court think the statement sufficient; which shows that such an objection is not on the merits; for, if it were, the court would not interfere. The rule is laid down by PARKE, J., in *Rex* v. *Wick St. Lawrence*, 5 B. & Ad. 526, 536. "It is a general rule, that the judgment of a court of competent jurisdiction is never final between the parties, except as to the point on which the court has adjudicated." Here the adjudication on the first appeal merely was, in substance, that the appeal could not be heard. [WILLIAMS, J. The adjudication confirms the order of removal.] That is merely the result of not hearing. In *Regina* v. *The Justices of Carnarvonshire* it was attempted to treat the decision as a hearing, on the authority of *Ex parte Broseley*, 7 A. & E. 423, but ineffectually. It is true that the sessions de-

*375]

cided rightly in *Ex parte Broseley*, and wrongly in *Regina* v. *The Justices of Carnarvonshire;* but the effect of the later authority is, that such a decision, whether right or wrong, is not on the merits. In *Regina* v. *Clint*, note (*b*) to *Regina* v. *Lydeard St. Lawrence*, 11 A. & E. 624, the appeal was heard, and decided *on a variance between the parol evidence and the examination. [Coleridge, J. How far do you go? Suppose the case is called on and your witnesses do not arrive, or are rejected on the voir dire, you are literally not heard on the merits: but are you not concluded?] That is a hearing: all that is offered is received. [*376

Ingham, contrà. The first decision was on the merits. The question at issue was the then last legal settlement. The appellants, having failed in their appeal, are at any rate in no better condition than if they had submitted to the order without appealing. [He was then stopped by the court.]

Lord Denman, C. J. This case is very clear. If the sessions decide on a mere matter of form, they may make an entry to that effect, or it may be shown in evidence. But here the appellants were heard on what they chose to bring forward. In *Regina* v. *The Justices of Lancashire*, antè, p. 367, we held that we would not compel the sessions to make a special entry that the decision was on a point of form. That is consistent with our present decision. The courts of quarter sessions in counties are not like this court: different members frequently constitute them at the successive sessions; and one sessions might consider that to be substance which a previous sessions had considered to be form. It would be very dangerous if we were to force the sessions to do more than say that they confirm or quash the order.

*Williams, J.(*a*) I am of the same opinion. The sessions came to a decision on the question of settlement. I do not understand how far Mr. *Granger* is prepared to go: his argument seems to be that, unless witnesses be actually heard, the appeal is not heard. [*377

Coleridge, J. Mr. *Granger* puts the question on the right ground, if he could sustain that ground: he contends that the decision was not on the merits but on form. I think it was on the merits, as all decisions are which are made after receiving all that can be legitimately offered. If the sessions reject what they ought to admit, and refuse to hear, that of course is not a hearing. But, if they reject only what ought not to be admitted, the party who has failed to produce admissible matter cannot say that the decision was therefore not on the merits. The difficulty put by my brother Williams cannot be got over: Mr. *Granger* could not, according to his argument, show where he would stop. The true line is very distinct.

Order of sessions quashed.(*b*)

(*a*) Patteson, J., was absent.

(*b*) See the preceding and following cases, pp. 342 to 406.

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*The QUEEN v. The Inhabitants of CHARLBURY and WALCOTT. [*378

On appeal against an order of removal from C. to B., the ground of appeal was, that a former order of removal from C. to B. had been quashed on appeal. On trial of the present appeal, it was shown that the first order had been quashed because the examination did not give the date of the birth of the pauper's husband. On the present appeal, the sessions quashed the second order, subject to a case, which stated that the first order was quashed because the sessions, on the first appeal, thought the omission material.

This court confirmed the second order of sessions, no ground being shown on which their finding, as to the view taken by the sessions on the first appeal, could be treated as incorrect.

ON appeal against an order of two justices, by which Elizabeth Wright, widow, and her four children, were removed from the township of Charlbury and Walcott to the parish or township of Bloxham, both in Oxfordshire, the sessions quashed the order, subject to the opinion of this court on the following case.

The first of the several grounds of appeal was: That a former order, made by, &c., two justices of Oxfordshire, bearing date 15th October, A. D. 1842, for removing E. W., and her four children, from Charlbury and Walcott to Bloxham, was quashed by the quarter sessions for the county of Oxford, on Monday, 2d January, 1843, on appeal by Bloxham against such order of removal; "and which said order of court related directly to the settlement of the said E. W. and her said four children on the day of the date of the said former order of removal, which is the same settlement now in question between the parties to the present appeal; and it is therefore binding and conclusive between them, so far as respects the place of the last legal settlement of the said E. W. and her said four children; it not appearing, on the copy of the examination," that the pauper E. W. has done any act to gain a settlement subsequent to the date of the former order of removal.

On the trial of the present appeal, it appeared that a former order of removal had been made, and quashed on appeal, as stated in the ground of
*379] appeal above set *out: but that such former order had been quashed upon an objection, taken in the grounds of appeal, that the examination on which the order was founded was insufficient, in not stating the date of the birth of the pauper's husband; which omission the court of quarter sessions (after hearing counsel) held to be material, and therefore quashed the order without hearing any evidence, or further going into the case. On the trial of the present appeal, a witness was tendered to prove "that, at the hearing of the former appeal, the order of removal was quashed upon a preliminary objection to the sufficiency of the pauper's examination, and that the merits of the case were not gone into:" but the sessions held that such evidence would not alter their decision; and thereupon, after hearing counsel, they quashed the present order of removal, subject to the opinion of this court, "whether the judgment quashing the former order of removal, under the circumstances above stated, was conclusive between the parties, so as to preclude the respondents from removing the paupers again upon a fresh order, founded upon an amended examination which supplied the omission in the former one."

According to the view to be taken by the Court of Queen's Bench, the order of sessions was to be confirmed or quashed, as the court might direct.

H. S. Keating and *Pigott* in support of the order of sessions. The first order was conclusive between the two parishes. *Regina* v. *Evenwood and Barony*, antè, p. 370, is precisely in point, except only in the circumstance that the question arose there on the statement of grounds of appeal in the
*380] first order, but here on the examination. *But the same principle applies to both; *Regina* v. *East Ville*, 1 Q. B. 828; *Regina* v. *Old Stratford*, 2 Q. B. 513. The materiality of the omission, here, to furnish the date, was a question for the sessions on the first appeal; and they decided, and rightly, that the omission was material. *Regina* v. *Clint*,(a)

(a) Note (b) to *Regina* v. *Lydeard St. Lawrence*, 11 A. & E. 624.

which turned upon an examination, shows that such a decision is conclusive on a second appeal. There a wrong date was given; here none is given, which is at least as material a defect. In *Regina* v. *Church Knowle*, 7 A. & E. 471, the respondents quashed their own order at sessions, having found that the examination was defective; and it was held that this bound them on an appeal against another removal. The first decision of the sessions was absolute against the removability to the appellant parish; therefore, according to the principle explained in *Rex* v. *Osgathorpe*, Bur. S. C. 261, the pauper is irremovable thither, no new settlement being set up. That is consistent with *Rex* v. *Wick St. Lawrence*, 5 B. & Ad. 526. The appellants here were put, on the first appeal, to negative only the material facts on the examination which could be disproved: but the examination showed nothing which it was necessary to negative: the order therefore was conclusively quashed. The appellants had no means of doing more than they did. If the sessions had held, on the first appeal, that the examination was sufficiently particular, that would have bound the appellants afterwards.

Kelly and *Walesby*, contrà. The first appeal was decided on a preliminary point, as in *Regina* v. *The *Justices of Carnarvonshire*, 2 Q. B. 325: here, therefore, as in that case, the decision was not final. [*381 The evidence was not heard on the first appeal: the merits have never been the subject of decision at all. [Coleridge, J. You take too broad a ground: surely you may have been heard conclusively, though, by your own default, the merits have not been discussed; as if you do not bring your witnesses. Patteson, J. I do not see precisely what is the meaning of the words "merits" and "form."] In *Regina* v. *Evenwood and Barony* the appellants had chosen their own ground: and it turned out that they could not maintain it. They failed, therefore, on the very question raised. But here the settlement is to be collected from what the witness states on examination: all that the sessions do is to find that he has made an omission which precludes them from inquiry. *Rex* v. *Wheelock*, 5 B. & C. 511, shows that the grounds of a former decision may be inquired into. It is now more important than ever to limit the effect of decisions on objection to examinations, because the late cases show that a removing parish cannot insist upon abandoning its order on discovering the objection,(*a*) and that the sessions cannot be compelled to make a special entry.(*b*)

Lord Denman, C. J. The object of the legislature and of this court has been to insure, as far as possible, a free and true communication between the parties. Unfortunately, the disputes upon these subjects have led to the incurring of great expense. Here, an examination has been sent by the respondents to the appellants, which, *the appellants say, is insufficient to give them the full history of the matter, by [*382 reason of the omission of a date. The date, indeed, is not necessarily essential to the settlement; but possibly it may be essential to showing the history of the case. The respondents had a discretion. Nothing was more easy than to abandon the first order, and proceed to make a new one on a sufficient examination. It is, indeed, now argued that they were unable to do so, because the appellants might have compelled them to go on, by entering the appeal for the purpose of getting costs. That has nothing whatever to do with the question. If the respondents were liable to any costs in consequence of the steps which they had taken, they might have

(*a*) *Regina* v. *Townstal*, and *Regina* v. *Stayley*, antè, p. 357.
(*b*) *Regina* v. *The Justices of Lancashire*, antè, p. 367.

offered to pay, or to refer the amount. If, by not doing so, they withheld the costs, it is their own fault that they thus obliged the appellants to go on. They cannot, in such a case, say that they were compelled to go to the sessions. They do go thither; and they take their chance of the judgment which the sessions may form on the question, whether or not the examination gives sufficient information. The order of removal is there quashed, because the sessions think the omission material. Then the respondents remove again to the same parish, and, upon the appellants showing the former decision, the respondents require the sessions to hold that not binding. The sessions refuse: and, rightly or wrongly, form their opinion. They say that the evidence offered would not, if received, induce them to hold the former order not conclusive; they therefore, in effect, decide upon assumption of the facts to be shown by such evidence. They say, we have adjudged before on this matter, upon the merits: they do not ask us whether they have done so or not. But then they ask us

*383] whether they *are now right or wrong in acting on that assumption. We do not know whether they are right or wrong in their interpretation of the first decision; we give them credit for being right. I think we ought to abide by *Regina* v. *Evenwood and Barony*, antè, p. 370, and to teach parishes that, if they bring a case before the sessions, they must be bound by the decision. The decision here may well have been on the merits, because the defect in the first examination may have disabled the appellants from obtaining the knowledge to which they were entitled. *Regina* v. *The Justices of Carnarvonshire*, 2 Q. B. 325, has been referred to, where we granted a mandamus to compel a hearing. We have always interfered where the sessions, on a preliminary objection which we considered ill-founded, have refused to hear. The sessions were there clearly mistaken in holding that the statement of grounds of appeal did not convey sufficient information. It is said, and truly, that we cannot call a decision on such a point either a decision on the form or one upon the merits: the words do not convey a correct distinction. I cannot here feel that the conclusion to which the sessions have come is unsound: and, therefore, I see no reason for disturbing it.

PATTESON, J. Many cases have been cited, upon which nice points have been raised. It is said that much litigation has been occasioned by our decisions on this act: but I should like to know what the effect has been upon the number of appeals. Be that as it may, I take it to be quite clear that, where the sessions quash an order of removal without making

*384] a special entry, *parties may afterwards give parol evidence as to the ground of the decision. If it can be shown that the decision was upon a particular point, and new matter has since arisen (as in *Rex* v. *Wheelock*,(a) where the order was quashed because the pauper was not chargeable, and another order was obtained afterwards,) the former decision is not conclusive as to such new matter. But here there was no fresh ground of removal. The first order was quashed on a ground which the sessions then held to be material, as is now expressly found: we cannot enter into the question, whether, on the first appeal, the sessions were right or not in so holding. Then a second order of removal is obtained, the respondents determining to exercise their right of showing on what ground the first decision was made. They accordingly go to trial: and the sessions find that the first decision was made because the sessions then

(a) And see *Regina* v. *Wye*, 7 A. & E. 761; *Regina* v. *Yeoveley*, 8 A. & E. 806; *Regina* v. *Perranzabuloe*, p. 400, post.

held the omission to be material. The sessions, therefore, now hold the first decision to have been on the merits, but ask us whether they are right in coming to that conclusion. Now, what is the matter in litigation? The same matter which was in litigation before, when the sessions held the examination insufficient. If the sessions, on the first occasion, held that the omission was material in an essential point, that is the same thing as if the appeal had succeeded upon a defect in the evidence of the respondents, in which case no doubt could be raised. Or the case may be considered as if the appellants had admitted the facts alleged by the respondents, but denied that they furnished any ground for the removal. That was the principle of *Regina* v. *Evenwood and Barony*, antè, p. 370. A question like the present has very recently come be- [*385 fore me in the Bail Court,(a) and I at first entertained an opinion rather different from that which I now entertain. But *Regina* v. *Evenwood and Barony* is on all fours with this case: and I should submit to that decision, even if I felt a difficulty in agreeing with it. On consideration, however, I do quite agree with it. Wherever there is a material omission in an examination, and the order of removal is quashed for that, there is a decision on the settlement itself. It is quite different from a decision on a preliminary point of form.

Williams, J. I am of the same opinion. When an order of removal is quashed, that is conclusive, as between the same parties, till some change takes place. It is a mistake to suppose that, when an order of removal is quashed because there is no chargeability, that is a decision only on a point of form. For, if the order be then quashed because there has been no relief, the ground of decision is that there was no right to remove: and, if relief be given afterwards, a removal is allowed, not because the first decision was on a point of form, but because there are new facts. Here the question arises whether the first order was quashed on form or on the merits. Now what are we to understand by a hearing on the merits? We shall fall into great difficulty unless we consider that, wherever a case is entered into, it is heard on the merits. Where else are we to stop? Are we to say there must be a dozen *witnesses heard, [*386 or a score? If, therefore, a case is heard, I do not understand how it can be decided on a point of form. Here the case was called on: and, by reason of an alleged defect in the examination, the sessions prevented it from going farther. The proceeding is somewhat analogous to a nonsuit: but, where a plaintiff is nonsuited, has he not been heard? I agree that, where the sessions decide upon a matter which is within their province, we ought not to inquire whether the decision is rightly grounded. The first decision, then, was on a hearing: and, that being so, what can I say but that the hearing was on the merits? That is conclusive, unless a new state of facts has arisen.

Coleridge, J. I am of the same opinion. Some of the arguments used at the bar suggested to me the same considerations as those which my brother Patteson has expressed. It is very easy to say that many nice points are now litigated here on appeal against orders of removal: but the practical question is, whether there are not fewer appeals, from the preciseness which has been required; whether parties do not now find it useless to go to sessions, because it appears that they have not given sufficient information to entitle them to prove their cases. The antagonist either says that this has not been done, or he says that the case is clearly stated,

(a) See *Ex parte Overseers of Ackworth*, p. 397, note (a), post.

but that, admitting it as stated, it is not enough. That is the result of a literal interpretation of the statute. Whether that which the statute requires has been complied with, the sessions are to judge. When they decide on this, it is just the same as if they heard all the case. If they think that the examination does not give sufficient information, that, as my
*387] brother *PATTESON says, is in truth a decision on the ground of defect of evidence. But that is a decision on the merits. No doubt there may be cases where the sessions improperly refuse to go into the point: then a mandamus may be applied for, which has repeatedly been done with success. But that is not the case here. The sessions have decided that the examinations do not contain enough to entitle the respondents to prove their case. A second order is made; and against that there is produced the first order, which is primâ facie conclusive between the parties. Then the respondents pray to be allowed to show the ground on which the first decision was founded. The sessions do not refuse, but hear the point. Still, on that, they had to decide whether the first decision was on the merits; and they decide that it was. They now ask us whether they were right in doing so. We cannot say that they were wrong: no particular circumstances are shown enabling us to do so. Many cases may be suggested in which what at first looks like form will be merits. Here the ground of the first decision was that a date was not stated. That may easily be supposed not material: but it may be cardinal; it may affect the legitimacy, the priority of a settlement at another place, or the ability of the opposite party to inquire into the facts. Then how can we take on ourselves to say that the sessions were wrong? We have not the materials for doing so, and must presume them to be right.

Order of sessions affirmed.(a)

(a) See the preceding and following cases, pp. 342 to 406.

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*388] *The QUEEN v. The Inhabitants of KINGSCLERE.

A pauper was removed from T. to K., on an examination stating that the pauper's father had received relief at K. for upwards of two years previous to his death, which took place at T. K. appealed, on the ground that the time of relief was not stated. The sessions quashed the order on this objection; entering specially that it was not quashed on the merits; subject to the opinion of this court, whether the insufficiency was a defect of form or a question of merits.

Held that, upon these facts, the court could not decide that the sessions were wrong or right in making the special entry; and the order of sessions was affirmed.

ON appeal against an order of two justices, by which William Webb and his family were removed from the parish of Thatcham in Berkshire to the parish of Kingsclere in Hampshire, the sessions made an order, reciting the appeal, and adding that, "upon reading the order" of removal, and "upon hearing counsel for and on behalf of" the respondents and appellants, "it appeared unto this court that the examination of the pauper and other persons, annexed to the order made by the said two justices for the removal of the said paupers, is insufficient: it is therefore ordered and adjudged by the court that the order of the said two justices be quashed, but not on the merits: and it is hereby quashed accordingly: and it is further ordered that a special case be stated for the opinion of Her Majesty's Court of Queen's Bench at Westminster, whether the insufficiency of the examination of the pauper is a defect of form or a question of merits."

The case set out the examinations. The only part now material was the examination of Thomas Webb, the pauper's uncle, who stated that his late

brother Alexander Webb, the father of the pauper, was a parishioner of the parish of Kingsclere, "of which he also received relief for upwards of two years previous to his death, which occurred in the parish of Thatcham, where he then resided."

The case then set out the grounds of appeal, among *which it was stated: That the order of removal, and the examinations, were bad on the faces thereof. And, further, that the said examinations were bad on the faces thereof, because it did not appear, in and by them or either of them, at what time or times, or in what year or years, the said A. Webb received any relief from Kingsclere, nor from whom (if from any one) he received the same. That the said examinations were bad on the faces thereof, because it did not appear, in and by, &c., that the said A. Webb ever received any relief from Kingsclere at any time, when he was not residing in that parish. That the said examinations were bad, &c., because it did not appear, in and by, &c., that the two years, during which it is alleged in the said examination of the said Thomas Webb that the said A. Webb received relief from Kingsclere, were the two years immediately previous to the death of the said A. Webb. [*389

At the hearing of the appeal, the respondents' counsel stated that the pauper, William Webb, had a settlement in the appellant parish derived through Alexander Webb his father, whom, he stated, the appellants had acknowledged to be their parishioner by relieving him while resident in the respondent parish. The appellants relied upon their grounds of appeal, and objected that the respondents were not entitled to go into evidence of that head of settlement, inasmuch as the time, at which Alexander Webb was supposed to have been relieved by the appellants while resident in the respondent parish, had not been stated with sufficient particularity in the examinations, and that the examinations were on that ground insufficient. The court, after hearing counsel for the respondents, adopted this view of the case, and quashed the order, without allowing the respondents to *go into their case, upon the ground of the insufficiency of the examinations in that respect. But, at the request of the respondents, and with a view to enable them to obtain a fresh order of removal, the court directed their order for quashing the order of removal to be drawn up in the form above stated. [*390

The question for the opinion of the court was, whether, under the circumstances above stated, the sessions were not bound to quash the order of removal absolutely, inasmuch as they had decided that the examinations on which it was founded were insufficient; or whether such insufficiency of examinations was mere defect of form. If this court should be of opinion that the insufficiency of the examinations was mere defect of form, the entry of the sessions was to stand; otherwise the order of removal be quashed absolutely.

Tyrwhitt, in support of the order of sessions. *Regina* v. *Charlbury and Walcott*, antè, p. 378, in effect disposes of this case. The sessions have held that their decision does not affect the merits: this court will not interfere: it has not the means of deciding which the sessions possessed. They have explained their own meaning, as has frequently been recommended by the court. (He proceeded to refer to *Regina* v. *Directors of Brighthelmston Poor*, antè, p. 342, and was then stopped by the court.)

Carrington and *Bros*, contrà. The decision in *Regina* v. *Charlbury and Walcott* is against the order of the sessions. The court there held a

decision, like that in the present case, to be on the merits. [Lord DENMAN, C. J. How can there be any general holding of *that sort?
*391] We have not the means of deciding. COLERIDGE, J. We did not say that a contrary decision there would have been wrong: we do not know.] The sessions show that they thought the time material here; else they would not have quashed the order at all. [Lord DENMAN, C. J. As an abstract proposition, neither they nor we can say that time is or is not material.] The decision of the sessions is now contradictory.

Lord DENMAN, C. J. We really are without materials for inquiring into the propriety of this decision. The sessions were the fit judges.

PATTESON, COLERIDGE, and WILLIAMS, Js., concurred.

Order of sessions affirmed.(a)

(a) See the preceding and following cases, pp. 342 to 406.

Ex parte The Overseers of PONTEFRACT.

On notice of appeal against an order of removal, the respondents, finding their examinations insufficient, gave the appellants notice that they, for that reason, abandoned their order, and should move at sessions to quash the order on a special entry, "Quashed, not on the merits;" that they were ready to pay the costs of maintenance, and all reasonable costs incurred in the appeal; but that all costs of appeal incurred in future would be at the appellants' peril. The appellants gave notice of trial, and attended the sessions with witnesses. The respondents produced none, but moved to quash the order as above stated. The appellants claimed to have their witnesses heard, or an entry made either stating in general terms that the order was quashed, or specifying that it was quashed for insufficiency of the examinations. The sessions refused to hear the witnesses, quashed the order, and made an entry, "Quashed, not on the merits."

On motion for a mandamus to the sessions to erase the entry, enter continuances, and hear the appeal,

Held, that the witnesses ought not to have been heard, and that the entry was right. Rule refused.

THE churchwardens and overseers of the township of Pontefract, in the West Riding of Yorkshire, entered and respited an appeal at the quarter
*392] sessions, July 3d, 1843, against an order of justices removing Ann *Auckland and her children from the parish of Thorne, in the said West Riding, to Pontefract. On the 3d of August, 1843, the parish officers of Thorne served the officers of Pontefract with the following notice.

"To the Churchwardens, &c.
In the Matter of an Appeal," &c.

"Whereas, under and by virtue of an order of removal under the hands and seals," &c., "bearing date," &c., "Ann Auckland," &c., "were removed from the parish of Thorne aforesaid to the said parish, township or place of Pontefract, as the place of their last legal settlement. And whereas, since the said removal and the entry of the said appeal against the said order of removal, we have discovered and are satisfied that the examinations on which the said order of removal was granted are defective and insufficient to support the said order of removal on the trial or hearing of the said appeal: Now we, the undersigned, being the churchwardens," &c., &c., "of the said parish of Thorne, do hereby give you and each and every of you notice that we have abandoned, and do hereby abandon, the said order of removal, and that, at the next general quarter sessions of the peace, to be holden," &c., "we shall apply to the said court of quarter sessions to quash the said order of removal upon a special

entry, 'quashed, not upon the merits.' And we further give you notice that we are now willing and ready to pay to you, the said churchwardens," &c., "of Pontefract, all reasonable costs already incurred by you in the matter of the said appeal, together with all costs incurred by you for the maintenance and support of the said paupers since the execution of the said order of removal. And, lastly, we further give you notice that all future costs to be incurred by you in prosecuting and *trying the said appeal will be so incurred at your own peril. Dated," &c. [*393

(Signed by the churchwardens and overseers.)

On September 29th, the officers of Pontefract served the officers of Thorne with notice of trial for the next sessions, (to be holden on 23d October,) and with notice of grounds of appeal. The appeal came on to be heard at those sessions. The notice of abandonment was admitted: and the respondents applied to the court to make a special entry that the order was quashed not on the merits. Their counsel stated, as the ground of abandonment, that the examinations were insufficient as not disclosing any settlement in the appellant township, and they said that the notice had been given as soon as the imperfection was discovered. The appellants' counsel demanded to have the appeal heard and their witnesses examined, that they might obtain a final decision on the settlement; and claimed that, if the order were quashed without hearing, and a special entry made, the court should only enter, as the ground of quashing, that the examinations were found by the respondents to be insufficient to support their order, or that those examinations were defective, on any existing ground, in respect of not disclosing sufficiently a settlement in or ground of removal to Pontefract. Counsel further argued that a quashing under the present circumstances was a decision touching the very merits of the settlement, and that it would be improper, when the facts as above stated were all agreed upon, to make an entry that the order was quashed "not on the merits." The court, after full argument on both sides, held that a quashing, under the circumstances stated, was a decision on the merits, and that no such special entry ought to be made; *but, finding that the practice of the West Riding sessions, for about a year past, had been to make such entry, and discharge the order on payment of costs, with the intention of enabling respondents to remove again, where there had been a proper notice of abandonment and offer to pay costs, they determined to abide by such practice (though they thought it wrong) till the opinion of the Court of Queen's Bench could be obtained for their guidance; and they adjudged that the order of removal should be discharged, not on the merits; the respondents to pay the appellants' costs down to the time of notice of abandonment, and their costs of coming to sessions. [*394

Pashley now moved (on affidavit stating the above facts, and setting forth the examinations) for a mandamus to the justices to erase the entry from their records, and to enter continuances and hear the appeal. This being an erroneous decision on a preliminary point, the court here may set it right; *Rex* v. *The Justices of the West Riding*, 5 B. & Ad. 667. So far as the application regards a mandamus to enter continuances and hear the appeal, it is warranted by *Regina* v. *The Justices of Middlesex*, 11 A. & E. 809; and *Regina* v. *The Justices of the West Riding* (*Sheffield* v. *Crich*) (a) is a precedent for a mandamus to the sessions to erase an entry from their

(a) Trinity Vacation, (June 17,) 1843. On return to mandamus calling upon the justices to erase the entry of an appeal and order confirming it, and to enter continuances, &c.

records. In *Ex parte Overseers of Ackworth*,(a) this term, PATTESON, J., held that the special entry was improper where the order was quashed for a substantial defect, and that the quashing for such defect was conclusive on
*395] the point of settlement; *but he thought he had no power to direct an erasure. [COLERIDGE, J. My brother PATTESON mentioned that to me. He thought it was a very strong case, but that he could not alter the entry of the sessions, where they had not stated a case for this court.] There the appellants had insisted on their objection at the sessions, where it was allowed; after which a mandamus to the sessions to rehear the appeal, which had been so heard, was refused. Here the respondents come to the sessions, and themselves ask to have the order discharged on a special entry. The fact of their being the parties who so apply cannot make the decision of sessions less an adjudication on the point of settlement than it would have been if no defect in the examinations had been discovered by the respondents before they went to the sessions. [COLERIDGE, J. It seems that the respondents here had no witnesses. WILLIAMS, J. Why were the sessions to hear one side? COLERIDGE, J. If they had allowed your witnesses to be examined, it could have made no difference, one side only being heard.] It was not right that the want of preparation, on the part of the respondents, should prejudice the appellants. If the sessions had heard the appeal, as proposed, and made a general entry, it would not have been presumed afterwards that they had acted improperly. [COLERIDGE, J. I think, if they had heard the witnesses, they would have been unfit ever to try an appeal again. Lord DENMAN, C. J. You say that the respondents offered to pay costs.] They offered the costs down to the time of abandonment: but it does not appear how they were to be ascertained and secured to the appellants without going to a trial at the sessions. This difficulty was put by the
*396] court in *Regina* v. *Townstal* and *Regina* v. **Stayley*, antè, p. 357, where this court held that the sessions were bound to enter and dispose of the appeal. [COLERIDGE, J. The sessions have a discretion as to giving costs. They might have refused to allow any subsequent to the offer.]

J. T. Ingham, who was to have shown cause in the first instance, was not heard.

Lord DENMAN, C. J. I am of opinion that the sessions did rightly. When the respondents said, "we cannot support our order, and are ready to pay costs," the appellants should not have made a job of a trial at sessions, but should have ascertained the amount of their costs, and said to the respondents, "if you will not pay, we will try the appeal." Under the circumstances stated it would have been an untruth to say that the case was decided on the merits. The appellants, in going to the sessions, took the chance of the opinion they might pronounce as to the decision being on the merits or otherwise. I think that the decision was not on the merits, and that their order was right.

WILLIAMS, J. This is a motion for a mandamus to hear; but the appellants already have a decision, which is in their favour, because the opposite party strikes. How could their situation have been altered if they had examined five hundred witnesses? I think the order of sessions is right.

COLERIDGE, and WIGHTMAN, Js., concurred.

Rule refused.(b)

(a) Bail court, November 22d, 1842, post, p. 397, note (a).
(b) See the preceding and following cases. pp. 342 to 406

*(a) Ex parte The Overseers of ACKWORTH. [*397
(Bail Court.)

Examinations, transmitted with an order of removal from S. to A., set out a former order of removal, unappealed against, also from S. to A. The order appeared to have been suspended, and, on appeal against the present order, it was objected, on the hearing, that the examinations did not show that the suspension had been regularly taken off, or the order of removal executed. The sessions held the objections fatal; but, to give an opportunity of removing again, they entered on their records that the order was discharged "not on the merits;" the appellants' counsel objecting, and insisting on their right to have the appeal fully tried, so as finally to dispose of the ground of removal. On motion for a mandamus to the sessions to erase the words "not on the merits," or enter continuances and hear the appeal: *Held*, by Patteson, J., in the Bail Court,

1. That the entry was wrong, for that the decision was a conclusive one upon the point of settlement.
2. That this court had no power to order an erasure of the entry.
3. That a mandamus to hear the appeal could not be granted, for that the sessions had already heard and determined it.

Quære, whether, on a future appeal, the now appellants could give evidence to explain the grounds of the special entry?

AT the quarter sessions for the West Riding of Yorkshire, October, 1843, the appeal of the township of Ackworth, in the said Riding, against an order of justices for the removal of Joseph Johnson and his family from the township of Shitlington, in the said Riding, to Ackworth, came on to be heard. The order was made on examinations which set forth a former order of removal, (July 31st, 1818,) unappealed against, from Shitlington to Ackworth, and which former order was relied on by the respondents, as showing the settlement of the paupers then removed, and those removed by the present order, to be in Ackworth. The examination also showed that the former order had been duly suspended by the justices who made it, but did not show it to have been executed by the due removal of the paupers under that order to Ackworth; nor did the examination show that two justices of the peace in and for the West Riding had ever directed the former order to be put in execution. These two objections to the examination were (among others) insisted on by the appellants in their statement of grounds of appeal, and were urged by counsel on the hearing of the appeal. The sessions held that the examination did not disclose any settlement in the appellant township, and that the objections were fatal; and the chairman thereupon stated that the order must be discharged; when a magistrate on the bench observed that it would be proper to discharge the order "not on the merits," so as to enable the respondents to remove again. The appellants' counsel objected to this, and argued that the decision come to on the insufficiency of the examination as to the settlement was a decision on the merits of that settlement, and that, if the question was doubtful, it ought to be left for determination elsewhere, when the occasion should arise. They offered, however, to consent to a special entry, on condition that the court should give the appellants their costs; but this the court refused. The appellants' counsel then insisted upon their objection, and stated that the question whether such a discharge as was here obtained were or were not *a discharge on the merits, had, a few days ago, come before the deputy recorder of Pontefract, who had reserved it for the Court of Queen's Bench. They [*398 urged that it would be highly unjust to make the entry, if it might hereafter be used as conclusive evidence of that which the real facts did not now show; and that the appellants had a right at this time to try their appeal so as finally to dispose of the grounds of removal; and they refused to consent that the case should be stopped and the proposed entry made. The court of quarter sessions ultimately determined that they would abide by their then view, and would dispose of the appeal in such a way as to enable the respondents again to remove; and that to effectuate such intention they would cause a special entry to be made on their records of the said order being discharged "not on the merits;" which entry was made accordingly.

Pashley (on 14th Nov. 1843) applied, before PATTESON, J., in the Bail Court, (on affidavit stating in substance the above facts,) for a rule to show cause why a mandamus should not issue, commanding the justices of the West Riding to erase the above-mentioned entry from the records of the quarter sessions, so far as it stated the quashing to be "not on the merits;" or else for a mandamus to enter continuances and hear the appeal. He submitted that, since, under stat. 4 & 5 W. 4, c. 76, s. 81, the respondents could give in evidence no other ground of removal than the examination disclosed, the quashing for omission therein of any fact material to the alleged settlement or ground of removal was the same thing as quashing in consequence of an omission to prove

such fact by evidence on the hearing at sessions, and it ought therefore to bind the parish and decide the settlement. He cited *Regina* v. *Church Knowle*, 7 A. & E. 471, and the judgment of COLERIDGE, J., Ib. p. 479; *Regina* v. *The Justices of Middlesex*, 11 A. & E. 809; *Regina* v. *Evenwood and Barony*, antè, p. 370. The sessions, having decided the merits of the settlement, have made up a false record, which ought to be, and may be, set right by this court. *Rex* v. *Justices of the West Riding*, (*Sheffield* v. *Crich*; see p. 394, note (*a*), antè.) *Cur. adv. vult.*

PATTESON, J., now delivered judgment as follows:

It appears that the examination, on which the order of removal was made, disclosed no sufficient ground of removal. It professed to set out a former order of removal from the respondent to the appellant township, and showed that former order to have been suspended by the justices who made it, but failed to show either that the suspension had ever been taken off, or that the order had been acted on after it was so suspended. The appellants, when the case came on for trial, took this objection: and the quarter sessions thought the examination bad, as it undoubtedly was. One magis- *399] trate thereupon proposed that the order should be quashed, *"not on the merits;" and the counsel for the appellants then insisted on trying the appeal, rather than have it so disposed of, and proposed that the respondents should go into their case. The sessions, however, ruled that the appellants must abide by their objection; and, deciding the objection in favour of the appellants, the court entered their judgment specially, that the order was discharged, not on the merits. When *Mr. Pashley* made this motion I was at first disposed to think that the sessions had done right; but the case of *Regina* v. *Inhabitants of Evenwood and Barony*, antè, p. 370, and the other cases which he cited, certainly show that the sessions were wrong in considering this as a preliminary point. The question has arisen before the full court in two cases, since this motion was made; *Rex* v. *Charlbury and Walcott*, antè, p. 378, and *Rex* v. *Kingsclere*, antè, p. 388. There is no doubt here that the decision of the sessions was touching the settlement. Where the examination actually omits some fact material to show the settlement, it is just the same thing as if the evidence produced by the respondents on the hearing were insufficient to prove that fact, and the parties failed on that account. It appears to me that the decision of the sessions quashing an order on account of an examination being defective in such a respect will be conclusive as to the settlement. I do not say that it is a decision "on the merits:" that is a term which does not convey any clear notion: I prefer saying that it is a decision on the point of settlement. The sessions, therefore, in this case, were clearly wrong. The first part of the application is for a mandamus to erase the entry so made: and the case of *Regina* v. *The Justices of the West Riding* (*Sheffield and Crich*; see p. 394, note (*a*), antè) is relied on. That was a very peculiar case. The sessions there had no authority whatever to make such an entry as we directed them, by the mandamus, to erase. Here they had jurisdiction to do what they did, the appeal being properly lodged. The case mentioned should not be extended farther than it went: and I think it impossible to interfere in the present case by directing the sessions to erase the special entry. As to the rest of the application, how can we compel them to hear? They have heard and determined. No doubt an error has been committed by the sessions: but it is an error which we cannot correct. Whether it will be possible hereafter to give evidence explaining the grounds of the decision which the sessions have recorded as a decision "not on the merits," is a question which it is unnecessary now to enter upon.

Rule refused.

(Ex relatione *Pashley*.)

*400] *The QUEEN *v.* The Inhabitants of PERRANZABULOE.

An order of removal from P. to B. was quashed, generally, on appeal. P. again removed the same pauper to B.; and B. appealed, stating, as grounds, that a former order removing the pauper to and from the same places had been quashed by the sessions, whose order then related to the same point as that now in question, and was conclusive; and that the pauper had not acquired any new settlement.

On the hearing, it appeared that the former order had been quashed because the examinations did not show chargeability. The new examinations did show it. The sessions, being of opinion that the omission in the former order went to the merits, quashed the new order, generally, but requested the opinion of this court whether the former order had been quashed on the merits or not.

Held: That the sessions might inquire into the ground of the former order to quash: That the first order of removal had been quashed on the merits, as then existing, but that no decision had then taken place on the question of settlement: That the charge

ability now established had introduced a new state of things, and that an order of removal made after that existed was not prejudiced by the order of sessions made before.

ON appeal against an order of justices, dated June 27th, 1842, removing Catherine Cocking from the parish of Perranzabuloe to the borough of Bodmin, both in the county of Cornwall, the sessions (January, 1843) quashed the order, subject to the opinion of this court upon the following case.

The examinations upon which the said order was grounded are as follows. The case then set forth the examinations, showing that the pauper had, for several years, while resident in Perranzabuloe, received relief from the overseer of Bodmin; and concluding as follows: "That the above-named Catherine Cocking is now resident in and chargeable to the parish of Perranzabuloe aforesaid."

The grounds of appeal were as follows. "Because a former order of," &c., "two of her majesty's justices," &c., "removing the said Catherine Cocking from the said parish of Perranzabuloe to the said borough of Bodmin, has been quashed by the court of quarter sessions for the county of Cornwall at the April sessions in the present year, and which said order of the court of quarter sessions related directly to the point then and now in question between the parties to the present *appeal, and is therefore binding and conclusive between them, so far as respects the place of [*401 the last legal settlement of the said C. C.—Because the said C. C. has not, since the said order was quashed by the said court of quarter sessions, had or obtained a legal settlement in the said borough of Bodmin; but is, on the contrary, legally settled in the said parish of Perranzabuloe."

Notice and grounds of appeal being proved at the hearing, the appellants, in support of their appeal, put in and proved an order of sessions, of which the following is a copy.

"Cornwall, (to wit.) At the general quarter sessions," &c., (April 5th, 1842), "before," &c., "justices," &c., "upon the continued appeal of the churchwardens," &c., "of the borough of Bodmin in the said county, from and against an order bearing date the 29th day of November last past, under the hands and seals," &c., for the removal of Catherine Cocking, widow, from the parish of Perranzabuloe, in the said county, to the said borough of Bodmin; and upon hearing what could be alleged and proved upon oath on either side; it is ordered by this court, and this court doth adjudge, that the said order be, and the same is hereby, reversed, and that the churchwardens and overseers of the poor of the said borough, some or one of them, do take and convey the said C. C. from the said borough of B. to the said parish of P., and her deliver to the churchwardens and overseers of the poor there, or some or one of them, who are hereby required to receive her into their said parish, and there provide for her as their own parishioner. And it is further ordered," &c. (Costs to be paid by respondents to appellants.)

The appellants proved that the pauper was the party *referred to in the above order, and then closed their case; in answer to which [*402 the respondents tendered evidence to show that the merits were not heard at the trial of the former appeal. It was then admitted, on both sides, that the former order of 29th November was quashed because the examination upon which that order was founded did not contain evidence of chargeability; and the court, being of opinion that the omission went to the merits, quashed the second order generally.

If this court should be of opinion that the former order was not quashed upon the merits, the order of quarter sessions was to be quashed. But, it the court should be of a contrary opinion, the same was to stand confirmed.

Erle in support of the order of sessions. The case was inquired into at the April sessions, 1842, and a judgment given which decided the settlement. The sessions reversed the order appealed against, and adjudged that the pauper should be removed back to the respondent parish. The respondents removed again: and, on a second appeal, the sessions have held that the former order of sessions was an adjudication of the pauper's settlement in Perranzabuloe, and binding between that parish and Bodmin. [PATTESON, J. The sessions on the first appeal quashed the order of removal generally. On a subsequent removal and appeal, the respondents were at liberty to go into the grounds of that decision. Then they say that the former order of removal was quashed because the examinations did not show chargeability, but that the pauper is now chargeable, and is shown to *403] be so by the present *examinations. If the former order was quashed because chargeability was not stated in the examinations, that is not a decision on the merits of the settlement now claimed. A pauper not chargeable to-day may become so to-morrow.] That argument would have had weight before the new poor law; but now, by stat. 4 & 5 W. 4, c. 76, ss. 79, 81, the examinations are sent with the copy of the order of removal, and the appeal is to be tried on the case contained in those examinations: they present one entire question, whether there be or be not a right to remove. If the sessions decide in the negative because the examinations are not sufficient, it rests with them to quash "on the merits" or otherwise. *Regina* v. *Charlbury and Walcott*, antè, p. 378, and *Regina* v. *Kingsclere*, antè, p. 386, favour the view here taken by the appellants. In the former case a prior order of removal had been quashed generally because the examinations did not show when the pauper's husband was born. It did not appear that that objection had any bearing on the merits: but the sessions, in giving effect to it, thought that they were deciding upon the merits; and this court held that, if they were of that opinion, they might act upon it and enter a final judgment; and that the subsequent sessions were right in holding that their order could not be disturbed. (He then read the judgments of Lord DENMAN, C. J., and PATTESON, J.)(a) [COLERIDGE, J. There the fact decided upon at the former sessions was a date, which might or might not be material. The sessions had decided that it was. How *404] *could we say that it was not? The sessions had heard the case: and my own judgment and those of the rest of the court went partly on that ground.] There a witness was "tendered" at the second sessions, to prove that, on the former appeal, the order of removal was quashed on a preliminary objection, and the merits were not gone into. [COLERIDGE, J The sessions held that that evidence would not alter their opinion. They said, in effect, "take the evidence as given; still we shall think that the former order of sessions was a decision upon the merits." The judgments in this court show how that point was understood by us. The case did not turn upon a refusal to hear.] The appellants here say that the examinations disclose one entire claim, composed of chargeability and settlement. Any step in the establishment of that claim may be objected to. The respondents must support it in omnibus. If they fail, though in a preliminary step, and the sessions give a general judgment, the appellants, who

(a) In *Regina* v. *Charlbury and Walcott*, antè, pp. 381—385; 13 Law J. N. S. (Mag. Ca.) 19.

have been put to the expense of preparing to try both points, are entitled to the benefit of that judgment as conclusive, no less than if it had proceeded upon matter more essential. PATTESON, J., said, antè, p. 385, in *Regina* v. *Charlbury and Walcott*, 13 Law J. N. S. (Mag. Ca.) 21, that, wherever there is a material omission in the examination, and the order is quashed by the sessions on that ground, that is a decision on the settlement itself. [PATTESON, J. I object, and did so in *Regina* v. *Charlbury and Walcott*, to the statement, in such cases, that an order was or was not discharged on the merits. The true question is, not whether the former order of sessions proceeded *on the merits, but whether it decided the same point as is sought to be raised by the second appeal. Chargeability and settlement are both merits. Here the point decided on the first appeal was wholly collateral to the question of settlement, which was left untouched on that occasion, but is the question sought to be raised on the second appeal.] It is true that the confirmation of a former order is conclusive only on the same point raised upon a new appeal: but the expression "quashed on the merits" has prevailed in the late cases on poor law. [PATTESON, J. I have tried to get rid of that.] The question proposed here by the sessions is, whether the former order was "quashed upon the merits." [COLERIDGE, J. Suppose that, in a case requiring forty days' residence, the pauper had been removed after residing only thirty-nine, and the order had been quashed on that account. If he were again removed after completing a forty days' residence, would the former order of sessions conclude the respondents on appeal?] In that case a new settlement would have been acquired after the first removal. [*405

J. Greenwood, contrà, was not heard.

Lord DENMAN, C. J. The former order of justices in this case was discharged on an objection which was held to be the merits; but it was on the merits as they then existed. A new state of things has arisen since; and the former order cannot affect that. The second order of removal has been quashed under a misconception; and the order of sessions must be discharged.

*PATTESON, COLERIDGE, and WIGHTMAN, Js., concurred. [*406

Order of sessions quashed.(*a*)

(*a*) See the preceding cases from p. 342.

The QUEEN *v.* SILVERSIDES.

(In Error.)

Stat. 39 & 40 G. 3, c. 89, s. 1, enacts that persons convicted of unlawfully having certain naval stores in possession, not being contractors, &c., as in the act mentioned, *shall be deemed receivers of stolen goods* knowing them to be stolen, and shall be transported for fourteen years *as other receivers of stolen goods are directed to be*, but empowers the court (by sect. 7) to commute the punishment by causing the offender to be pilloried, whipped, fined or imprisoned.

Held, that stat. 3 G. 4, c. 114, did not extend to cases within the above act, so as to authorize a sentence of hard labour for offences under it.

And that, assuming this to have been otherwise, stat. 3 G. 4, c. 114, was repealed by stat. 7 & 8 G. 4, c. 27, s. 1, not being so incorporated with stat. 39 & 40 G. 3, c. 89, as to be kept alive by sect. 2 of stat. 7 & 8 G. 4, c. 27, which excepts from the repeal statutes relating to the public stores.

A court of quarter sessions having, on conviction under the first mentioned act, passed sentence of imprisonment with hard labour, this court, on error, reversed the judgment and discharged the defendant.

Indictment on the above statute alleged that defendant, on, &c., at, &c., unlawfully had

in his custody certain naval stores, &c., he the said S. (defendant) not being a contractor, &c. Held, that time was sufficiently assigned to the fact of defendant not being a contractor.

INDICTMENT at the quarter sessions, holden in and for the borough of Portsmouth, before the Recorder.

The first count stated that defendant, on 19th January, A. D. 1842, at, &c., "unlawfully, willingly and knowingly, had in the custody, possession and keeping of him, the said George Edward Silversides, certain naval stores marked with the mark usually used to and marked upon such like naval stores of our Lady the now Queen, that is to say, nineteen pounds' weight of copper spike nails, each of the said spike nails being marked with the broad arrow, and being new; seventeen pounds' weight of mixed metal nails," &c. (describing other stores in the same manner,) "he, the said George Edward Silversides, not being a contractor with the
*407] principal officers or commissioners of *our said Lady the Queen, of the navy, ordnance or victuallers for the use of our said Lady the Queen, or employed by any contractor with the principal officers or commissioners of our said Lady the Queen, of the navy, ordnance or victuallers for the use of our said Lady the Queen, and not being a contractor with the commissioners for executing the office of Lord High Admiral of the United Kingdom of Great Britain and Ireland, for the use of our said Lady the Queen, or employed by any contractor with the commissioners for executing the office of Lord High Admiral aforesaid, for the use of our said Lady the Queen, to make any stores of war, or naval stores whatsoever:" To the diminution of the naval stores of our said Lady the Queen, against the form of the statute, &c.,(a) and against the peace, &c. The second count was for unlawfully concealing stores, described as above,
*408] against *the form of the statute, without any averment that defendant was not a contractor, or employed by a contractor, &c., as stated in the first count.

The defendant pleaded guilty: and the court gave judgment that he should be imprisoned and kept to hard labour in the jail of the said borough for twelve calendar months.

Error was brought in this court; and the errors assigned were, in substance: That the indictment did not show that the defendant was not a contractor, &c., or employed, &c., at the time when he had in his possession, or when he concealed, the stores described in the indictment. And that defendant could not, for the offence charged in the indictment, or

(a) Stat. 39 & 40 G. 3, c. 89, "for the better preventing the embezzlement of his majesty's naval, ordnance, and victualling stores."

Sect. 1 enacts, "That, from and after," &c., "every person or persons, (such person or persons not being a contractor or contractors, or employed as in the said recited act," &c., 9 & 10 W. 3, c. 41, "is mentioned,) who shall willingly or knowingly sell or deliver, or cause or procure to be sold or delivered, to any person or persons whomsoever, or who shall willingly or knowingly receive or have in his, her, or their custody, possession, or keeping, any stores of war, or naval, ordnance, or victualling stores, or any goods whatsoever marked as in the said recited acts are expressed, or any canvas marked," &c., "(the said stores of war, or naval, ordnance, or victualling stores or goods above mentioned, or any of them, being in a raw or unconverted state, or being new or not more than one third worn,) and such person or persons who shall conceal such stores or goods, or any of them, marked as aforesaid, shall be deemed receivers of stolen goods knowing them to have been stolen, and shall, on being convicted thereof in due form of law, be transported beyond the seas for the term of fourteen years, in like manner as other receivers of stolen goods are directed to be transported by the laws and statutes of this realm, unless such person or persons shall upon his, her, or their trial, produce a certificate," &c., from the officers, and to the effect stated in the same clause. See sect. 7, p. 410, note (a), post.

either or any of them, be legally imprisoned and kept to hard labour in the jail, &c., for the space, &c. And that the said offences are not, nor is either or any of them, legally punishable with hard labour. Joinder in error.

Poulden, for the plaintiff in error. First, the charge in the first count is made up of two material allegations; that the defendant had the stores in his possession, and that he was not a contractor, &c. To each of these material allegations the indictment ought to have assigned a precise time; 4 Hawk. P. C. 44, (7th ed.) b. 2, c. 25, s. 77; 1 Chitt. Crim. Law, 219, (ed. 2.) In the same volume of the latter work, p. 220, the author adds: "So it is said, that the word *being* (*existens*) will, unless necessarily connected with some other matter, relate to the time of the indictment rather than of the offence; and, therefore, an indictment for a forcible entry on land, being the prosecutor's freehold, without saying 'then being,' was held insufficient." Again, pp. 221, 222: "It seems, however, *that the nicety which requires these words to be cautiously inserted to every material allegation, is not so strictly observed in indictments for inferior offences, as in cases where the life of the prisoner is in danger." "In an indictment for a forcible entry, it is enough to state that the defendant entered and dispossessed, without any second averment of time or venue. But, in such case, the place unlawfully entered must be stated to have been then and there the property of the party complaining, and the omission will be fatal." The rule is strongly laid down in *Rex* v. *Hollond*, 5 T. R. 607, 624, and was lately exemplified in *Regina* v. *Brownlow*, 11 A. & E. 119, 127. [*409

Shepherd, for the Crown, was then called upon by the court as to this point. A time is assigned to the whole matter alleged, though the length of the sentence makes it appear doubtful. The allegation is, in substance, that defendant, on January 19th, had stores in his possession, not being a contractor, &c. [COLERIDGE, J. If you read it that he, on January 19th, not being a contractor, had in his possession, &c., it is clearly sufficient.]

Lord DENMAN, C. J. We think the count is good. The allegation of defendant not being a contractor can refer to no time but the 19th of January.

PATTESON, WILLIAMS, and COLERIDGE, Js., concurred.

Poulden. Then as to the judgment. No statute authorizes the sentence of hard labour for this offence. Stat. 39 & 40 G. 3, c. 89, s. 1, awards transportation; *and sect. 7,(*a*) in case of that sentence being mitigated, gives other specific forms of punishment, which do not include hard labour. [Lord DENMAN, C. J., referred to *Rex* v. *Bridges*, 8 East, 53.] [*410

Shepherd, for the Crown, was then called upon. Sect. 1 of stat. 39 & 40 G. 3, c. 41, enacts that a person committing the offences there mentioned "shall be deemed receivers of stolen goods knowing them to have been stolen," and shall "be transported beyond the seas for the term of fourteen years, in like manner as other receivers of stolen goods are directed to be transported by the laws and statutes of this realm." Sect. 7 does not warrant the punishment of hard labour: but stat. 3 G. 4, c. 114,

(*a*) Which enacts, "That it shall and may be lawful to and for the court before whom any offender or offenders shall be indicted and convicted of all or any of the crimes or offences hereinbefore mentioned to be punishable with transportation, to mitigate or commute such punishment, by causing the offender or offenders to be set on the pillory, publicly whipped, fined, or imprisoned, or by all or any one or more of the said ways and means, as such court in its discretion shall think fit;" "and also to order such offender or offenders to be imprisoned until such fine be paid; any thing hereinbefore contained to the contrary thereof in anywise notwithstanding."

empowers the courts to award it for certain offences, one of which is "any misdemeanor for having received stolen goods knowing them to have been stolen:" and this enactment will extend to persons who, by the former act, are to be "deemed receivers of stolen goods knowing them to have been stolen." [PATTESON, J. Stat. 3 G. 4, c. 114, is repealed, as to the punishment for receiving stolen goods, by stat. 7 & 8 G. 4, c. 27, s. 1.] Sect. 2 of stat. 7 & 8 G. 4, c. 27, provides that nothing in that act "shall in
*411] any wise affect or alter *such part of any act as relates to" "the naval, military, victualling, or other public stores of his majesty," &c. If, therefore, stat. 3 G. 4, c. 114, is incorporated with stat. 39 & 40 G. 3, c. 89, this enactment preserves it. [Lord DENMAN, C. J. Sect. 1 of stat. 39 & 40 G. 3, c. 89, enacts specifically that the offenders there mentioned shall be transported "as other receivers of stolen goods are directed to be transported;" and, in case of that punishment being mitigated, sect. 7 gives a particular mode of commutation. The more general provisions of stat. 3 G. 4, c. 114, are not imported into this act.] The statute of 3 G. 4 may be taken to extend the power of commutation given by sect. 7.

Poulden, contrà. Stat. 3 G. 4, c. 114, cannot be kept alive by 7 & 8 G. 4, c. 27, s. 2, which merely preserves any enactment that "relates to" "the naval, military, victualling, or other public stores." And, supposing the former act still in force, it extends only to persons convicted of "any misdemeanor for having received stolen goods;" but this cannot apply to the receivers of stolen goods with whom offenders under stat. 39 & 40 G. 3, c. 89, sects. 1 and 7, are classed. When that act passed, misdemeanor in receiving goods feloniously stolen was an offence distinctly provided for by statute, and not, generally at least, punishable with transportation.(a)

Lord DENMAN, C. J. The judgment is clearly erroneous. The only way in which it can be maintained is by importing into this act a subsequent statute, 3 G. 4, c. 114, as altering the mode of punishment. The
*412] argument used would incorporate with the statute of G. 3, *all subsequent acts providing for the punishment of those who come under the description of receivers of stolen goods. And, supposing that such an argument were correct, stat. 3 G. 4, c. 114, is expressly repealed by stat. 7 & 8 G. 4, c. 27, s. 1. It is contended that sect. 2 keeps alive the act of 3 G. 4, as one relating to public stores: but there are many statutes repealed by the first section of stat. 7 & 8 G. 4, c. 27, s. 1, to which sect. 2 may refer, without bringing in stat. 3 G. 4, c. 114, which says nothing about stores. The only question now remaining is, what should be done with the defendant.

Poulden contended that the prisoner could not be remanded to the court below for judgment, a sentence having been pronounced, and that he must be discharged. He cited *Rex* v. *Ellis*, 5 B. & C. 395; and *Rex* v. *Bourne*, 7 A. & E. 58.

Shepherd, contrà. The court below would not be called upon to pass any new judgment contradictory to their former sentence, but only to remit so much of it as relates to hard labour. That distinguishes the case from *Rex* v. *Ellis*.

Lord DENMAN, C. J. We are bound by that case, and must discharge the defendant.

PATTESON, WILLIAMS, and COLERIDGE, Js., concurred.

Per Curiam. Judgment reversed.
Defendant to be discharged

(a) 2 East's P. C. 744, c. 16, s. 142. See s. 144.

*ROWLAND v. BLAKSLEY. [*413

This case is reported, 1 Q. B. 403.

PRICE and Another v. QUARRELL and Another.

Reported, 12 A. & E. 784.

TIMMS v. WILLIAMS.

Proceedings to recover the amount of a promissory note, made payable to "the treasurer for the time being" of a loan society under stat. 5 & 6 W. 4, c. 23, (see stat. 3 & 4 Vict. c. 110, s. 16,) must be taken by the treasurer in office when such proceedings are to be commenced, not the party who was treasurer when the note was made.

Such treasurer cannot bring an action upon the note, but must proceed by complaint before a justice under stat. 5 & 6 W. 4, c. 23, s. 8.

***Quære*, whether the trustees of the society could sue upon such note, in virtue of the rights vested in them by section 4?**

ASSUMPSIT, plaintiff describing himself as "the treasurer, for the time being, of a loan society called the City of London Loan Society, established in pursuance of the statute," &c. (5 & 6 W. 4, c. 23.) The declaration stated that, before the passing of stat. 3 & 4 Vict. c. 110, to wit, on, &c., defendant and Joseph Woodward and George Spencer, for securing payment of the sum of 10*l*., then and before the passing of the last-mentioned statute lent by the said society to the said Joseph Woodward, made their promissory note in writing, *and delivered the same to the treasurer of the said society at the office of the said society, No. 18, [*414 Primrose Street, Bishopgate, and thereby jointly and severally promised to pay "to the treasurer for the time being of the said society," at the said office, 10*l*. for value received, by weekly instalments of 4*s*. each, the first instalment to become due and payable on Thursday, 23d April, A. D. 1840, between the hours of seven and ten in the evening, and to be continued every Thursday evening then after until the whole should be repaid: and thereupon, afterwards, to wit, on, &c., defendant, in consideration of the premises, promised plaintiff, then being such treasurer as aforesaid, to pay the said note according to the tenor and effect thereof. Averment, that the several times for payment of the said several instalments had respectively elapsed before the commencement of this suit; and that, at the respective times when the said instalments respectively became due and payable, to wit, on Thursday the said 23d, &c., between the hours, &c., and on every succeeding Thursday evening between the hours, &c., plaintiff, being at all those periods the treasurer of the said society, was ready and willing at the said office of the said society to receive payment of the said several instalments, and then, to wit, on each of those days and times, presented the said note at the said office, and then and there required payment of the money then due and payable on the said note. Nevertheless, &c.: averment that defendant and Woodward and Spencer paid 7*l*. 12*s*., part of the 10*l*., but that defendant hath not, nor have Woodward and Spencer, nor has either of them, paid the residue, &c., or any part thereof, and the residue, &c., to wit, 2*l*. 8*s*., still remains wholly due and unpaid. To the *damage of plaintiff, as such treasurer as aforesaid, of 10*l*.: [*415 and therefore, &c.

General demurrer and joinder.

W. H. Watson for the defendant. First, the plaintiff could not recover upon this note at common law. It is payable "to the treasurer for the time being:" that must be the person who was treasurer when the note was made: and, unless by legislative enactment, the right of action could not pass from one treasurer to another without endorsement. There is nothing to attach the promise in law, on which the action must be founded, to the person of the plaintiff. [PATTESON, J. The declaration says that the defendant "promised the plaintiff, then being such treasurer as aforesaid:" if a promise in law arose, it would be at the time of making the note, and "then" would refer to that time. COLERIDGE, J. There is nothing in the declaration inconsistent with the plaintiff's being the party to whom the note was made.] It ought to have been expressly stated that he was treasurer when the note was made, so as to be the person to whom the promise would result. But, secondly, if any person could sue on this note, the trustees appear to be the proper parties. Stat. 5 & 6 W. 4, c. 23, ("for the establishment of loan societies," &c.) enacts, by sect. 4, that "all moneys, goods, chattels, and effects" of any such society "shall be vested in the trustee or trustees of such institution for the time being, for the use and benefit of such institution and the respective members thereof;" and, after death, resignation, &c., of trustees, shall vest in their successors; and shall, for all purposes of action or suit touching the same, be deemed the pro-
*416] perty of the trustee or trustees, and shall, in *every such proceeding, where necessary, be stated to be his or their property; and the trustee or trustees "shall and they are hereby respectively authorized to bring or defend" any action, suit, &c., touching such property, and to sue and be sued, &c., in his or their proper name or names, as trustee or trustees, &c., without other description. By this clause, (if the act stopped there,) a note given to the treasurer would vest in the trustees and their successors, and must be sued upon by the persons who bore the official character when the action was to be commenced; like a bastardy bond under stat. 54 G. 3, c. 170, s. 8; *Addey* v. *Woolley*, 8 Taunt. 691. But, thirdly, the proper course of proceeding is before justices; and for this purpose the treasurer is the party authorized by stat. 5 & 6 W. 4, c. 23. Sect. 8 enacts, "That all notes and securities entered into for the payment of such loans shall be made payable to the treasurer or clerk for the time being of the said institution; and if the party or parties liable to pay the same shall fail to make full payment in money of the sum in the note or security mentioned, or any part thereof, for seven days after demand made on such party, or left at his usual place of abode, by or on behalf of the treasurer or clerk for the time being of the said institution, it shall and may be lawful for any one or more of his Majesty's justices of the peace" for the county, &c., where the person refusing payment shall be or reside, "and such justice or justices is and are hereby required, upon complaint made by such treasurer or clerk as aforesaid," to summon the person complained of; and
*417] that on appearance, or, in default thereof, on proof of summons, *such justice or justices shall proceed to hear and determine the said complaint, and award such sum to be paid by the person or persons respectively liable to the payment of any such note or security to such treasurer or clerk as shall appear to the justice or justices to be due, with such sum for costs, not exceeding 10*s*., as to him or them shall seem meet; and power of distress is given on non-payment. The intention was to give the numerous contributors to these institutions a short and cheap remedy: and, in *Crisp* v. *Bunbury*, 8 Bing. 394, under the act for regulation of

savings banks, 9 G. 4, c. 92, s. 45, the Court of Common Pleas, taking into consideration the objects of the legislature, (which were like those proposed by the present act,) held that the jurisdiction of the superior courts might be ousted without express words for that purpose; TINDAL, C. J., saying that even words which appeared permissive only might have that effect, if the object and intent of the statute manifestly required it. [Lord DENMAN, C. J., mentioned *Rex* v. *Mildenhall Savings Bank*, 6 A. & E. 952.] Stat. 3 & 4 Vict. c. 110, ("to amend the laws relating to loan societies,") repeals (by sect. 1) stat. 5 & 6 W. 4, c. 23, but keeps it alive for the recovery of all sums lent before the passing of the act. Sect. 16 is, in substance, nearly the same as sect. 8 of stat. 5 & 6 W. 4, c. 23: and it is followed by clauses which are not expressly introduced in the act of W. 4, but serve to show how the legislature intended that, as well as the subsequent act in pari materiâ, to be applied. Sect. 17 enables the treasurer or clerk of any loan society to proceed for recovery of any sum due on a promissory note in a county court or court of request: [*418] *sect. 18 enacts that, if the whole sum due on such note exceed the amount for which any such court has jurisdiction, the treasurer or clerk may recover so much as that court can give judgment for, and forego the rest. These clauses would scarcely have been necessary if the legislature had not considered that sect. 16, taken by itself, ousted all jurisdiction but that of the justices.

It is observable that sect. 19, of this latter statute, makes an express provision that the treasurer for the time being may sue for and recover the amount of any note made payable to the treasurer for the time being, whether the person filling that office be the same or not. This implies that the enactments previously made did not give such a power in the like case.

Cowling, contrà. First, if it were necessary that the proceedings should be instituted by the same treasurer to whom the note was given, it cannot be argued, on general demurrer, that this does not appear sufficiently by the present declaration. And the objection on this head has been otherwise sufficiently answered by the court. Secondly, the sum due on this note is recoverable by action, and in the name of the treasurer. Stat. 3 & 4 Vict. c. 110, s. 1, partly repeals stat. 5 & 6 W. 4, c. 23, but, by subsequent clauses, re-enacts it, subject only to some new provisions. Sect. 16 of the latter act is substantially the same as sect. 8 of the earlier; and the form of a promissory note to the treasurer, in stat. 3 & 4 Vict. c. 110, sched. (A), shows the nature of the security contemplated by both statutes. Sect. 8, of stat. 5 & 6 W. 4, c. 23, by enacting that "all notes and securities entered into for the payment" of loans under the act "shall be made payable to *the treasurer," &c., gives impliedly a right of action to the treasurer upon such notes; and the clause which follows, empowering [*419] justices to summon and adjudicate, is permissive only. TINDAL, C. J., in delivering judgment in *Crisp* v. *Bunbury*, 8 Bing. 394, 399, fully recognises the proposition that "the jurisdiction of the superior courts of Westminster is not to be ousted, except by express words, or by necessary implication:" and there are several instances in which statutes giving a summary remedy before justices have been held not to exclude the right of action, but to be cumulative, and give a choice of proceedings: *Horsefall* v. *Davy*, Holt, N. P. C. 147, on stat. 11 G. 2, c. 19, s. 4; *Manser* v. *Taylor*, 3 Eag. & Y. 1275, 2 Eagle on Tithes, 393, on stat. 7 & 8 W. 3, c. 34, s. 4.(a) If this were not so under the present statute, it might hap

(a) See *Richards* v. *Dyke*, antè, p. 256.

pen that a magistrate, on some bonâ fide doubt as to the law, might refuse to interfere: the court, in such a case, would not grant a mandamus; and the complainant would be without remedy. [Lord DENMAN, C. J. By what words or necessary implication were the superior courts ousted of jurisdiction in *Crisp* v. *Bunbury*?] The words of stat. 9 G. 4, c. 92, s. 45, were, that "the matter so in dispute *shall* be referred to the arbitration," &c.; language very different from that of stat. 5 & 6 W. 4, c. 23, s. 8. Then, if an action lies, "the treasurer or clerk for the time being" is the person who should bring it. This may be inferred from the provision of stat. 5 & 6 W. 4, c. 23, s. 8, that all notes shall be made payable to him. Sect. 4 does not interfere with this construction. The object there was to
*420] declare in whom the property should be vested, and to *facilitate remedies as between the society and strangers. But for sect. 4, if the society brought an action, every member must have been party to the record. Sect. 8 was intended to give the society a remedy, by action or otherwise, against their own members, whom, but for that enactment, they could not have sued. [COLERIDGE, J. The former part of sect. 4 vests all the property in the trustees; then was not a corresponding enactment, which appears in the latter part of the section, necessary to complete the provision? It seems to follow from the vesting of the property that there should be a power to sue for it. PATTESON, J. Suppose trover were brought for one of the notes, in whom would the property be laid? By sect. 9 the interest on any loan is to be demanded and received by "the trustees or managers."] It may not be possible to reconcile all the clauses with any one construction: but the plaintiff's view of sect. 8 agrees with the general scope of the act, and is confirmed by the corresponding enactments of stat. 3 & 4 Vict. c. 110. *Addey* v. *Woolley*, 8 Taunt. 691, shows that, on a security framed as this is, the person in office when the action is to be brought is the proper party to sue. [PATTESON, J. There the officers to whom the bond had been given were placed by statute on the footing of a corporation, for the purpose of enforcing the security.] Sect. 19 of stat 3 & 4 Vict. c. 110, seems intended merely to remove doubts, not to introduce a new regulation.

W. H. Watson, in reply. Without legislative enactment a note could not be made "to the treasurer for the time being" of a society. Stat. 5 & 6 W. 4, c. 23, s. 8, sanctions that form: but sect. 4 makes the note the
*421] *property of the trustees. [PATTESON, J. Still it would require a special provision to enable one party to sue on a security given to another.] The words of sect. 4 are sufficient for that purpose. [PATTESON, J. It is difficult to say that they place the trustees in the situation of endorsees of the treasurer.] It is suggested that magistrates might refuse to act; but the same argument might have been used as to arbitrators in *Crisp* v. *Bunbury*, and as to magistrates in *Cates* v. *Knight*, 3 T. R. 442, referred to there by the lord chief justice. [Lord DENMAN, C. J. In doubtful cases we do not compel justices to act; but here there could be no doubt.] The remedy contemplated is before justices: if any action lay, it must be at the suit of the trustees.

Lord DENMAN, C. J. The great question here is, whether the treasurer can maintain this action to recover money due to the society upon a loan, because stat. 5 & 6 W. 4, c. 23, s. 8, directs that notes given to secure such loans shall be payable to "the treasurer or clerk for the time being." There is no authority for holding such a power vested in the treasurer, upon such words only. Where a statute of this kind contemplates that a particu

lar right of action shall be given, it is created by express enactment.(a) A note given to secure a loan from the society is, no doubt, a chattel of the society. The property in such chattel does not vest in the treasurer, but is, by sect. 4, deemed to be in the trustees "for all purposes of action or suit, as well criminal as civil." Then sect. 8 gives a mode by which the [*422 *treasurer for the time being may put such note in force when the society wish to recover the sum secured; a magistrate being invested with full power to adjudicate upon the complaint. The remedy, by this course, is complete: and we are not to suppose that justices will fail to perform the duty which the law requires of them. As in the case of savings banks, so here, as it appears to me, the legislature has thought it useful to withhold the power of instituting expensive suits in the superior courts, and to appoint a domestic forum to settle those small disputes which a society of this kind is likely to be engaged in.

PATTESON, J. The words of stat. 5 & 6 W. 4, c. 23, s. 8, making notes payable to the "treasurer" "for the time being," are certainly ambiguous; and I at first thought they meant the person who was clerk or treasurer at the time of giving the note. But I think that is not so. The meaning is that the note shall be payable to the officer and his successor. If, therefore, the plaintiff had been treasurer at the time when the note was made, sect. 8 would not enable him to sue on that account. Then, do the words imply that the person who happens to be treasurer when default is made may bring an action? If so, then, wherever an act of parliament made notes payable to the officer of a society for the time being, special clauses enabling the officer for the time being to sue and be sued, and directing that actions should not abate by a change in the person, and all similar provisions, would be rendered unnecessary. But we have never held any thing equivalent to this. If the legislature meant that one person should sue on a security given to another, it would expressly provide so. *But [*423 here express provision is made for another mode of proceeding; and the remedy must be sought by that. Not that the jurisdiction of the superior court is thus taken away: that jurisdiction never arises; for the treasurer has no power at law to sue upon the note given to his predecessor. It is not necessary to determine whether or not the trustees could have maintained an action on his note. The property may be in them: but it does not follow that they have the right of action.

WILLIAMS, J. Mr. *Cowling* did not sufficiently distinguish *Crisp* v. *Bunbury* from this case. A difference was suggested between the words "shall be referred to the arbitration," &c., on which that case turned, and "it shall and may be lawful for any one or more of his Majesty's justices," &c., in stat. 5 & 6 W. 4, c. 23, s. 8: but that distinction is not supported by the judgment of TINDAL, C. J., which was grounded as much on the object and intent of the statute in question there as upon any particular words. And, although in the early part of stat. 5 & 6 W. 4, c. 23, s. 8, the expression used is only "it shall and may be lawful," the subsequent words of that section are of a more imperative character. The justice is "required" to summon on complaint; and then it is enacted that, on appearance, he "shall proceed to hear and determine the said complaint."

COLERIDGE, J. It is enough for us in this case to determine that the present plaintiff cannot sue, there being no words which expressly give the

(a) The Friendly Societies' Act, 10 G. 4, c. 56, s. 21, was cited on this point in the course of the argument.

*424] power as in *other statutes. Mr. *Cowling's* argument is, in effect, that in other statutes the words are unnecessarily used, for that making the note payable to the treasurer for the time being enables him to sue. But that clearly would not be so where the treasurer to whom the note was given had quitted office when the action was to be commenced. In the case of overseers, an express legislative provision was necessary for the purpose of enabling those in office to sue upon a bastardy bond given to their predecessors. And, in the present statute, a particular mode of redress is pointed out, the most proper and equitable one for such cases. It is suggested that justices might refuse to act, and the court might not feel authorized to issue a mandamus: but these are cases so unlikely to occur that it could hardly be necessary to provide for them.

Judgment for defendant.(a)

(a) See *Graves* v. *Colby*, 9 A. & E. 356; *Albon* v. *Pyke*, 4 Man. & G. 421.

KING *v.* BICKLEY.

Reported, 2 Q. B. 419.

*425] *WILLIAM HENRY KING *v.* EMILY ANN BIRCH.

In an action of debt, plaintiff signed judgment for want of a plea; and the incipitur was entered up for the whole debt claimed in the declaration, which was the aggregate of the sums named in the several counts, and exceeded the real debt. Plaintiff sued out a fi. fa., which, in the mandatory part as well as the endorsement, was for the real debt only, and taxed costs, and which recited a judgment as for such lesser sum only. A summons being taken out to set aside the proceedings for irregularity, on account of the variance between the fi. fa. and the entry of the incipitur, plaintiff, before the summons was heard, completed the judgment roll, with a remittitur of all above the real debt and costs, and an award of judgment for such debt and costs only. The execution having been set aside at chambers for irregularity, the judge's order was rescinded on motion in banc, the complete judgment roll agreeing with the fi. fa., and the court, on such motion, not looking to the incipitur.

And the court afterwards refused to set aside the judgment and subsequent proceedings on the ground of variance between the incipitur and the judgment itself;

Or because the declaration, as stated on the judgment roll, varied, by overstating one of the sums demanded, from the declaration, filed and now verified by affidavit. Or because of a variance between the declaration filed and the judgment roll as to the date of the declaration.

The judgment roll was completed, as above mentioned, March 17th. The summons, and motion to set aside the judge's order, were pending from March 15th till the end of Easter term. At the beginning of Trinity term, defendant moved (for the purpose of bringing error) that the judgment roll might be made conformable to the declaration. *Held*, that the variance between them was matter of irregularity only, and the application made too late.

Platt, in last Easter term, obtained a rule (drawn up on reading an order of Lord DENMAN, C. J., dated 19th March last, *the judgment roll in the cause*, and certain affidavits) calling on the assignees of the defendant to show cause why the said order, setting aside the writ of fi. fa. in the cause and all subsequent proceedings for irregularity, should not be rescinded. The affidavits, on which the rule was obtained, stated as follows.

The action was in debt, to recover the principal sum of 2000*l.* and upwards, due upon several promissory notes and bills of exchange given by defendant to plaintiff for money lent. The defendant did not plead: and, on the 28th of February last, the plaintiff became entitled to, and signed, final judgment. The aggregate amount of the sums demanded in the severa

counts was 7952*l.*, which exceeded the actual debt: and the *plaintiff therefore took judgment for 2145*l.* 12*s.*, (being the real debt,) and [*426] 7*l.* 15*s.* taxed costs, entering a remittitur for the 5806*l.* 8*s.* The judgment roll, so completed, was entered and carried into the treasury.(*a*) On the same 28th February, the plaintiff issued a fi. fa.(*b*) on *this judgment for 2145*l.* 12*s.* and 7*l.* 15*s.*, endorsed to levy those sums. On 1st [*427] March the sheriff levied; and he proceeded to sell on the 9th, 10th, and 11th of March. On the 7th of March a fiat in bankruptcy was awarded against the defendant. On 14th March, the petitioning creditors having claimed the property seized, Lord DENMAN, C. J., made an order that the sheriff should pay the proceeds of the execution into court, and an issue should be tried: and such proceeds, amounting to 1710*l.* 16*s.* 11½*d.*, were accordingly paid in. The plaintiff was afterwards served with a summons, by the parties claiming under the fiat, to show cause why the fi. fa. should not be set aside for irregularity; the alleged irregularity being that, by the entry which the clerk of the judgments had made on the plaintiff's signing judgment, the plaintiff appeared to take judgment for 7952*l.*, owing to the general practice of merely entering an incipitur (*c*) of the declaration on the judgment paper and roll at the time of signing judgment, the clerk of the judgments never seeing the complete roll, which is usually completed afterwards and filed with another officer, the clerk of the treasury. Under these circumstances, it was objected that a variance appeared, as to the sums

(*a*) The judgment roll began "Pleas," &c. (in the usual form.) Witness, Thomas Lord Denman. Roll, 2600. The 28th day of February, A. D. 1842. Middlesex, to wit. William Henry King, the plaintiff," &c., "complains," &c. The sum demanded in the commencement of the declaration was 7952*l.* The first count was on a promissory note for 1572*l.*; second count, on a bill of exchange for 50*l.*; third count, on a bill of exchange for 100*l.*; fourth count, on a promissory note for 230*l.*; fifth count, for 3000*l.*, money lent; sixth count, for 3000*l.*, on an account stated. After the declaration, the roll proceeded as follows.

And the said Emily Ann Birch, in her proper person, says nothing in bar or preclusion of the action of the said William Henry King: whereby the said W. H. K. remains undefended against the said E. A. B.: and hereupon the said W. H. K. freely here in court remits to the said E. A. B. the sum of 5806*l.* 8*s.*, parcel of the said sum of 7952*l.*, in and by the declaration above mentioned and demanded, and all damages sustained by him on occasion of the detention thereof, and prays judgment for the sum of 2145*l.* 12*s.*, residue of the said debt, together with his costs and charges by him about his suit in this behalf expended, to be adjudged to him, &c. Thereupon it is considered that the said W. H. K. do recover against the said E. A. B. the said sum of 2145*l.* 12*s.*, residue, &c., and also 7*l.* 15*s.* 0*d.* for his damages which he hath sustained, as well on occasion of the detaining the said sum of 2145*l.* 12*s.*, residue, &c., as for his costs and charges by him about his suit in this behalf expended, by the court here adjudged to the said W. H. K., with his assent. And the said E. A. B. in mercy, &c. And let the said E. A. B. be acquitted of the said sum of 5806*l.* 8*s.*, parcel, &c. And the damages aforesaid remitted, &c.

(*b*) The affidavits set forth the fi. fa., the mandatory part of which was as follows: "We command you that of the goods and chattels of Emily Ann Birch, widow, of," &c., "you cause to be made 2145*l.* 12*s.*, which William Henry King lately, in our court before us at Westminster, recovered against her; also 7*l.* 15*s.*, which were adjudged to the said W. H. K., as well for his damages which he had sustained by reason of detaining of the said debt, as for his costs and charges by him about his suit in that behalf expended; whereof the said E. A. B. is convicted, *as appears to us of record;* together with interest upon the said two several sums of 2145*l.* 12*s.* and 7*l.* 15*s.*, at the rate of 4*l.* per cent. per annum, from the 28th day of February in the year of our Lord 1842, *on which day the judgment was entered up:* and have that money, with such interest as aforesaid, before us at Westminster, immediately after the execution thereof, to be rendered to the said William Henry King for his debt and damages and interest as aforesaid; and that you do all such things," &c. Endorsed to levy 2153*l.* 7*s.*, and interest, &c., besides sheriff's poundage, &c.

(*c*) See note (*a*) to *Phillips* v. *Birch*, 4 Man. & G. 405.

named, between the mandatory part of the fi. fa. and the judgment. On 19th March last, Lord DENMAN, C. J., made the order which was the
*428] *subject of the present motion: "that the writ of fieri facias issued herein, and all proceedings thereon, be set aside for irregularity, with costs to be taxed, to be paid by the plaintiff to the defendant's assignees, their attorney or agent." The judgment roll was in fact filed on the 17th of March. An affidavit of that proceeding, and of the remittitur being entered on the roll, was made on the same 17th of March.

The affidavits in answer stated that the defendant was declared bankrupt on the 8th of March: that the summons, upon which the order of the 19th of March was made, was served on the plaintiff on the 15th of March, for showing cause on the 16th: that the plaintiff, not attending on the 16th, was, on that day, served with a second summons to show cause on the 17th: that no remittitur was entered till the 17th of March: that the summons was heard on the 17th, when the plaintiff produced an affidavit of the remittitur being entered; in answer to which an affidavit was put in that the remittitur had been entered after the order had been applied for: that the Lord Chief Justice thereupon took time for consideration, and that he afterwards made the order of 19th March.

In Easter term, (May 9th,)

Kelly and *E. James* showed cause. The writ of execution varies from the judgment, as appears by the incipitur: and all proceedings under it are void; *Webber* v. *Hutchins*, 8 M. & W. 319. If the plaintiff wished to levy the lesser sum only, he might have taken out a writ of execution for the whole amount named in the incipitur, and have endorsed it to levy the
*429] lesser sum; or he might, in the *first instance, have entered on the record a remittitur of part, and prayed judgment and taken out execution for the residue. He cannot now avail himself of the change which he has made by the judgment roll which he has carried in: having entered the incipitur for one sum, he was not authorized to make a full entry of judgment for the other. And, besides, the question is, whether the Lord Chief Justice's order was right or wrong; and that order had reference to the state of things at the time of the summons; which was antecedent to the carrying in of the roll. The utmost length to which the court would go in this case would be to grant a cross rule for amending the judgment; and then terms would be imposed. Here, however, that cannot be done, the rights of third parties having intervened; *Hunt* v. *Pasman*, 4 M. & S. 329; *Phillips* v. *Tanner*, 6 Bing. 237, and the second point in *Webber* v. *Hutchins*. The bankrupt's assignees claimed before the roll was made up. By R. Hil. 4 W. 4, *General Rules and Regulations*, 3, 5 B. & Ad. ii., judgments have now no relation, and must be entered of record of the day on which they are signed, unless a court or judge make a special order for entering them nunc pro tunc. It is true that, as to interest under stat. 1 & 2 Vict. c. 110, s. 17, the incipitur gives the date to the judgment; *Fisher* v. *Dudding*, 3 Man. & G. 238: but the principle of the new rules, as well as of the Statute of Frauds, 29 C. 2, c. 3, ss. 13, 14, 15, is, that no rights shall be affected by any thing in a judgment which comes into existence after those rights are
*430] vested. Therefore the judgment, as altered, cannot be *considered to be of the date of the incipitur, from which it varies. [PATTESON, J. In *Hunt* v. *Pasman* there was error on the record.]

Platt and *Pashley*, contrà. The rule nisi is drawn up on reading the judgment roll. As the judgment roll now stands, it agrees with the writ. If the roll was irregularly made up, the proper course was for the defendant

to apply to have it set aside. The court will look at the roll only, as in *Dickenson* v. *Teague*, 1 C. M. & R. 241, S. C. 4 Tyrwh. 450. But the judgment does not, legally speaking, vary from the incipitur. The incipitur does not bind as to the sum. When the judgment is by default, there is no verdict fixing the sum; and then the incipitur merely contains the sum in the declaration, which, as the action is in debt, is the aggregate of all the sums in the several counts. The roll, when completed, may contain the proper sum. When proceedings were ore tenus, the officer of the court would make a memorandum, which would be the incipitur, upon judgment being pronounced; and he would then insert the whole sum claimed; he might afterwards, when the judgment was completed, set down the correct sum. The incipitur is like the clerk of the peace's minute of a judgment on an indictment, which minute is of no authority as evidence of the judgment, but, for the purpose of such proof, the judgment itself must be completely made up; *Rex* v. *Smith*, 8 B. & C. 341. *Ayrey* v. *Davenport*, 2 N. R. 474, is a case to the like effect. [PATTESON, J. Could you make an incipitur for 20*l.*, and complete the roll by entering judgment for 100*l.*?] The *incipitur marks the sum beyond which the judgment cannot go. In [*431] 2 Tidd's Practice, 943, (9th ed.,) it is said that a judgment "is not a perfect and permanent record, till the roll is brought into court and filed." What has been done here may be considered as a remittitur upon the sum named in the incipitur; as a nolle prosequi for a part, entered up after judgment for the whole, was held equivalent to a retraxit, in *Bowden* v. *Horne*, 7 Bing. 716; see p. 723. The allegation in the writ "as appears to us of record" is now correct; and the plaintiff was bound to make the two correspond. The sheriff is directed by the fi. fa., to cause to be made the sum recovered *by the judgment;* 1 Chitt. Arch. Pr. 419, (7th ed.) Here, before the actual order of Lord DENMAN, C. J., was made, the roll was complete in its present form.

Lord DENMAN, C. J. On the argument, I am satisfied that my order ought to be rescinded. In good sense, the practice certainly should be that the incipitur should contain the sum to be levied, and no more. Yet, though I feel the objection to allowing a variation to be made pending an inquiry, we must, on this application, see whether the writ varies from the judgment roll. My order was founded on a doubt which I felt, whether the incipitur could be corrected. There must, indeed, be no variance on the record: but the judgment is no record till it is made up; the incipitur is merely the instruction for the future judgment. There is therefore no irregularity in this writ.

PATTESON, J. The order sets aside the fi. fa., as varying from the judgment, and would be right if there *were such a variance. The question is, whether the fi. fa. does so vary; that comes to the question, [*432] what the judgment is. I certainly thought, till now, that signing the judgment was the same thing as entering the incipitur; and I still protest against the doctrine that the incipitur is to be for one sum and the judgment for another. I cannot find it settled (nor do I believe it to be so; and, if the course be so, the sooner it is altered the better) that the incipitur is to contain the whole sum named in the declaration. It ought to contain the sum which is to be in the judgment roll. Where the action is on a bond with a penalty, you cannot exactly pursue the same course as in other cases; you there take out judgment for the penalty, and execution for the actual damages. But there is no doubt that in all cases a party who consents to take less than the judgment specifies may take out execution for the whole sum in the judgment and endorse the writ to levy less. He may, on the same

principle, enter a remittitur on the record of the judgment, as is done here. So far as regards the question of variance between the judgment and the writ, we must throw the incipitur over; for there is no variance if the complete judgment roll agree with the writ. Still I think that it is going a great deal too far to deal with an incipitur in this way.

WILLIAMS, J., concurred.

WIGHTMAN, J. The objection rests wholly in the alleged variance of the judgment described in the writ from that which was actually obtained. The writ recites a judgment of record: and it is alleged that this recital states
*433] a smaller sum than that in the *real judgment. But, on looking at the record, we find that it agrees with the writ. Whether the judgment could have been set aside on the ground that it does not agree with the incipitur, is another question. But the ground of the objection which is taken fails. It seems to me that, if the parties claiming under the fiat proposed to take advantage of a variance between the incipitur and the writ, they should have applied to compel the other party to carry in the record: and then their objection as to the variance, if good at all, might have been made available. Rule absolute.

Kelly, in the present term, (May 23d,) moved, on affidavits setting forth the facts already stated, and the declaration, as filed, for a rule to show cause why the judgment roll and judgment, and all subsequent proceedings, should not be set aside for irregularity, on the following grounds. 1. By the affidavits the declaration appears, in reality, to have been dated February 21st, whereas the judgment roll dates it February 28th; therefore there is a variance between the declaration and the roll: or, if the date "28th February" is to be considered as that of the judgment roll, then the declaration appears on the roll without a date, which, by the pleading rules, Hil. 4 W. 4,(*a*) it ought to have: or else it is uncertain what the date denotes. 2. The declaration, as it is now truly set forth, claims only 300*l*. as due on the account stated; that makes the aggregate of the
*434] sums claimed in all the counts 5252*l*.(*b*) But, on the *roll, the sum due on the account stated appears to be 3000*l*.; and accordingly judgment is entered up for 7952*l*., though reduced to 2145*l*. 12*s*. by means of a remittitur. The defendant's admission, by virtue of which judgment was entered up, extended to 300*l*. only, as claimed by the declaration on the account stated. The variance would be ground for a writ of error; and the plaintiff has no right to exclude the defendant from it by the correction now made. 3. The judgment varies from the incipitur, therefore the whole is irregular. This is not the point decided last term. It was then held that the execution could not be set aside, because the judgment agreed with it, though the incipitur varied. When the summons was served, on the 15th of March, for setting aside the fi. fa., the present ground of complaint did not exist; for the remittitur was not entered till the 17th: proceedings were, of course, stayed till the summons and the subsequent motion were disposed of; and, till then, the irregularity did not become prejudicial. *Worthington* v. *Wigley*, 5 Dowl. P. C. 209, shows the materiality of a variance between an issue delivered and the roll.

PATTESON, J.(*c*) The point argued on showing cause against the rule

(*a*) General Rules and Regulations, 1, 5 B. & Ad. i.

(*b*) The total sum demanded in the beginning of the declaration filed was 7952*l*.

(*c*) Lord Denman, C. J., was absent during the argument

obtained in this case last term is substantially the same as the third point now raised. On this there will be no rule. On the others: if it be erroneous that the aggregate sum in the declaration should not correspond with the sum for which judgment is entered up, it does seem that the plaintiff ought not to be allowed to correct his own mistake, and thereby take away the defendant's opportunity of bringing a writ of *error. [*435
We will therefore grant a rule to show cause why the judgment roll should not be made conformable to the declaration. As to the date, the time for that objection is gone by; but you may take a rule for making the date on the roll conformable to the true one.

WILLIAMS and COLERIDGE, Js., concurred.

A rule was drawn up, calling upon the plaintiff to show cause why the judgment roll should not be made conformable to the declaration as filed, so far as related to the sum specified in the count upon an account stated

Platt and *Pashley* now showed cause on an affidavit stating that 3000*l.* was written for 300*l.* in the engrossed declaration, by the mistake of a clerk, which was not discovered till May, 1842; and that the defendant did not take the declaration out of the office, and was not misled or damaged by the error, having suffered judgment by default, and there being no defence on the merits. They contended that the record ought not to be now altered for the purpose of enabling the defendant to bring error on account of a mistake merely clerical, and which might easily have been corrected while the proceedings were in paper: that the defect was at most an irregularity, and waived by delay on the part of the defendant: and that the judgment could not be altered after a term had elapsed: Lamb. Eiren. c. 13, p. 70, (ed. 1581;) Co. Litt. 260 a; *Rex* v. *Carlile*, 2 B. & Ad. 971.

**Kelly* and *E. James*, contrà, as to the delay, contended, as on the motion for the rule nisi, that the pendency of the summons, and [*436
afterwards of the rule for setting aside the order of Lord DENMAN, C. J., had made an earlier application, on the ground now stated, unnecessary.

Lord DENMAN, C. J. The most that can be made of this is, that it is an irregularity: and the defendant comes too late.

PATTESON, J. This is at most an irregularity; and it appears that the original draft of the declaration was right.

WILLIAMS and COLERIDGE, Js., concurred. Rule discharged.(a)

(a) See *Phillips* v. *Birch*, 4 Man. & G. 403.

The QUEEN *v.* The EASTERN COUNTIES Railway Company.

(On the Prosecution of the CHRISTCHURCH Paving Commissioners.)

THE argument and decision on the motion for costs in this case, (referred to in 1 Q. B. 765, note (*c*), under the title "*Regina* v. *The Commissioners for paving Christchurch, Spitalfields*,") are reported, 2 Q. B. 578.

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*The QUEEN *v.* BARNES and Another. [*437

Where the sessions have quashed or confirmed an order subject to a case, and the Court of Queen's Bench, on argument, sends back the case to be restated, it is the duty of those contesting the original order to give notice to those who support it, before proceeding to have the case reheard.

And, where an order had been so quashed, and the case stated and sent back, and the

respondents, without giving notice of trial, attended the sessions, and, in the absence of the appellants, obtained a confirmation of the order, this court, on certiorari, quashed the last-mentioned order, though the respondents had given the appellants notice of the order of this court sending the case back for restatement.

ON appeal against an order of justices upon surveyors of highways for payment of a portion of the highway rate to certain trustees of a turnpike road,(a) the quarter sessions (for Derbyshire) quashed the order, subject to the opinion of the Court of Queen's Bench upon a case. The case was stated, and argued in this court in Michaelmas term, 1841; when the court made a rule that the orders should be sent back to be restated. The respondents did not apply to the appellants for a meeting to restate the case, nor give them any notice of an intention on the respondents' part to bring the matter before the next quarter sessions; nor did the appellants, in fact, know of such intention; but at the January sessions, 1842, the respondents moved (no one appearing on behalf of the appellants) that the original order might be confirmed; which was done by an order reciting the previous proceedings, and the non-appearance of the appellants. In last Easter term a certiorari was obtained to bring up this order of sessions, for the purpose of its being quashed.

The attorney for the appellants, in his affidavit made in support of the rule, declared his belief that it was incumbent on the respondents, who had originally brought the case into this court, to give notice of their intention to proceed for a restatement, and deposed that, if such notice had been given, he should have instructed counsel to appear at the sessions. The affidavits in opposition stated that an agent for the appellants was
*438] *present in the Court of Queen's Bench when the rule was made for sending the case back to be restated, and that the appellants were served with a copy of that rule: that the attorney for the respondents attended at the January sessions with his counsel, documents, and witnesses, having done all that was previously necessary, as he was advised and believed, for the purpose of procuring the restatement: and that, at a late period of the sessions, the appellants not then appearing, he moved to have the original order confirmed. That the attention of the court was then called to the law and practice on cases sent for restatement, and to decisions in the Court of Queen's Bench on that subject: "and it was thereupon suggested by the court, whether a notice of the intended application should not have been given by the respondents to the appellants: and, after discussion thereupon, the court considered, and intimated its opinion, that, if any notice was necessary, according to law and the practice of that court, it should have been given by the appellants to the respondents, or that the appellants ought to have appeared: and the court thereupon confirmed without reservation or condition the original order of justices." The last mentioned order of sessions being brought up and a motion made to quash it,

Wildman and *Griffin* now showed cause. It was not necessary that the sessions should restate the case. Their duty was to rehear; and upon so doing they might decide as they thought fit. *Rex* v. *The Earl of Effingham*, 2 B. & Ad. 393, note (a); and *Rex* v. *Bloxam*, 1 A. & E. 386; and the *Anonymous* case (1 A. & E. 389) there cited by Sir J. SCARLETT, show
*439] the practice. *[Lord DENMAN, C. J. Will it be contended that, when the case was sent back, the sessions were bound at all events to state a new case? The evidence on the rehearing might remove every

(a) See stat. 2 & 3 Vict. c. 81

difficulty.] (*Clarke* and *Whitehurst*, in support of the rule, stated their objection to be, not that suggested, but that the respondents ought to have given notice of trial.) This court will not quash an order of sessions which is good on the face of it, and relates to a point of practice which they had authority to decide. [Lord DENMAN, C. J. It is said that they have applied their rule of practice unjustly.] The injustice ought to be very manifest to warrant an alteration of their order; but here the appellants suffered by a default of their own. They should have been ready to proceed at the sessions. Their agent was present in this court when the rule was made for sending back the case to be restated. It was not necessary even to serve them with a copy of the rule. *Rex* v. *The Justices of Monmouthshire*, 8 B. & C. 137; *Rex* v. *The Justices of Leicestershire*, 1 M. & S. 442; and *Rex* v. *James*, 2 M. & S. 321, show that, in a case like the present, this court ought not to assume the jurisdiction of reviewing the judgment of the sessions. The court has refused to interfere, even where the chairman had, by mistake, (not discovered till the close of the sessions,) pronounced judgment for quashing, instead of confirming, an order, and the justices themselves supported the rule for a mandamus to rehear, or to correct the judgment by the chairman's notes: *Anonymous* case in note to Dickinson's Guide to the Quarter Sessions, 661, note (*z*), 5th ed., by *Talfourd*.

**Clarke*, (with whom was *Whitehurst*,) contrà. If neither party had taken any step, the order of sessions, quashing the original order, would have stood. The appellants had no interest in moving the case. It, therefore, lay upon the respondents to give notice of the proceeding at sessions. (He was then stopped by the court.) [*440

Lord DENMAN, C. J. The principle laid down is a just one. The party who, in the first instance, succeeded at sessions, is not bound to stir the case for the purpose of having the order of sessions reviewed. The question whether the appellant, in ordinary cases, ought to give notice, does not apply here. As to quashing the order now brought before us by certiorari, that is the substance of every application of this kind.

PATTESON, WILLIAMS, and COLERIDGE, Js., concurred.

Rule absolute, without costs.

The reporters have been favoured with the following note of the case referred to in *Morgan* v. *Powell*, p. 282, note (*b*), antè.

WOOD v. MOREWOOD.

Derby Summer Assizes, 1841. Before PARKE, B.

THIS was an action by the plaintiff for an injury to his reversion in certain closes by making holes and excavations and getting coals, with a count in trover for coals. There were pleas of leave and license, and that the defendant was seised as of freehold in the mines of coal, on which issue was joined. The defendant claimed under Sir John Zouch, who was seised of the closes, with others, and the beds of coal under the same, temp. Eliz., and conveyed all the coals belonging to him to one under *whom the defendant proved his title. The plaintiff claimed the closes in question by a prior conveyance of them, without the exception of coals, from Zouch. The defendant had won the coals under the closes, bonâ fide supposing that these were his own under his title from Zouch. Whether they passed or not depended upon the question whether an ancient settlement by another Zouch, (temp. Eliz.,) which existed at the time of the conveyance of the plaintiff's closes for value, was voluntary or not. There was also some evidence of license as to part. The plaintiff claimed damages on the principle laid down in the case of *Martin* v. *Porter*, 5 M. & W. 351, which amounted to about 10,000*l.* or 11,000*l.* [*441

Sir *W. W. Follett*, for the defendant, contended that the jury were the proper judges

of damages, and that, in this case, where there was no imputation of fraud or want of reasonable care and caution on the part of the defendant, they might assess the damages on the principle that the defendant should pay the fair price per acre at which the bed of coal would have been sold to a person who was to be at the expense of getting it.

PARKE, B., told the jury that, if they found for the plaintiff, they were to determine what damages should be given: that, if there was fraud or negligence on the part of the defendant, they might give, as damages under the count in trover, the value of the coals at the time they first became chattels, on the principle laid down in *Martin* v. *Porter;* but, if they thought that the defendant was not guilty of fraud or negligence, but acted fairly and honestly in the full belief that he had a right to do what he did, they might give the fair value of the coals as if the coal fields had been purchased from the plaintiff.

The jury adopted the latter estimate, and found for the plaintiff, damages 210*l.* per acre; 2310*l.*

No motion for a new trial was made.

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*442] *TRINITY VACATION.

ALLUM v. FRYER.

Testator devised premises to his wife in trust for his mother during the mother's life, and after her decease to the wife during her life: and, if his wife's mother, S. P., should survive the two former devisees, then he gave the interest and produce of his estate to S. P. during her life; and after her decease to be distributed as was aftermentioned. And, as to all the residue of his estate and effects which he should die possessed of, &c., he devised the same to his wife for her life, or so long as she continued unmarried and, after her decease, or marriage, then to the said S. P.; but, if S. P. should be then dead, he willed that the whole should be sold, and the money divided among his brother's and sister's children, share and share alike. And, as to all the residue of his estate and effects whatsoever or wheresoever, he gave and bequeathed the same to his wife, appointing her his residuary legatee and sole executrix. The wife survived both the testator's mother and S. P.

Held that the residuary clauses and the words immediately preceding did not vest any estate in the wife, either for her own benefit or in trust.

ON the trial of this cause, before MAULE, B., at the Wiltshire Summer Assizes, 1840, a verdict was found for the plaintiff on four of six issues, and for the defendant on the remaining two, with leave to move as after-mentioned. Cross motions were made accordingly, in Michaelmas term, 1840, and rules nisi granted.

Cause was shown in Trinity vacation, 1841,(a) and the rules supported and opposed respectively by *Butt* for the defendant, and *Erle* and *Cockburn* for the plaintiff. The authorities cited, in addition to those mentioned in the judgment, were Co. Litt. 113 a; *White* v. *Vitty*, 2 Russ. 484; *In re Horsfall*, M'Cle. & Y. 292; *Lord Braybroke* v. *Inskip*, 8 Ves. 417; *Ex parte Morgan*, 10 Ves. 101; *Doe dem. Hampton* v. *Shotter*, 8 A. & E. 905; *Tylden* v. *Hyde*, 2 Sim. & Stu. 238. The pleadings and material facts, and the points discussed, will appear sufficiently from the judgment, which was delivered in this vacation (June 21st) by

*443] *Lord DENMAN, C. J. This was an action of trespass for breaking and entering the plaintiff's close and cottage,(b) and taking away poles and other things. The defendant pleaded, 1. Not guilty. 2. That the close and cottage were not the close and cottage of the plaintiff. 3. That the poles, &c., were not the poles, &c., of the plaintiff. 4. A justification under a demise from Hannah Catherine Painter, who was alleged to be seised in fee, which seisin was traversed by the replication. 5. That the close and cottage were the soil and freehold of Thomas Painter, which

(a) June 19th. Before Lord Denman, C. J., Patteson and Williams, Js.
(b) In the parish of Wokingham, Wilts.

allegation was traversed by the replication. 6. A justification under a demise from Sarah Sadgrove,(a) who was alleged to be seised in fee, which seisin was traversed by the replication.

The jury found for the plaintiff on all the issues except the 5th and 6th, and on those for the defendant.

Two motions were made, the one to enter a verdict for the defendant on the 2d issue as well as the 5th and 6th, the other to enter a verdict for the plaintiff on the 5th and 6th.

The case turns upon the construction of the will of John Sadgrove. By it(b) he gives the premises to his wife Sarah Sadgrove, in trust for his mother Susannah *Sadgrove for life; and after her decease for herself (his wife) for life, or so long as she should continue his widow: [*444 then he goes on, "and my further will and mind is that, if Sarah Painter, or," &c., "my wife's mother, shall happen to survive my said mother and my said wife Sarah, then I give and bequeath the interest and produce of my whole estate to the said Sarah Painter for her life, and *after her decease to be distributed as hereinafter mentioned.* And, as to all the rest, residue and remainder of my estate and effects of what nature or kind soever which I shall die possessed of or be entitled unto at the time of my decease, I give, devise and bequeath the same unto my said wife Sarah for and during the term of her natural life, or so long as she continues my widow and unmarried; and, *after her decease* or having been married, then to the said Sarah Painter if she shall be then living; but, if she shall be then dead, then my will and mind is *that the whole shall be sold, and the money arising therefrom shall be equally divided between and amongst my brother and my sister's children, share and share alike.* And, as to all the rest, residue and remainder of my estate and effects whatsoever or wheresoever, I give and bequeath the same to my said dear wife, and appoint *her residuary legatee* and sole executrix of this my last will and testament."

Sarah Sadgrove (the widow) survived both Susannah Sadgrove and Sarah Painter, and received the rent of the property till her death in 1838. One Jonathan Painter was her tenant from year to year, and died in 1839; under whose widow, Hannah Catherine Painter, the defendant justifies in the fourth plea: and Thomas Painter, under whom he justifies in the 5th plea, was the heir at law of Sarah Sadgrove: so that, in truth, the *only question raised by the issues is, what estate Sarah Sadgrove took [*445 under the will.(c)

Now it is clear that, under the specific devise of the premises in question, she took only an estate for life, and that, if Mrs. Painter survived her, the premises upon Mrs. Painter's death were to be distributed; but it is not said *by whom.* What was to be done with them in the event of Sarah Sadgrove surviving Mrs. Painter is not stated in that devise.

(a) To Jonathan Painter, since deceased, whose administratrix, Hannah Catharine Painter, was alleged to have demised to the defendant.

(b) The devising part of the will began as follows. "First, I desire that all such just debts as I shall owe at the time of my decease, my funeral expenses, and the expense of proving this my will, be fully paid and discharged. I give and bequeath to my loving wife, Sarah Sadgrove, all my house and premises situate in the parish of Oakingham in the county of Berks, and also all the cottage and premises near Oakingham in the county of Wilts, in trust for my mother Susannah Sadgrove, that she shall receive the rents and profits thereof for and during the term of her natural life: and after her decease I give and bequeath the said rents and profits unto my said wife Sarah, during the term of her natural life, or so long as she shall continue my widow."

(c) The plaintiff claimed under a Mrs. Redshaw, who was alleged to be entitled either under the will as a brother's child, or as heir at law of the testator.

It is equally clear that, under the first residuary clause, Sarah Sadgrove took only an estate for life: and there it is provided that on her death, in case she survived Mrs. Painter, the premises should be sold, but it is not said *by whom*, and the money distributed among the nephews and nieces.

Then comes the last residuary clause, which, it is contended, gives the fee in the premises to Sarah Sadgrove; yet it is not pretended that it can operate so as to revoke the former parts of the will, and give her the premises in question for her own benefit, but in order that she should deal with them under the first residuary clause, that is, should sell them and distribute the money. This could hardly have been the intention of the testator, because it would be absurd to direct Sarah Sadgrove to sell, when that sale was not to take place until after her death or marrying again. The last residuary clause must be taken to operate only on such property as was not previously devised, and, from the words of it, is apparently intended to pass *whatever it does operate upon to Sarah Sadgrove for her own benefit. [*446]

Independently of the last residuary clause, if the premises had been directed to be sold, and the money arising from the sale had been placed in a course of distribution within the province of the executor, then it should seem that Sarah Sadgrove's executor would have had a power of sale; but, as it was only to be distributed among certain persons, the heir would have that power; *Bentham* v. *Wiltshire*, 4 Madd. 44, *Patton* v. *Randall*, 1 Jac. & Walk. 189, and other cases there cited. But in neither case would any estate pass by the first residuary clause; only a power. If any estate beyond the life-estate passed to Sarah Sadgrove at all it must be by the last residuary clause. And upon the whole we are of opinion that nothing did pass by that clause, and that the rule for entering a verdict for the plaintiff on the 5th and 6th issues must be made absolute, and the other rule, of course, discharged.

Plaintiff's rule absolute.
Defendant's rule discharged.

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*447] *Ex parte CARR.

The Examiners of attorneys rejected a candidate on the ground of insufficient service, it appearing that, while articled, he had acted as agent to an insurance office, and that the attorney to whom he was articled was himself acting as clerk to another attorney. The latter fact was disputed.

This court refused, on motion by the candidate, to refer the examinations to a Judge, that he might decide upon the qualification; the jurisdiction, on appeals of this kind, being vested in all the Judges by Reg. Gen. Hil. 6 W. 4.

But, the attorney under whom the former service took place having since died, they ordered, on motion ex parte, that the clerk should be articled to another attorney for the residue of his term of service, without assignment, though it was not ascertained whether or not the deceased attorney had left personal representatives; no other objection appearing.

Heaton, in last Trinity term, (June 13th,) (*a*) made an application on behalf of the above party, the nature and grounds of which will appear sufficiently from the judgment, delivered in this vacation (June 25th) by

Lord DENMAN, C. J. This applicant appears to have served with Arthur William Tooke, for three years, one month and a day, in the usual way, except that he was prevented by illness from actual service for six months of the time. He was then regularly assigned to Ward, and served

(*a*) Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.

him one year, seven months and twenty-two days, when Ward absconded. He was then, by rule of court, without assignment from Ward, articled to Francis Short,(a) for eleven months and six days, reckoning that period as the residue of five years and six months. This time he swears he served, and in Hilary term last applied for examination. The examiners thought the testimonials of service insufficient: but the court thought he ought to be examined,(b) and he was, and rejected for insufficient answers. He gave notice for a second examination. Some *correspondence [*448] passed between the examiners and him, from which it appears that they at least doubted the sufficiency of his service with Short, on two grounds. First, that he, Carr, during the time, also acted as agent to an Insurance Office. Secondly, that Short himself acted as clerk to another attorney. He admits the first, and adduces some evidence to bring the latter into question: Short himself is dead. But the examiners have examined him, and rejected him generally.

He now prays in the alternative. First, assuming that they have rejected him for insufficient service with Short upon either ground, that they shall be directed to send to one of the judges of this court the examinations, that he may decide whether he is or not duly qualified to be admitted. The answer to which is, that, the examiners having examined and rejected, the appeal is to the judges generally, not to the court or a single judge.(c) Secondly, that we should order him to be articled to Henry William Dyson for the residue of the term, without assignment, exactly as was done for him in the case of Short.(d) There is this distinction between the cases, that, in the former case, Ward had absconded, in this, Short is dead, and probably has a personal representative: but there seems no substantial reason why the latter alternative should not be granted.

Rule. On reading, &c. It is ordered: That the said H. C. be at liberty to enter into further articles of clerkship with H. W. Dyson, gent., of, *&c., for the residue of his term of five years, and the further [*449] period of six months, in order to enable the said H. C. to complete his service of five years in the said affidavit mentioned, and that such new articles be enrolled without any assignment from Thomas Ward in the said affidavit named, or the personal representatives of Francis Short, deceased, in the said affidavit also named. And it is further ordered, that notice of this rule be given to the secretary of the Incorporated Law Society.

(a) January 28th, 1841. Short was described in the affidavit as, "then of," &c., "but now deceased."

(b) *Ex parte Henry Carr*, 1 Dowl. P. C. N. S. 565.

(c) Reg. Gen. Hil. 6 W. 4, s. 3, 4 A. & E. 744, 746.

(d) See *Ex parte Wilkinson*, 9 Dowl. P. C. 320. Part of the rule in that case (not mentioned in the report) was, that Wilkinson should be at liberty to enter into further articles for the residue of his service of clerkship, and that they should be enrolled without assignment of the original articles.

RUSSELL v. SHENTON.

The cleansing and repairing of drains and sewers is primâ facie the duty of him who occupies the premises, and does not devolve upon the owner, merely as such.

Therefore a declaration in case for omitting to cleanse and repair drains and sewers, whereby the plaintiff's adjacent premises suffered damage, is bad on general demurrer if it charge the defendant as the "owner and proprietor" of such drains and sewers, unless it also allege some ground of liability.

The words "owner and proprietor" do not necessarily import that the party is occupier

CASE. The declaration stated that plaintiff, before and at the time of the committing of the grievances, &c., was lawfully possessed of a dwelling-house and premises wherein plaintiff and his family during all the time aforesaid inhabited and dwelt: that defendant before and at the time, &c., was the owner and proprietor of divers drains and sewers, to wit, &c., situate and being in and upon certain premises belonging to defendant, near to and adjoining the said dwelling-house and premises of plaintiff, into and through which drains and sewers divers quantities of soil, filth and water from time to time passed and flowed, and by reason thereof defendant, as such owner and proprietor as aforesaid, during all the time aforesaid, ought from time to time well and sufficiently to have kept cleansed and repaired the said drains and sewers, and to have continually hindered and prevented the soil, filth and water
*450] so from time to time passing and flowing into and *being in the said drains and sewers from unduly accumulating therein, and from running and proceeding therefrom unto or into the said dwelling-house of plaintiff: nevertheless defendant, well knowing, &c., but disregarding his duty in that behalf, and wrongfully and unjustly intending, &c., on, &c., and on divers other days, &c., wrongfully suffered the said drains and sewers to become foul and in bad repair, and also wrongfully suffered divers large quantities of soil, &c., unduly to accumulate therein, and wrongfully kept and continued the said drains and sewers so foul and in bad repair, &c., for a long space of time, to wit, &c.; and by reason thereof, &c., divers large quantities of the said soil, &c., then ran and flowed therefrom unto and into the said dwelling-house, &c., and thereby then caused divers unwholesome smells, &c., and the walls, &c., of plaintiff's dwelling-house became decayed, &c.: to the damage, &c.

Plea 5 was, in substance, that defendant was the owner and proprietor of the said drains and sewers, &c., and of the land, &c., in and upon which they were constructed, that is to say of the reversion of and in the said drains, sewers, land, &c., expectant on the determination of the demises after mentioned: that, before any of the said several times when, &c., he had demised the said drains, sewers, land, &c., to certain tenants for terms which were still subsisting; and the said tenants, before and at the said times when, &c., were in the possession and occupation of the said drains, &c., and land, exclusively, and were, as such tenants, liable to cleanse and repair, &c.; and defendant was not in possession, and could not lawfully enter to cleanse and repair, &c. Verification.

*451] The plea was specially demurred to, on grounds *which it is unnecessary to state. The defendant also delivered a statement of objections to the declaration. The substance of these will appear sufficiently from the argument. The demurrer was argued in the last term.(a)

Butt, for the defendant.(b) The declaration is bad. It alleges that defendant is owner and proprietor of drains and sewers, and assigns as a breach his omission to cleanse and repair them: that is an obligation which the law casts upon the occupier, not the owner; and, though cases may exist in which it is cast upon the owner, that is not a primâ facie obligation on which a plaintiff can declare generally. "Owner and proprietor" cannot mean *occupier*; and, if those words imply seisin in fee, the nature of the obligation ought to be set out in the declaration. [COLERIDGE, J. On general demurrer do not the words mean "legal owner?"] They cannot mean seisin in fee. [COLERIDGE, J. In acts of parliament where both terms

(a) May 31st. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.
(b) The defendant's counsel was heard first, the plaintiff's counsel not objecting.

are used, the expression *owner and proprietor* is sometimes used as opposed to the word *occupier*. On general demurrer may not the word *owner* mean *owner in fee?* Lord DENMAN, C. J. Lord ELLENBOROUGH objected very strongly to the use of the expression "owner and proprietor" in an indictment which charged the defendant with liability to repair a bridge by reason of ownership; *Rex* v. *Kerrison*, 1 M. & S. 435.] Assuming the expression to be equivalent to an allegation of seisin in fee, the declaration is bad for not alleging that the defendant was also *occupier. In case against tenant in fee for non-repair of fences, *Cheetham* v. *Hampson*, 4 T. R. 318, Lord KENYON held it clear that the action could not be maintained against the owner of the inheritance, when the land was shown by evidence to be in the possession of another: and BULLER, J., distinguished the case from *Rosewell* v. *Prior*, 2 Salk. 459, 460, which was an action against the owner, not in possession, for a nuisance in making an erection which stopped ancient lights, because "there the owner let the premises with the nuisance complained of, which had been before erected upon them. That therefore was a misfeasance of which he himself had been guilty; and, say the court, his demise affirmed the continuance of the nuisance, and therefore might be said to be a continuation of it by himself." In the present case the declaration does not show that the defendant had the power to cleanse, or was under any obligation to repair: the common law obligation is on the occupier; if any other obligation exists in the particular case, the declaration ought to be specially framed to meet it. The forms in Chitty on Pleading, vol. 2, pp. 585—587, 7th ed., state the defendant to be in possession. Several authorities are cited in Com. Dig. *Action upon the Case for a Nuisance*, (B,) to the effect that, if one erect a nuisance and demise the land, and the nuisance continue, the landlord may be charged for erecting, and the tenant for continuing it. *Brent* v. *Haddon*, Cro. Jac. 555, (*a*) shows the tenant's liability: but the landlord would not be liable for the continuance unless on some special obligation, which must be pleaded specially. [COLERIDGE, J., referred to *Thompson* v. *Gibson*, 7 M. & W. 456.] There, the defendants having erected on *the land of a corporation of which they were members a building which was a nuisance to a market, the lord of the market afterwards demised the market to the plaintiff, who recovered against defendants for the continuance of the nuisance, though they had no right to enter upon the land to remove it. That was an affirmative act: the one now in question was a mere omission. [COLERIDGE, J. Suppose the owner suffered the soil in his drains to accumulate, and then demised them; would he not be liable?] He might be charged as occupier for every thing which he did previous to the demise. [COLERIDGE, J. Then suppose the plaintiff's possession to commence after the accumulation has happened: cannot he sue for continuance of the omission?] *Thompson* v. *Gibson*, 7 M. & W. 456, decided only that the person who originally commits the nuisance is chargeable for the continuance of it: in the present case the declaration does not allege that the defendant whilst occupier permitted the accumulation, but it charges him generally on a common law obligation, as owner and proprietor, to prevent the accumulation. If this case had gone to trial, the judge, on proof that the accumulation took place while defendant, though seised in fee, was not in possession, but whilst other persons were, must, according to the authority of *Cheetham* v. *Hampson*, 4 T. R. 318, have ruled that the obligation did not attach upon him. If, however, the declaration, on general demurrer, must be taken primâ facie to mean that

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(*a*) See *Ryppon* v. *Bowles*, Cro. Jac 373.

the defendant was in possession, then the plea is good; because it shows that others were in fact in possession, upon whom the direct obligation to cleanse and repair attached.

*454] *E. James, contrà. The only question is, whether the declaration be bad on general demurrer; that is, whether, under any supposable circumstances, the defendant may be liable. *Cheetham* v. *Hampson* shows only that the occupier is the party primâ facie liable. In *Tenant* v. *Golding*, 1 Salk. 21, the plaintiff complained that a wall, part of the defendant's house, which the defendant debuit et solebat reparare, was out of repair, by reason whereof filth ran from defendant's premises into plaintiff's; and it was alleged, in arrest of judgment, "that this being a charge laid upon the owner himself, the plaintiff should have showed a title by prescription; sed non allocatur, for it is a charge laid on the defendant of common right, which by law he is subject to."(a) In *Payne* v. *Rogers*, 2 H. Bl. 349, (where *Cheetham* v. *Hampson* was cited,) it was held that, although the tenant was primâ facie bound to repair, and therefore liable for a damage caused by non-repair, "yet if he could show that the landlord was to repair, then that the landlord was liable." Here it is not to be assumed that, on an issue in fact, such liability in the landlord would not have been proved. The premises might have been untenanted. *Rosewell* v. *Prior*, 2 Salk. 460, pl. 6, shows that the defendant, even if he had demised, which, however does not appear by the declaration, might have been subject to liability, as here alleged, for not cleansing and repairing. A tenant at will would not have been bound
*455] to cleanse *drains and repair outer walls. The owner might have agreed to do these works. [PATTESON, J. I do not understand what is meant by "owner and proprietor" in the declaration.] It is a term often used in railway acts. [PATTESON, J. In *Rex* v. *Sutton*, 3 A. & E. 597,(b) the defendant was said to be liable as owner and occupier; but that was a charge of liability to repair a bridge, ratione tenuræ. I do not know any instance of a person being charged, as owner, with liability to such repairs as are mentioned here. If the defendant were so liable, it must be not as owner but by some contract with the occupier. COLERIDGE, J. And, although such a contract might have effect as between the contracting parties, I should think that, as to other persons, the landlord, if liable, must be so as owner.] The judgments in *Payne* v. *Rogers*, 2 H. Bl. 349, and *Rex* v. *Pedly*, 1 A. & E. 822, seem to show that the owner, as such, may take the liability on himself. [COLERIDGE, J. It would be difficult to say that a contract between the landlord and tenant could give third persons a right to sue the landlord.] It might be evidence on a count charging him as owner, and such evidence would support the form of allegation used here, that defendant was the owner, &c., and "by reason thereof" ought to have cleansed and repaired; *Boyle* v. *Tamlyn*, 6 B. & C. 329, judgment of BAYLEY, J., p. 338. It would seem from the language of the court in *Rex* v. *Kerrison*, 1 M. & S. 435, (see p. 437,) that the term ownership extended to every kind of interest, including that of an occupier.

Butt, in reply. If a tenant at will would not have been bound, as between
*456] him and his landlord, to do *the works in question, still he would have been liable to third persons for a nuisance arising from an

(a) Butt here referred to the report of S. C., (as *Tenant* v. *Goldwin*,) 1 Salk. 360, and to the record, set out in 2 Salk. 770, and in *Tenant* v. *Goldwin*, 2 Ld. Ray. 1089, (and see 3 Ld. Raym. 324,) as showing that nothing was charged against the defendant, in that case, inconsistent with a mere possession.

(b) See *Baker* v. *Greenhill*, antè, p. 148.

omission of them during his tenancy. "By common law, he who has the use of a thing ought to repair it;" Lord MANSFIELD, in *Taylor* v. *Whitehead*, 2 Doug. 745, 749. The same doctrine is stated in note 3 to *Pomfret* v. *Ricroft*, 1 Wms. Saund. 322 *a*. In this case, therefore, it ought to have appeared that the party charged was he who had the use. In *Payne* v. *Rogers* the declaration itself seems to have shown that the house was occupied by a tenant; probably, therefore, it alleged some ground on which the owner was liable. [PATTESON, J. If a declaration alleged seisin in fee, that would primâ facie imply occupation; *Bullard* v. *Harrison*, 4 M. & S. 387.(*a*) But is an allegation of ownership equivalent to a statement of seisin in fee? The uncertainty of the terms "owner and proprietor" is dwelt upon in Mr. *Abbott's* argument for the defendant in *Rex* v. *Kerrison*.] No instance can be found in which so loose a mode of statement has been held sufficient, at least before verdict. In *Tenant* v. *Golding*, 1 Salk. 21, 360, the point now taken was not raised; and that was a case on judgment by default. *Cur. adv. vult.*

Lord DENMAN, C. J., in this vacation, (June 25th,) delivered the judgment of the court.

This was an action for nuisance to the plaintiff's lands by reason of the foul state and bad repair of drains of which the defendant is the owner and proprietor, situate on his land adjoining that of the plaintiff, *and which the defendant, as such owner thereof, ought to repair. The plea was demurred to; but the defendant took exceptions to the declaration. [*457

It charges no act on the defendant, either of making or continuing the nuisance. It merely states him to be the owner and proprietor of the drains, and seeks to cast upon him, as such, a legal obligation to make good the damage ensuing to his neighbour from their foul condition. There is no authority in support of such a claim, but several against it; *Brent* v. *Haddon*, Cro. Jac. 555; *Cheetham* v. *Hampson*, 4 T. R. 318; *Boyle* v. *Tamlyn*, 6 B. & C. 329. The plaintiff also argued that the statement of the defendant's being owner and proprietor involved his being also occupier; for which he relied on some expressions used by the judges of this court in *Rex* v. *Kerrison*, 1 M. & S. 435, as showing that an averment that a person is owner and proprietor is equivalent to averring that he is *seised*: which latter term was said, in *Bullard* v. *Harrison*, 4 M. & S. 387, primâ facie to import that he is in possession and occupation. If ownership imports occupancy, and occupancy creates the duty, it would seem but reasonable to require occupancy to be pleaded in direct terms. But those expressions of Lord ELLENBOROUGH and the judges must be taken with reference to the case in which they were employed, and do not show more than this, that the averment was equivalent to averring that the party had the whole interest, not that he was seised, which is a word of technical import. We cannot consider it as an assertion of that actual occupation, which is necessary to charge the defendant, but by no means follows as matter *of law from his ownership or property in it. The words themselves are in some degree ambiguous; but, in whatever sense used, they do not necessarily import occupation, and are used in this declaration evidently in contradistinction to *occupier*. [*458

Tenant v. *Goldwin*, 1 Salk. 21, 360, was cited for the plaintiff; but plainly it was assumed in that case that the defendant was occupier as well as owner of the adjoining house. The record is not set out; (*b*) but the

(*a*) See *Stott* v. *Stott*, 16 East, 343; *England* v. *Wall*, 10 M. & W. 699; *Johnson* v. *Faulkner*, 2 Q. B. 925.

(*b*) But see 2 Salk. 770.

declaration averred that the defendant debuit et solebat to repair the wall separating his privy from the plaintiff's cellar, and that the filth came from it into the cellar for want of such reparation. Holt says, "it was the defendant's wall and the defendant's filth." The present declaration contains no averment that the defendant occupied, or that he did any act to the plaintiff's annoyance. *Payne* v. *Rogers*, 2 H. Bl. 349, was also quoted. The language of the court is not very clear in that case; but, if the marginal note may be taken as a fair representation of the effect of the decision, it will be hard to reconcile with *Cheetham* v. *Hampson*. "If the owner of a house is bound to repair it, he, and not the occupier, is liable to an action on the case for an injury sustained by a stranger from the want of repair." But the court intended by the owner's being bound to repair, an obligation as between him and the occupier. The Chief Justice and BULLER, J., expressly hold the occupier primâ facie liable: if so, this declaration is defective in not showing how that liability is taken out of the occupier and transferred to the owner. *Rex* v. *Pedly*, 1 A. & E. 822, was an indictment
*459] against *the owner of houses and privies, which had been built for the very purpose of being so used as to create a nuisance unless the owner took effectual means to prevent it. Those means not having been adopted, the owner, who received rent for both, was held liable for the public nuisance which arose, not from a single privy, but from the whole assemblage of them. The court expressed no dissent from the cases cited, which were the same as have been adduced, on this argument, for the defendant.

The declaration is therefore bad. Judgment for defendant.

LAZARUS v. COWIE.

Declaration on a bill of exchange, by endorsee against acceptor.

Plea, that the acceptance was for the accommodation of the drawer, and without any consideration, that before the endorsement to plaintiff the drawer negotiated the bill for his own use, and paid it when due, whereupon it was redelivered to him; and, after it was due, the drawer endorsed it to plaintiff without its being restamped, or payment of any duty in respect of the reissuing; and that plaintiff before and at the time of the endorsement to him had notice of the premises.

Held, on special demurrer,

1. That payment by an accommodation drawer being equivalent to payment by an acceptor, the bill when reissued was in law a new bill, and required a fresh stamp.
2. That, inasmuch as stat. 55 G. 3, c. 184, s. 19, expressly prohibits the reissuing of a bill of exchange which has been paid, and inflicts a penalty on any person doing it, the defence was available by plea.
3. That the plea was not bad for duplicity, because, though the allegation of notice was unnecessary, the facts alleged constituted only one defence.

ASSUMPSIT on a bill of exchange drawn by George Arnold upon, and accepted by, defendant, and endorsed by Arnold to plaintiff.

Fifth plea. That defendant for the accommodation and at the request of Arnold accepted the bill, and that there never was any consideration or value whatever for defendant's accepting the same, or paying the amount
*460] thereof, or any part of such amount; that the bill *was and is an instrument or bill liable to the charges and duty imposed by the statute in such case made and provided; (a) that the bill, after defendant had accepted the same, and before the same was endorsed to plaintiff, to wit, on, &c., was by Arnold endorsed and negotiated for his own use and benefit;

(a) 55 G. 4, c. 184.

that Arnold, when the bill became due and payable, and before the same was endorsed to plaintiff, to wit, on, &c., fully paid and satisfied the bill, and that the bill was thereupon then given up and delivered to Arnold fully paid, satisfied and discharged; and that the bill, after the same had been so paid, &c., and given up and redelivered as aforesaid, and also after the same was due and payable, to wit, on, &c., was, without ever having been in any manner restamped, and without the payment, for or in respect of the reissuing of the bill, of any money or duty whatsoever, endorsed by Arnold to plaintiff, and was thereupon delivered by Arnold to plaintiff, contrary to the form of the statute, &c.: (*a*) of all which said several premises the plaintiff, before and at the time when the bill was endorsed to him, had notice. Verification.

Special demurrer, stating, among many other causes, that the plea is double and multifarious, inasmuch as it sets forth as a defence that the bill was accepted for the accommodation of Arnold, and by him paid at maturity, which alone, if true, would form a good defence; and also that the bill, having been so accepted for the accommodation of Arnold, was by him endorsed to plaintiff after the same became due, with notice thereof, which would, if true, form another good defence; and that the plea also seeks to comprise a third defence, inasmuch as it alleges that the bill, being a bill liable to the charges and duty imposed on bills of exchange by the [*461] *statute, &c., was paid at maturity by Arnold as the drawer thereof for his own accommodation, and by him reissued without being restamped or a fresh duty being paid in respect thereof, contrary, &c. That the statement in the plea, that the bill was an instrument or bill liable to the charges and duty imposed by the statute, is insufficient, inasmuch as it does not set forth the facts which rendered the bill liable to the stamp duty imposed by statute originally, which constitute a question of law, but states a conclusion of law, and seeks to submit the same to the country. That the allegation in the plea that the bill was and is a bill liable, &c., is uncertain, and that it is impossible for plaintiff to take any issue thereon. That the absence of a stamp does not vitiate a contract or bill of exchange, but merely renders the same unavailable in evidence. That the fact of a bill of exchange wanting a stamp, or of the sufficiency thereof, is to be tried and adjudicated upon by the judge, and ought not to be submitted to the country.

Joinder in demurrer.

The case was now argued.(*b*)

J. W. Smith, in support of the demurrer. If the defence to be relied on is, that the bill was reissued without being restamped, that is a defence which cannot be pleaded; *Haward* v. *Smith*, 4 New Ca. 684. If the plea raises any other defence in addition to that, it is bad for duplicity.

Flood, contrà. In the case cited, the plea was that the bill "was not, at the time it was made, nor at any *time since, duly stamped [*462] or marked with any proper stamp or mark, denoting that the lawful, requisite, and proper rate or duty, chargeable or charged thereon, had been or was duly stamped," &c., "thereon," without showing either what was the proper stamp, or what was the stamp on the bill; so that it was left uncertain whether the bill had not a stamp of a higher amount than the statute imposes, which would be valid, though not the proper stamp; and on that ground the case was decided. There also the denial of the bill having ever been properly stamped caused the plea to be equivalent to the general issue; here the plea admits the bill to have been duly stamped

(*a*) Sect. 19. (*b*) Before Lord Denman, C. J., Patteson, Williams, and Wightman, Js

when drawn, and is therefore a good plea in confession and avoidance. Neither is the plea bad for duplicity. The facts alleged constitute, and are intended to constitute, only one defence. It is said that the plea raises three answers: but it is the defect of stamp only which makes the other facts amount to an answer. Payment by the drawer at maturity is no defence for the acceptor against a bonâ fide holder for value: negotiation of an overdue bill is merely so far a ground of suspicion that the holder is called upon to show that he did give value for it: a drawer for value may, until payment by the acceptor, reissue the bill so as to give a right of action both against himself and against the acceptor; and even on an accommodation bill the necessity for a new stamp supplies the only answer; for the acceptor gives the drawer authority to do any thing which is necessary for raising money on the bill, inter alia to reissue it; but, as the drawer is himself the party ultimately liable, payment by him puts an end to the
*463] bill, and a fresh stamp becomes necessary, as much as it *would after payment by the acceptor. For the same reasons the circumstance that the endorsee had notice of the premises would not of itself be a sufficient answer.

He was then proceeding to argue the other grounds of demurrer. [Lord DENMAN, C. J. The court is not bound by the long enumeration of causes of demurrer which parties choose to insert in their statement: we shall not decide on any of the points which were not argued on behalf of the plaintiff.]

J. W. Smith in reply. There are three distinct defences. 1. Payment by the party ultimately liable, after which he reissued the bill to plaintiff, an endorsee, with notice: this alone would be a sufficient answer: and, as the reissuing appears to have been after the bill was due, the allegation of notice was unnecessary. 2. Endorsement to the plaintiff after the bill was due, with notice of its being an accommodation bill, is another complete defence. 3. The Stamp Act: and, although that is matter which cannot be made the subject of a plea, it makes the plea double; *Regil* v. *Green*, 1 M. & W. 328:(a) and the objection is available only on special demurrer. [PATTESON, J. Can you say that a mere averment of the bill having been reissued without restamping would have been any thing like a defence?] There are several averments which are immaterial to the defence under the Stamp Act, but are intended to make up the defence of the bill having been reissued after payment by the party ultimately liable: notice and negotiation after maturity are of no importance under the Stamp Act. Even if they do not constitute good independent defences, they fall within the
*464] observation of PARKE, B., in **Regil* v. *Green*: "This is not precisely duplicity, but the plaintiff has no right to include several matters in his replication, so as to embarrass the trial." Then, the defect of stamp is available only by taking the objection at the trial, so as to cause the rejection of the instrument as inadmissible in evidence. According to the established practice, if the objection is not taken at the proper time, the judge will direct the jury that there is a valid legal instrument giving a good cause of action.(b) *Cur. adv. vult.*

Lord DENMAN, C. J., in this vacation, (June 25th,) delivered the judgment of the court.

In the case of *Charles* v. *Marsden*, 1 Taunt. 224,(c) it was held to be

(a) See *Wright* v. *Watts*, antè, p. 89.
(b) See *Foss* v. *Wagner*, note (a) to *Field* v. *Woods*, 7 A. & E. 116; *Doe dem. Phillip* v. *Benjamin*, 9 A. & E. 644.
(c) See *Sturtevant* v. *Ford*, 4 Man. & G. 101.

no defence that a bill was an accommodation bill, and endorsed to the plaintiff after it became due, unless it had been shown also that it was agreed not to be endorsed after due. According to that case, the endorsee, after it is due, stands in the shoes of the endorser in other cases, but not in that of accommodation bills. Again, if a bill is paid by the drawer before due, yet he may reissue it before due; *Burridge* v. *Manners*, 3 Camp. 194: or, if he pay it when due, he may also reissue it; *Callow* v. *Lawrence*, 3 M. & S. 95.(*a*) This plea therefore contains no defence without the averment of want of stamp: all the other averments do not make a defence; neither should it appear that they were intended so to do, but are [*465
*introductory only and necessary under the circumstances to raise the defence of want of stamp. The averment of notice to the plaintiff at the end is indeed unnecessary; but it is equally so if the other part of the plea be supposed to be a defence. The plea therefore is not multifarious, but is one defence, viz., want of stamp.

Then, is such a defence pleadable? The case of *Haward* v. *Smith*, 4 New Ca. 684, only decides that a plea that the bill has no *proper* stamp is bad, because it is doubtful whether such a plea means to deny that there is any stamp at all, (which it seems in that case to have been conceded would be a question for a jury,) or that it had an insufficient stamp, which would be a question for the court; and so the plea was held to be uncertain. Here the plea states that there was no fresh stamp: that is a question for the jury; and, if, under the other circumstances stated in the plea, the bill required a fresh stamp, the plea is good. Now it cannot be denied that, if a bill be paid when due by the person ultimately liable upon it, it has done its work, and is no longer a negotiable instrument. No person could sue on it; no person remains liable on it. If put into circulation again, it becomes a new bill payable at sight, and must have a fresh stamp; stat. 55 G. 3, c. 194, s. 19; *Holroyd* v. *Whitehead*, 1 Marsh. 128. If a bill therefore be paid when due by the *acceptor*, it clearly cannot be reissued without a fresh stamp: if so paid by the *drawer*, being also payee, it might, in ordinary cases, be reissued without a fresh stamp; *Callow* v. *Lawrence*. But the drawer of an accommodation bill is in the same situation as the acceptor of a bill for value: he is the person ultimately liable; and his payment discharges the bill altogether.

*It is said, however, that the stamp acts do not make a bill without a stamp void, but only forbid its being received in evidence. [*466
That may be so in some cases; but the nineteenth section of stat. 55 G. 3, c. 184, above-mentioned, expressly prohibits the reissuing a bill of exchange which has been paid, and inflicts a penalty of 50*l.* on any person doing it. A bill issued contrary to such prohibition is certainly void.

We think, upon the whole, that the facts may be so pleaded, and that our judgment must be for the defendant.

Judgment for defendant.

(*a*) As to promissory notes, see the authorities in *Bartrum* v. *Caddy*, 9 A. & E. 275.

HOGGINS, LEARY, and BAGSHAW *v.* GORDON and Others.

Declaration in assumpsit alleged that, before the promise, &c., a cause, wherein the now defendants were plaintiffs and G. was defendant, was referred by judge's order to the award of plaintiffs A. and B., and such third person as they should appoint in writing, or any two of them: that afterwards, and before the promise, &c., by a writing dated 5th January, 1841, A. and B. appointed plaintiff C. to be the third arbitrator:

that defendants afterwards, in consideration that plaintiffs, at the request of defendants, would take upon themselves the burden of the reference, promised plaintiffs to pay them their reasonable costs of the said award as they should by their said award appoint: that plaintiffs accepted the burden, &c., and, within the time limited, made their award ready to be delivered to the parties, and thereby awarded, amongst other things, that defendants should pay plaintiffs a certain sum for their costs, the said sum to be paid to plaintiffs immediately after the execution of the award, whereof defendants afterwards had notice: nevertheless, though the sum was a fair sum, and a reasonable time had elapsed before the commencement of the suit, defendants had not paid.

Held, on special demurrer, that an express promise would be intended, and therefore the action was maintainable:

That the consideration as alleged was sufficiently definite, being the undertaking by plaintiffs of a known duty:

That the award directing payment of costs "immediately after the execution of the award" must be construed to mean "within a reasonable time after notice:"

That the contract was joint.

ASSUMPSIT. The declaration stated that, before the making of the promise, &c., a cause was depending in the Court of Common Pleas, wherein the now defendants were plaintiffs and James Gawen was defendant. And, *467] before, &c., to wit, on, &c., by a certain order *then made by Sir Thomas Coltman, Knight, then being one of the justices, &c., the said Sir T. C. did, with consent of the now defendants and the said James Gawen, order that all matters in difference, &c., should be referred to the award, &c., of plaintiffs Hoggins and Leary, and such third person as they should by writing under their hands appoint in that behalf, or of any two of them, so as they or any two of them should make and publish their award in writing, &c., ready to be delivered to the said parties in difference, or such of them as should require the same, on or before, &c.; with provisions for enlarging the time, signing judgment, and for the costs of the cause: that the costs of the reference and award should be in the discretion of them the said arbitrators, or any two of them: powers to examine parties and witnesses; provisions that actions or suits should not be brought against the arbitrators, for the prevention of affected delays, for the order to be made a rule of the Court of Common Pleas, and for giving the then defendants time to pay any balance. That afterwards, and before the making of the promise, &c., by a memorandum in writing, dated the 5th January, &c., under the hands of plaintiffs Hoggins and Leary, and made before Hoggins and Leary entered on the said matters in difference, Hoggins and Leary did duly nominate plaintiff Bagshaw to be the third arbitrator, to whom, together with them, &c., the matters, &c., should be referred, according to the tenor, &c.: of all which premises defendants then had notice. And thereupon defendants afterwards, to wit, on, &c., in consideration that plaintiffs, at the request of defendants, would take upon themselves the burden of the reference, *468] undertook and promised plaintiffs to pay *them their fair and reasonable costs of the said award in such manner and at such time as plaintiffs, as such arbitrators, should by their said award in writing direct and appoint. That plaintiffs, confiding, &c., did then accept and take upon themselves the burden of the reference, and did afterwards, to wit, on, &c., and on divers other days, &c., proceed in and with the said reference, and hear, examine, and consider, &c., and did afterwards, and before, &c., duly make and publish their award in writing under their hands of and concerning the matters in difference so referred to them, ready to be delivered to the said parties in difference, and did thereby, amongst other things, award, order, and direct that the costs of the said award of plaintiffs, amounting to 191*l.* 19*s.*, should be in the first instance paid to plaintiffs by the now de-

fendants immediately after the execution of the said award; but that the sum of 95*l.* 19*s.* 6*d.*, being one moiety or equal half part thereof, should be repaid by the said James Gawen to the now defendants at the expiration of twelve months from the date of the said order: whereof defendants afterwards, to wit, on, &c., had notice. Yet defendants, not regarding, &c., did not nor would pay plaintiffs the said sum of 191*l.* 19*s.*, &c., or any part thereof, although the said sum, &c., was the fair and reasonable costs of the plaintiffs of the said award, and although a reasonable time for the payment thereof had elapsed before the commencement of the suit; but had wholly neglected, &c.

Special demurrer. The grounds insisted upon will appear sufficiently from the argument. Joinder.

The case was argued in last term.(*a*)

**Bovill* for the defendants. An arbitrator cannot maintain an action on an implied promise to pay the costs of arbitration; *Virany* v. *Warne*, 4 Esp. 47, which seems to be the case alluded to in *Burroughes* v. *Clarke*, 1 Dowl. P. C. 48—50, by TAUNTON, J., who says that Lord KENYON had ruled "that the office of arbitrator was altogether honorary, and that an arbitrator could not maintain an action for his fees:" and the general practice is in accordance with this view. An arbitrator has two remedies: he may retain the papers till his fees are paid; or he may move for an attachment for the contempt in refusing to pay them; *Hicks* v. *Richardson*, 1 B. & P. 93. [PATTESON, J. In *Swinford* v. *Burn*, Gow. 7, DALLAS, C. J., expressed an opinion that an arbitrator may recover compensation for his trouble.] This declaration is framed as on a special contract, but is defective. First, the consideration, as laid, "that plaintiffs, at the request of defendants, would take upon themselves the burden of the reference," is indefinite and without value. A promise to forbear some little time is no consideration; Roll. Abr. 23, *Action sur Case*, (V.) pl. 25, 26: nor a promise to forbear for an indefinite time; *Philips* v. *Sackford*, Cro. El. 455; S. C. as *Sackford* v. *Phillips*, Moore, 689: nor to pay in a short time; *Tolhurst* v. *Brickenden*, Cro. Jac. 250. [Lord DENMAN, C. J., referred to *Hardres* v. *Prowd*, Style, 465.] In that case the promise was on an executed consideration. [Lord DENMAN, C. J. Suppose it had been said, I will give you 1000*l.* if you will go to York?] That is definite: here it is as if one had said, I will give you 1000*l.* if you will go on the road towards York. A promise to "take upon themselves the burden" of the reference is *not a promise to investigate or to carry out the investigation to an award, or to make an award of any thing but costs; or, if something more is to be intended, the statement is too vague; *Figes* v. *Cutler*, 3 Stark. N. P. C. 139. [COLERIDGE, J. That was a case upon evidence of a contract for a partnership: without knowing the terms the jury could not find any value.] The rule is as stated in Chitty on Contracts, p. 73, 3d ed. (1841.) "But in order to constitute a valid parol or written agreement, the parties must *express* themselves in such terms that it can be ascertained, to a moral or reasonable degree of *certainty*, what they mean. And if an agreement be so vague and indefinite, that it is not possible to collect the full intention of the parties, it is void; for neither the court nor jury can make an agreement for the parties." Secondly, the promise, as laid, is inconsistent with the order of reference: the promise is to pay such reasonable costs as plaintiffs by their said award in writing

[*469]

[*470]

(*a*) Friday, June 3d. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.

direct; whereas, according to the terms of the submission, the award of costs was to be made by the three plaintiffs or any two of them. Thirdly, the plaintiffs have no joint right of action: each ought to have sued for his own proportion: the appointments were several; the labour of each was several; and an award by any two would have been sufficient. Fourthly, the promise is to pay costs as directed by the award: and the award directs payment immediately after the execution of the award, which is an impossibility created by plaintiffs' own act. The declaration indeed alleges that the defendants had notice, and that a reasonable time had elapsed: but, assuming the construction of the award, to which this allegation seemingly
*471] points, to be fair, it is not alleged that defendants were *ever requested to pay: that is always necessary when the omission complained of is something which ought to have been done in a reasonable time; 1 Chitty on Pleading, p. 340, 7th ed., *Bach* v. *Owen*, 5 T. R. 409. Fifthly, there is nothing to show that any party had benefit from the award: it is not even alleged that the award was of any thing but costs. Sixthly, there is no sufficient statement of the time at which the third arbitrator was appointed, which, as the allegation is material, vitiates the declaration.

Peacock, contrà. First, as to the sufficiency of the consideration. The declaration shows an express contract; the remedies which have been suggested on the other side show the legality of such a contract. The cases cited for the defendants turned on the circumstance that time, being of the essence of the consideration, was not ascertained, not on its inadequacy when ascertained, however short it might have been. In Chitty on Contracts, p. 32, 3d ed., (1841,) it is said, citing (besides other authorities) *Wilkinson* v. *Oliveira*, 1 New Ca. 490, that it is immaterial that the detriment or charge assumed is in fact of the most trifling description, provided it be not utterly worthless in fact and in law. *Travers* v. ———, 1 Sid. 57, illustrates this. It is well established that the court on demurrer will not look into the question whether the consideration is adequate.(*a*) Neither is it any objection that the plaintiffs were not compellable to perform their undertaking. [PATTESON, J. The promise never attaches if
*472] they do not make an award.] There are *many cases in which the consideration is not obligatory, but in the nature of a condition precedent: the consideration here is similar to that proved in *Payne* v. *Wilson*, 7 B. & C. 423, where, the plaintiff having, at defendant's request, consented to suspend proceedings against A., defendant promised to pay a sum of money on a certain day. The objection that the consideration, as stated, is too vague, is not well founded: the allegation that plaintiffs were to take upon themselves the burden of the reference imports that they were to perform all the duties of arbitrators. Com. Dig. *Arbitrament* (I. 6), citing *Rose* v. *Spark*, Aleyn, 51, shows that these instruments shall have a reasonable intendment. An award of nothing but costs would be no award at all; but the costs are to be the costs of the "said award," by which must be intended a valid award under the submission. This is an answer also to the objection that there is no averment of any award having been made but an award of costs. Next, as to the objection that the award to pay money immediately involves an impossibility. It is usual to award money to be paid "immediately" or "forthwith;" and these expressions are always construed to mean "in a reasonable time."(*b*) As to the de-

(*a*) See *Hitchcock* v. *Coker*, 6 A. & E. 438, 456; *Haigh* v. *Brooks*, 10 A. & E. 309; *Skeate* v. *Beale*, 11 A. & E. 983, 992.

(*b*) See judgment of Littledale, J., in *Gibbs* v. *Southam*, 5 B. & Ad 913.

livery of the award, there is an averment that plaintiffs were ready to deliver it, which is sufficient. As to the objection that there is no averment of defendants having been requested to pay the money, there is an averment that defendants had notice: it is not necessary to request a party to pay a debt which is due from himself: there "the bringing of the action is a sufficient request; but otherwise it is upon a promise to pay a collateral sum *upon request;" *Birks* v. *Trippet*, 1 Saund. 32, 33 a; [*473
and this is the principle of *Gibbs* v. *Southam*, 5 B. & Ad. 911. The present is the common case of a contract for work and labour to be paid for by the parties for whom it is to be performed. Lastly, as to the objection that the time at which the third arbitrator was appointed is not sufficiently stated. It is laid "afterwards and before the making of the promise;" and the appointment is alleged to have been in writing bearing date 5th January, 1841: the writing, if necessary, will be intended to have been made on that day; *Giles* v. *Bourne*, 6 M. & S. 73. But the time need not be laid. "The necessity of laying a time extends to *traversable* facts only, and, therefore, no time needs be alleged to matter of inducement or aggravation;" Stephen on Pleading, p. 328, 5th ed. This allegation, then, is not traversable; for the appointment of the third arbitrator is alleged merely as inducement to the contract with the three, which is distinctly averred.

Bovill, in reply. In all the cases in which the courts have refused to enter into the adequacy of the consideration, the consideration was the doing of some definite act, or the delivery of some specific chattel, such as the bill of one of several parties for a sum which all of them were previously liable to pay, (*Thompson* v. *Percival*, 5 B. & Ad. 925,) or a bad guarantee, (*Bushell* v. *Beavan*, 1 New Ca. 103:) but here the court is left to define the duties of the arbitrators in the particular case.

Lord DENMAN, C. J., in this vacation, (June 25th,) delivered the judgment of the court.

*This was an action for work and labour, by two arbitrators and an umpire, against the defendants, whom their award required to [*474
pay the costs of the reference, these costs being left in their discretion. Numerous objections were taken on special demurrer.

One of them was that such an action will not lie, as the remuneration of an arbitrator, like that of a physician or barrister, is left to the option of his employers, and cannot be enforced. But it was properly admitted, in the argument, that, where there is an express promise to pay, such an action may be maintained.

But the consideration was said to be badly alleged in these terms; in consideration that the plaintiffs "would take upon themselves the burden of the reference." We are however of opinion that these are intelligible words, and describe a known duty, the non-performance of which would excuse the defendants from paying, but which is averred, and not denied, to have been performed by proceeding to hear and award upon the matters in dispute.

Another point was, that the award of these costs is altogether bad, requiring the defendants to pay them immediately after the execution of the award. But we think that words of this nature must be construed with a reasonable allowance. The costs became payable on notice to the defendants; and such notice is averred.

A more substantial objection seemed to be that there is no joint right in these plaintiffs to sue the defendants for the costs. The order of reference

named the two arbitrators, and gave them power to nominate an umpire: and they in the first place proceeded to nominate the plaintiff thirdly named, of which it is averred that defendants had notice, and made their
*475] promise to all three *to pay them their fair and reasonable costs in consideration of their taking upon them the burden of the reference. The plaintiffs then agree to act jointly; and the defendants promise to them jointly to pay them costs. They aver a joint performance of their promise, and an award by all that they should pay to all. This is clearly a joint contract. Judgment for plaintiffs.

The QUEEN *v.* HARVEY.

The proceedings which take place with respect to the burgess lists in a borough, under stat. 5 & 6 W. 4, c. 76, between September 5th and November 1st, are only for the preparation of that which is to be the burgess list or roll for the year beginning on November 1st; and, until that day, the placing of a name upon such list or roll gives no qualification under the statute, the list or roll of the former year being the burgess list or roll till Nov. 1st.

Therefore, where a person not a councillor was elected alderman, to supply an extraordinary vacancy, on October 29th, his name being on the revised burgess list finally made up on October 22d, but not being on the burgess list of the preceding October,

Held, that he was not, at the time of such election, "entitled to be on the burgess list," within stat. 5 & 6 W. 4, c. 76, s. 28, and therefore was not qualified to be a councillor, and not properly elected alderman. Quo warranto information granted.

A RULE nisi was obtained in Michaelmas term, 1841, for a quo warranto information against Robert Ellison Harvey, to show by what authority he claimed to be an alderman of the borough of Liverpool, on grounds which will appear by the following statement.

Mr. Harvey was elected on 29th of October, 1841, to fill up an extraordinary vacancy in the office of alderman, under stat. 5 & 6 W. 4, c. 76, s. 27, which requires that the alderman, in such case, shall be elected, "either from the councillors or from the persons qualified to be councillors." Mr. Harvey, when elected, was not a councillor: and his qualification to be a councillor was disputed on the ground that he was not, at the time of his election, "entitled to be on the burgess list" of the borough, according to sect. 28.

*476] It appeared by the affidavit of the deputy town clerk *that Mr. Harvey's name was entered in the burgess list made out by the overseers on September 5th, 1841, and delivered on that day to the town clerk. That the list was duly revised by the mayor and assessors between the 1st and 15th of October, and Mr. Harvey's name retained, no objection having been made to it. "That the burgess lists so revised, and signed as directed by the said act, were delivered by the mayor to the town clerk of the said borough, and that the said town clerk caused the said burgess lists to be fairly and truly copied into one general alphabetical list of the burgesses of each ward in a book by him provided for that purpose, with every name therein numbered, beginning," &c. (as prescribed in sect. 22, of stat. 5 & 6 W. 4, c. 76:) "and that such book was completed on or before the 22d day of October, 1841; and that such book is the burgess roll of the burgesses of the said borough entitled to vote as in the said act mentioned." And that Mr. Harvey's name was inserted in the said burgess roll.

His name was also inserted in the burgess list made out by the over-

seers for 1840, 1841; but the revision of that list was never completed. In last Easter term:(a)

Kelly and *Crompton* showed cause.(b) The question is, whether a person whose name has been placed on the *overseers' lists, retained on revision, and entered in the burgess roll by the town clerk, is [*477 thereby "entitled to be on the burgess list," within sect. 28, before November 1st, the commencement of the year for which the list is made up. The right to vote would not accrue till November 1st; but sect. 28 does not require that the party shall be entitled to vote as a burgess: he must be "entitled to be on the burgess list;" and the question is, what constituted the burgess list, for the purpose of this enactment, on 29th October, 1841. It was the list made out on September 5th, and completed on 22d October, 1841. The defendant was then on the burgess roll, though his right to vote was suspended. The burgess lists and burgess roll are kept distinct in all the sections of stat. 5 & 6 W. 4, c. 76, from sect. 15 to sect. 22, the word "list," being used to denote the statement made out by the overseers, till it becomes the roll on 22d October, after which the word "roll," is adopted. In sect. 29, where it is said that every burgess "who shall be enrolled on the burgess roll," shall be entitled to vote in the election of councillors, the difference of expression *cannot be unintentional. The language of the forms in schedule [*478 (D.) is, in several instances, not consistent with any supposition which would confound the "burgess list" with the "burgess roll:" and a distinction between them is pointed at in stat. 6 & 7 W. 4, c. 104, s. 7. [WIGHTMAN, J. Suppose the party had been upon the burgess list of 1840, 1841, but was not qualified to be on that of 1841, 1842.] He would not then be eligible as an alderman in October, 1841. But, when the name has been inserted and retained in the list of September, 1841, the party is qualified for the ensuing year. The words "entitled to be on the burgess list," in sect. 28, cannot mean the burgess list of the year preceding that for which the alderman is to be elected, and for which, obviously, the qualification is required. The construction suggested by the prosecutors would substitute "roll," for "list," and adds the words "and entitled to vote in the election of councillors." The court will not allow this, especially in favour of a disqualification.

Sir *W. W. Follett*, Solicitor general, *Wortley* and *G. Henderson*, contrà. Mr. Harvey was neither a burgess, nor qualified to be a councillor on the

(a) May 5th. Before Lord Denman, C. J., Patteson, Williams, and Wightman, Js.

(b) A statement of the matters to be discussed had been drawn up and agreed to by counsel on both sides, in the following words.

"It is agreed that the only questions upon the affidavits for the opinion of the court are: Whether Mr. Harvey, being on the overseers' lists of 1841, made out under stat. 5 & 6 W. 4, c. 76, s. 15, and remaining upon them upon the revision under sects. 18 and 19, and upon the delivery of them as revised to the town clerk under sect. 22, and being accordingly, under that section, put upon the burgess roll duly made out for the year 1841 by the town clerk, and completed before the 22d of October, 1841, (as deposed to by the deputy town clerk, at the joint request of the relator and the defendant,) and being entitled to be on such lists and roll, but not having been, or having been entitled to be, on any list or roll in or previous to the year 1840, except that he was in point of fact on the overseers' list made out for the year 1840, the revision of which list was never completed, and having the requisite estate, and being also rated in the requisite amount for a councillor, required by sect. 28, was, on the 29th of the same month of October, qualified to be elected an alderman of the borough, he having been elected to that office on that day, and having, within the five days (viz.: on the 1st of November, 1841,) made and subscribed the acceptance of office, and also the declaration required by stat. 9 G. 4, c. 17; or whether on the 1st day of November he was a good alderman."

29th of October, when he was elected alderman. A person becomes burgess only by being on the roll, properly so called, which is made up on 22d October, and takes effect from November 1st. Mr. Harvey, on October 29th, was not on any burgess roll then in operation. The "burgess list," mentioned in sect. 28, cannot mean the lists made up by the overseers for their respective parishes under sect. 15. These, at the close of the revision, are reduced into one alphabetical list, under sect. 22; but till
*479] then there is no general list for the ensuing year. *The names in the overseers' lists are only those of the persons who claim to be burgesses: the language used in schedule (D.) shows this. [PATTESON, J., referred to stat. 6 & 7 W. 4, c. 104, s. 7.] The clauses are loosely worded; but "list" and "roll," there, must mean the same thing. Suppose this election had happened before September 5th: if the overseers' lists constitute the "burgess list," there was none then in existence. Sect. 47 requires that, when an extraordinary vacancy happens, the burgesses shall "elect from the persons qualified to be councillors another burgess to supply such vacancy." By sect. 9, every male person who, on the last day of August in any year, shall have had certain qualifications, shall, "if duly enrolled in that year," be a burgess. The enrolment contemplated must be that which takes place in October of the same year; and the roll then made up is, by sect. 22, the burgess roll of the burgesses entitled to vote "at any election which may take place in such borough between the first day of November inclusive in the year wherein such burgess roll shall have been made and the first day of November in the succeeding year." The legislature, therefore, must have intended that the qualification to be a councillor or alderman, under sect. 28 or sect. 47, should depend upon the party's being a burgess included in the final enrolment, and whose year of qualification to vote has commenced. The words in sect. 47, "elect from the persons qualified to be councillors another burgess," cannot mean that the person will become a burgess by such election; for, by the other provisions of the act, a person does not become a burgess by being a coun-
*480] cillor, or in any manner without enrolment. In stat. 7 W. 4 and *1 Vict. c. 78, sects. 5 and 24, the word "roll" appears to be used for "list." The book alphabetically made out is the true burgess roll; but it may be that in some clauses the word "list" is used with reference to the revised lists which, as well as the book, are kept by the town clerk, and the contents of which are substantially the same. The construction of stat. 5 & 6 W. 4, c. 76, s. 28, suggested on the part of the prosecution, is the only one which gives a reasonable and uniform effect to the statute: according to any other view there would be two burgess lists in operation during some part of every year. *Cur. adv. vult.*

Lord DENMAN, C. J., in this vacation, (June 24th,) delivered the judgment of the court. After stating the nature and grounds of the application, and the date of Mr. Harvey's election, and referring to stat. 5 & 6 W. 4, c. 76, s. 27, his lordship said:

By that section, whenever an extraordinary vacancy takes place in the office of alderman, the council are, within ten days, to elect some other person, either from the councillors or from the persons qualified to be councillors; and by the twenty-eighth section it is enacted that no person shall be qualified to be elected or to be a councillor or alderman, if he is not entitled to be on the burgess list of the borough. Mr. Harvey was not a councillor of the borough: but, on the 5th of September in the year 1841, the name of Mr. Harvey, who was not entitled to have his name on the

previous list or roll, was placed upon the list, made out by th overseers, of persons entitled to be enrolled in the burgess roll of that year. Upon revision of the lists, Mr. *Harvey's name was retained; and it appeared that the book to be made out by the town clerk, containing [*481 the general alphabetical list, had been completed on the 22d of October, pursuant to the twenty-second section of the act, and that Mr. Harvey's name was on it. The question was, whether the list upon which Mr. Harvey's name appeared at the time of his election was "the burgess list" of the borough at the time of his election, within the meaning of the twenty-eighth section; and whether his being entitled to have his name upon that list, and it being actually there, qualified him to be elected an alderman on the 29th of October, 1841.

By the fifteenth section of the act, the overseers of the poor of every parish within the borough are, on the 5th of September, to make out an alphabetical list, to be called "the burgess list," of all persons entitled to be enrolled in the burgess roll of that year in respect of property within the parish; and the overseers are to sign such burgess lists, and deliver them to the town clerk on the 5th of September. These lists (which in sections 18, 19, and 20, are called burgess lists) are to be revised, as directed by those sections, and, by the twenty-second section, the burgess lists so revised are to be delivered by the mayor to the town clerk, who is to cause them to be copied into one general alphabetical list in a book to be completed on or before the 22d October: and such book is to be the burgess roll of the burgesses entitled to vote at any election between the 1st of November in the year wherein such burgess roll is made and the 1st of November in the following year.

Some doubt may be raised on the language of the act of parliament, as to what is intended by the term "burgess list," and whether the list, or rather lists, made *out by the overseers, or the general alphabetical list made out by the town clerk, should be considered the burgess [*482 list; but we are of opinion that, in order to be qualified, the name of Mr. Harvey ought to have appeared upon the list or roll which was in force during the current municipal year, ending on the 1st of November, 1841, and that it was not enough that his name should appear upon a list or roll which was not to be in force *until* the 1st of November, 1841. Had Mr. Harvey's name been upon the list or roll which was in force during the current year, between the 1st of November, 1840, and the 1st of November, 1841, he would clearly have been qualified, though his name had not been on the list upon which it is now; and it seems equally clear that the legislature did not intend that there should be *two* burgess lists, containing different names, in operation at the same time, at any period during the current year. The proceedings which take place with respect to the burgess lists between the 5th of September and the 1st of November in any year are only for the preparation of a list which is to be the burgess list or roll for the year beginning on the 1st of November: and, until that day arrives, the placing of a name upon it will give no qualification to the party whose name is so placed, the list or roll of the former year being the burgess list or roll until that day.

This view of the case, derived entirely from the act itself, is not altered by any thing in stat. 7 W. 4 and 1 Vict. c. 78, or any subsequent act: and we therefore think that the rule should be made absolute.

Rule absolute.

*483] *COATS and Another *v.* CHAPLIN and Another.

The traveller of M., a tradesman residing in London, verbally ordered goods for M. of plaintiff, a manufacturer at Paisley. No order was given as to sending the goods. Plaintiff gave them to defendant, a carrier, directed to M., to be taken to him, and also sent an invoice by post to M., who received it. The goods having been lost by defendant's negligence, and not delivered to M.:
Held, that defendant was liable to plaintiff.

CASE. The declaration charged that defendants, before, &c., were, and still are, common carriers, in connection with the Grand Junction Railway Company, (that is to say,) to carry and convey goods from the London terminus of the London and Birmingham Railway, and deliver the same to the consignees thereof in London and the vicinity: that plaintiffs, on, &c., at, &c., caused to be delivered to the Grand Junction Railway Company, and the Grand Junction Railway Company then accepted and received of and from the plaintiffs, a parcel containing goods, to be safely and securely carried and conveyed by the Grand Junction Railway Company from Liverpool to London, upon and along divers railways, according to the statutes in such case, &c.; and the Grand Junction Railway Company, having so carried and conveyed the said goods for plaintiffs from Liverpool to London, afterwards, to wit, on, &c., at the terminus of the London and Birmingham Railway at London, delivered the same to defendants, as such common carriers, for and on behalf of plaintiffs, to be taken care of by defendants, and to be safely and securely carried and conveyed from the said terminus, and to be delivered by defendants, as such common carriers, for plaintiffs, to the consignees of the said goods at London, to wit, Messrs. J. and J. Morrison, there, for certain reasonable reward: and defendants, as such common carriers, then took and received the said goods, for and on behalf of plaintiffs, to be *taken care of, &c. Breach, non-delivery to the *484] consignees at London, and that defendants so carelessly, &c., that the goods where wholly lost to plaintiffs.

Pleas. 1. Not guilty. Issue thereon.

2. That the Grand Junction Railway Company did not deliver the goods, or any part thereof, to defendants, for and on behalf of plaintiffs, to be safely carried, &c., and delivered, for plaintiffs, to the consignees; nor did defendants take and receive the same, for and on behalf of plaintiffs, for the purpose aforesaid, in manner and form, &c.: conclusion to the country. Issue thereon.

There were other issues in fact.

On the trial, before WIGHTMAN, J., at the Middlesex sittings in Trinity term, 1841, it appeared that the plaintiffs were manufacturers at Paisley, in Scotland, and that the defendants were common carriers, in connection with the Grand Junction and other railway companies. In August, 1840, the traveller of a firm trading in Fore Street, London, under the style of "Morrison, Dillon, and Co.," ordered the goods in question, amounting in value to 80*l.* 4*s.* 3*d.*, of the plaintiffs at Paisley, verbally; and it was not shown that any direction as to the mode of conveyance, or any express order that the goods should be sent at all, was given. The plaintiffs, August 18th, sent the goods by the Paisley and Glasgow carrier, in a truss which was directed "Messrs. J. and J. Morrison, London," and, at the same time, sent an invoice by post in a letter bearing the same direction: this invoice was headed as follows: "Paisley 15th August, 1840.

"Messrs. J. and J. Morrison. Bought of Coats and Shaw."

The letter containing it was received in due course by Messrs. Morrison, Dillon, and Co. in London. The *truss, directed as aforesaid, was delivered on 22d August at the Grand Junction Railway Company's office at Liverpool, and, on 25th August, was, with other articles, put into the hands of the defendants at the London terminus of the London and Birmingham railway, for delivery to the respective consignees. The defendants did not deliver the truss to any person as the consignee. For the defendants it was contended that plaintiffs, the consignors, having done every thing in their power to render the contract binding, had parted with the ownership, and could not maintain the action; and that, defendants having received the goods on behalf of the consignees, the allegation of receipt on behalf of plaintiffs was negatived: *Dutton* v. *Solomonson*, 3 B. & P. 582, and *Morgan* v. *Sykes*(a) were cited. The learned judge overruled the objections, reserving leave for the defendants to move to enter a nonsuit, or a verdict for defendants on the second issue. Verdict for the plaintiffs on all the issues. [*485

Platt, in the same term, obtained a rule according to the leave reserved.

Erle and *Knowles* now showed cause. Delivery, on a perfect contract, to the vendee's agent, or his usual carrier, is a delivery to vendee; *Dutton* v. *Solomonson; Dawes* v. *Peck*, 8 T. R. 330: but, where the contract is imperfect, or the goods are sent by a conveyance not authorized by the vendee, or the vendee retains an option to refuse the goods, the property, until *acceptance by the vendee, remains in the vendor; *Swaine* v. *Shepherd*, 1 M. & Rob. 223; *Freeman* v. *Birch*.(b) The consignee's right to sue arises only as soon as some right of property has passed to him; *Fragano* v. *Long*, 4 B. & C. 219; *Alexander* v. *Comber*, 1 H. Bl. 20. In the present case no property passed to the consignees, because, as against them, the Statute of Frauds, 29 Car. 2, c. 3, s. 17, had not been complied with, no contract having been made out and signed by them; *Hanson* v. *Armitage*, 5 B. & Ald. 557; *Elmore* v. *Kingscote*, 5 B. & C. 583; *Hoadley* v. *M'Laine*, 10 Bing. 482: and they could not have maintained trover for the goods; *Alexander* v. *Comber*. In the cases which will be relied on as authorities to the contrary, *Saunderson* v. *Jackson*, 2 B. & P. 238, and *Schneider* v. *Norris*, 2 M. & S. 286, the bills of parcels were virtually signed by the parties charged. In *Morgan* v. *Sykes*, the plaintiffs sent two pipes of wine to a customer on a written order, and by a specified conveyance; but the order did not state the price: one pipe, the subject of that action, was lost by the negligence of the defendant, the carrier: the case was tried before Lord ABINGER, C. B., who held that the price could not be supplied by parol evidence, and therefore that there was no memorandum within the statute: the defendant then relied on a part acceptance by the consignee in receiving the other pipe; but the Lord Chief Baron held that part acceptance after the cause of action had accrued amounted to nothing: and the case being afterwards moved, on behalf of the defendant, in the Exchequer, that court *held that the Lord Chief Baron was right on both points. In the present case there is neither memorandum signed by the consignees nor acceptance.(c) As regards the second issue, the only question [*486] [*487

(a) Before Lord Abinger, C. B. Not reported. See p. 486, post.
(b) Cited from 1 Nev. & M. 420. See p. 492, note (a), post.
(c) It was also argued that the consignees were discharged, as against the consignors, by the parcel having been neither delivered nor properly directed: and, as to this, *Buckman* v. *Levi*, 3 Camp. 414, and *Clarke* v. *Hutchins*, 14 East, 475, were cited. On this point the court gave no opinion.

is, whether the railway company delivered the goods to the defendants, the ultimate carriers: it has already been shown that there was no delivery on behalf of the consignees.

Platt and *Bros*, contrà. The question is, whether the non-fulfilment of the requisites of the Statute of Frauds makes this case an exception to the general rule, that goods sent by a carrier are the property of the consignee. The cases on this subject are collected in 1 Selw. N. P. 406, ed. 10, *Carriers*, IV. If the consignees here had sued the plaintiffs for non-delivery, they must have succeeded, on the authority of *Schneider* v. *Norris*, 2 M. & S. 286; which shows that, in such an action, the invoice would have been sufficient evidence for the consignees. [PATTESON, J. The consignees might have repudiated the goods; for they had not accepted. Then how could they sue the carrier? In *Hart* v. *Sattley*, 3 Camp. 528, CHAMBRE, J., held that there was an acceptance, because the goods were delivered to a carrier through whom the vendee had been in the habit of receiving goods from the vendor: but nothing of that sort is in proof here. In *Dawes* v. *Peck*, 8 T. R. 330, the goods were delivered to a carrier named by the consignee.]
*488] The consignors *themselves were the agents of the consignees, as soon as the goods were put in motion for the consignees: the carrier is at the least as much the agent of the consignees. This is not a question between consignor and consignee: the question on the second issue is, for whom the goods were delivered to and received by the defendants. In note (1) to *Wilbraham* and *Snow*, 2 Wm. Saund. 47 k, it is shown that delivery to the carrier gives the possession to the consignee generally; though, if the consignor agree with the carrier to pay the price, he is then an insurer to the consignee for the safe delivery, and becomes the contractor with the carrier; which was the exception in *Moore* v. *Wilson*, 1 T. R. 659, as explained by Lord KENYON, in *Dawes* v. *Peck*, 8 T. R. 333. This is the principle of *Freeman* v. *Birch*, see p. 492, note (a), post, and *Syms* v. *Chaplin*, 5 A. & E. 634. In *Swain* v. *Shepherd*, 1 Moo. & Rob. 223, the goods had not been contracted for. "If A. delivers goods to B. to be delivered over to C., C. hath the property, and C. hath the action against B.; for B. undertakes for the safe delivery to C., and hath no property or interest but for that purpose;" 1 Bac. Abr. 515, 7th ed.,(a) *Bailment*, (D). A recovery in trover by the consignee against the carrier would not prevent the delivery to the carrier from operating as a delivery to the consignee, in an action between him and the consignor; *Groning* v. *Mendham*, 5 M. & S. 189. Even if sect. 17 of the Statute of Frauds were applicable, its effect would be, not to destroy the contract, but merely to preclude giving evidence of it between the vendor and vendee: the contract must not be
*489] confounded *with the remedy upon it; *Stead* v. *Dawber*, 10 A. & E. 57, 65. In *Thornton* v. *Kempster*, 5 Taunt. 786, 788, the court observed that the objection of the Statute of Frauds "did not interfere with the substance of the contract." In this case the plaintiffs had no right left, as against the consignees, except that of stoppage in transitu; and that only in the case of insolvency.

Lord DENMAN, C. J. The case on the part of the plaintiffs is, that the goods had not passed from the plaintiffs, so far as to give them a right of action against the consignees, who had had no opportunity of accepting so as to satisfy the Statute of Frauds. The fact, no doubt, is so: there had been no such acceptance. The invoice makes no difference: that was merely a memorandum made by the consignors; it showed no contract between the

(a) Citing 1 Roll. Abr. 606, tit. *Detinue*, (C), pl. 1.

parties. The order was general; no directions were given to send by a particular carrier; the defendant was selected by the consignors. There was, therefore, no acceptance by the consignees. Our decision in favour of the plaintiffs is not at variance with the cases which show that, where the property has passed to the consignee, he is the proper party to sue. *Swain* v. *Shepherd*, 1 Moo. & R. 223, goes the full length of this case. There the consignee had ordered the goods only on approval, and retained the power of rejection; and PARKE, J., held that the consignor might sue for the loss. The language of the learned judge there is, indeed, confined to the facts of the particular case; but the principle which we are now acting upon is recognised, namely, that, until *the property has passed from the vendor, he may treat the goods as his in an action against the carrier. [*490

PATTESON, J. We have not the facts very exactly before us: the order was oral; but probably more passed than was actually proved. If the consignees had selected a particular carrier, it would have made a difference: perhaps, if they had ordered that the goods should be sent by "some carrier," the delivery to any carrier *might* have constituted a delivery to the consignees. But I do not see how the mere order can have the effect contended for. Morrison, Dillon and Co., might have waited, or might themselves have sent for the goods. I do not see how delivery by a consignor, of his own accord, to a carrier can be a delivery to the consignee. Therefore, I think that the consignors here may maintain the action. Many nice distinctions as to the delivery of goods have arisen upon the Statute of Frauds. But suppose that in this case there had been a written order, as silent as the verbal order appears to have been respecting the sending of the goods: how could the vendors, upon sending them by a carrier of their own selection, have become entitled to charge the vendees for goods sold and delivered? I think that the property had not passed, and that the action is maintainable.

WILLIAMS, J. The carrier must be responsible to one party or the other: but, if the wrong party were to recover against him, he would be liable to be harassed again. This case is distinguishable from any that have been cited for the defendants. I cannot find any instance in which the right has been held to pass to the *consignee, where he has not expressly directed the sending by some particular conveyance, or at least the sending by some conveyance or other. Here there is merely an order for the goods: there is no evidence that any thing was either said or implied as to the sending them. The plaintiffs might have waited for further directions: at any rate, nothing had passed which would give them a right against the consignees. The goods therefore were still the property of the consignors; and consequently this action is maintainable. [*491

WIGHTMAN, J. To entitle the consignee to bring such an action as this, the property should be in him. At first I was struck with the apparent applicability of *Dutton* v. *Solomonson*, 3 B. & P. 582, which case is more favourable to the defendants than any other cited. But there the vendee seems to have ordered that the goods should be sent by some carrier,(a) though he did not name any one. Here it was not proved that any mode of conveyance was expressly ordered, nor that there was, as in *Hart* v. *Sattley*, 3 Camp. 528, any regular course of business between the parties in this respect. The case therefore being distinguishable from all those cited, we should be going farther than any authority has yet gone if we held that the property was here vested in the vendees. Without going so far as to hold that a consignee can never maintain such an action as this, unless the

(a) See the judgment of Lord Alvanley, 3 B. & P. 584.

requisites of the Statute of Frauds have been so satisfied as to render him liable to an action for goods sold and delivered by the consignor, it is
*492] enough for us now to say *that it has in no case been held that the property passed to the consignee by the consignor's mere delivery to a carrier, the consignee having given no order whatever for the sending.

Rule discharged.(a)

(a) The following is the case referred to in the argument, pp. 486, 488.

FREEMAN v. BIRCH.

A laundress sent linen, which she had washed, to the owner, by the carrier, whom she paid. The carrier having lost it: *Held*, that the laundress was entitled to sue the carrier for the loss.

ACTION on the case against a carrier for the loss of goods. Plea, Not guilty. On the trial, before PATTESON, J., in Easter term, 1833, in the Bail Court, it appeared that the goods consisted of linen belonging to a person named Spike, who lived in London. The plaintiff was a laundress living at Hammersmith, and had been intrusted with the linen to be washed for the owner. She was in the habit of sending it, when washed, to the owner in London; and she paid the carriage to London. The goods were lost by the carrier in their passage from the country to London. The learned judge was of opinion that, under these circumstances, the plaintiff was entitled to recover. Verdict for plaintiff.

Heaton now moved for a new trial. The action should have been brought by the owner of the linen. He had the property, and was also the consignee. In Selwyn's Nisi Prius, tit. *Carriers*, IV. (see vol. i. p. 406, ed. 10,) the cases are collected: and it appears that the consignee is the proper party to sue for the loss of goods consigned to him. *Dawes* v. *Peck*, 8 T. R. 330, and *Dutton* v. *Solomonson*, 3 B. & P. 582, are authorities to this effect. There it was held that the delivery to the carrier had passed the right to the vendee: and the present is, in this respect, like the case of a vendor and vendee.

LITTLEDALE, J. If there be a complete sale, the property is out of the vendor altogether. But here the plaintiff had a special property, which had not passed from her.

PARKE, J. The question is, who employed the carrier, and at whose risk were the goods carried? The plaintiff paid for the carriage. The owner of the linen was not the employer of the carrier; and the risk of the bailee was not over till the goods were delivered. In the case of a complete sale, the vendor transmits as agent for the vendee.

Per Curiam. (DENMAN, C. J., LITTLEDALE, and PARKE, Js.) Rule refused.

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*493] *IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

WHYTE, Administrator, &c., v. ROSE.

To an action of debt on a deed, by an administrator under a prerogative administration from the Archbishop of Canterbury, it is no answer that the intestate died abroad, and that, at the time of the death, the deed was in Ireland, and was *bona notabilia* to be administered in Ireland.

So held by the Court of Exchequer Chamber, reversing the judgment of the Court of Queen's Bench.

DEBT. The plaintiff declared as administrator of the goods, &c., of Ellen Davy, (formerly Loneragan,) deceased, for arrears of an annuity granted to her, while sole, by a certain indenture, &c., payable at, &c., in the city of Dublin, by four equal quarterly payments, &c.

The letters of administration were set out on oyer, and appeared to have been granted by the Archbishop of Canterbury, on January 16th, 1838, to the plaintiff as the attorney of Manning Davy, the lawful husband of Ellen

Davy, formerly Loneragan, spinster, late of Halifax, in Nova Scotia, deceased. They recited that "the said Ellen Davy, formerly Loneragan, as is alleged, lately died intestate, having, whilst living, and at the time of her death, goods and chattels," &c., "in divers dioceses," &c., (in the usual form;) and they constituted the plaintiff administrator of all and singular the goods, &c., of the deceased, for the use and benefit of the said Manning Davy, then residing at Quebec in Upper Canada, and until he should duly apply for and obtain letters of administration, &c. Plea: "That Halifax in Nova Scotia is in parts beyond the seas; and that, before and at the time of the death of the said Ellen, to wit, on 6th October, A. D. 1835, the indenture in the declaration mentioned was without the province of Canterbury, to wit, at Dublin in the kingdom of Ireland, and was not then, *at the time of the death of the said Ellen, to be administered within the province of Canterbury; but, on the contrary thereof, was then of the notable goods of the said Ellen to be administered within the kingdom of Ireland." Verification. [*494

Demurrer, assigning for causes: "That it is not alleged, or shown in the said plea, that the said indenture was, at the time of the death of the said Ellen, bona notabilia or assets within any province or diocese of England, or that the said Ellen had, at the time of her death, within this realm, any other assets or goods whatsoever; but, on the contrary, the plea shows the said Ellen and the said indenture to have been beyond seas at the time of her death, and does not in any manner invalidate the grant of the administration to the plaintiff, or the plaintiff's title to sue on the said indenture." Joinder.

The demurrer was argued in Easter term, 1840,(a) by *J. W. Smith* for the plaintiff, and Sir *F. Pollock* for the defendant. It is considered sufficient to report the argument in the Court of Error.(b) *Cur. adv. vult.*

Lord DENMAN, C. J., in Trinity vacation, (June 24th,) 1840, delivered the judgment of the court.

This was an action of debt on an indenture made between the intestate and the defendant. The plaintiff made profert of letters of administration granted by the Archbishop of Canterbury. The plea shows that the *intestate was a British subject, and died at Halifax, in Nova Scotia: and that, at the time of her death, the indenture was at Dublin in Ireland, and was *bona notabilia* to be administered there. To this plea there was a demurrer, showing for cause that the plea does not show *bona notabilia* in any province or diocese in England, without the province of Canterbury, but, on the contrary, shows that the indenture was beyond the seas. [*495

It was argued that the plea was in the nature of a plea to the jurisdiction of the Archbishop, and ought to show a proper jurisdiction. This is not strictly so; it is a plea in bar: but still it may be true that it ought to show some other jurisdiction, because it may be that the letters of administration of the Archbishop of Canterbury are in all cases good, unless it be shown that the granting them belongs to some one else.

Now, if this indenture had been alleged to have been in the province of York, there is no doubt that the plea would have been good. The question is therefore reduced to this, whether the court is bound to take judicial notice that the granting letters of administration of goods in Ireland belongs

(a) April 24th. Before Lord Denman, C. J., Littledale, Patteson, and Coleridge, Js.

(b) Besides the authorities cited in the Exchequer Chamber, the following were referred to in the argument below. *Spratt* v. *Harris*, 4 Hag. Ecc. Ca. 405, 408; 1 Will. Ex. 270, (3d ed.,) Part I. b. 4, c. 3, s. 6; *Attorney General* v. *Cockerell*, 1 Price, 165, 179.

to some authority there. We take the words of the plea, "the kingdom of Ireland," to mean "that part of the United Kingdom of Great Britain and Ireland, called Ireland;" and, no doubt, we are bound to take such judicial notice. In *Shaw* v. *Stoughton*, 2 Lev. 86; S. C., 3 Keb. 163, "Dictum fuit per HALE, et nemy deny, si home morust aiant biens en les several provinces de York et Canterbury, several administrations doint estre commit, et issint si en Angleterre et Ireland."

*496] But it is said that Irish letters of administration would *not enable the administrator to sue here. The cases cited by no means establish that proposition as regards an action for goods in Ireland, whatever may be the case if the action be for goods in England. But, at all events, they do not dispense with Irish letters of administration, even if it be necessary to add English letters *ad litem*, which the letters in the present case are not. No case establishes that the Archbishop of Canterbury has original jurisdiction over *bona notabilia* in Ireland. Our judgment must therefore be for the defendant. Judgment for defendant.

The plaintiff brought error in the Court of Exchequer Chamber, assigning, as errors, that the plea was not sufficient in law, and that judgment was given for the defendant, whereas, &c. Joinder in error.

The case was argued in the Exchequer Chamber in Michaelmas vacation, 1841.(a)

J. W. Smith, for the plaintiff in error (plaintiff below).(b) First: To

*497] maintain an action at law in *England on a deed which at the time of the death was assets in Ireland, it is necessary, and is sufficient, that the administrator should have letters of administration from an ecclesiastical court in this country: Irish letters of administration need not be superadded. That the letters from the Archbishop's Court are good, and a foreign grant of administration not material, appears from *Tourton* v. *Flower*, 3 P. Wms. 369; *Logan* v. *Fairlie*, 2 Sim. & Stu. 284; (c) and *Lowe* v. *Fairlie*, 2 Madd. 101. The cases are collected and discussed in *Tyler* v. *Bell*, 2 Mylne & C. 89; and in *Price* v. *Dewhurst*, 4 Mylne & C. 76, 80; S. C. (before the Vice-Chancellor) 8 Sim. 279. Lord COTTENHAM, C., said: "How can this court, in administering a testator's property, take any notice of a will of which no probate has been obtained from the Ecclesiastical Court of this country? This court knows nothing of any will of personalty, except such as the Ecclesiastical Court has, by the probate, adjudged to be the last will." These cases, indeed, did not relate to Ireland: but in *Swift* v. *Swift*, 1 Ball & B. 326, decided in that country, a person having obtained letters of administration in England sued out a *ne exeat regno* in Ireland, against a party who had there possessed himself of the assets; and it was held that the process could not be supported, because no administration had

(a) November 29th and 30th. Before Tindal, C. J., Lord Abinger, C. B., Coltman and Maule, Js., and Parke, Alderson, and Rolfe, Bs.

(b) The points made by the plaintiff were stated in the margin of the error book, as follows. "That the plea is bad in form and substance, and contains no legal or valid answer to the declaration; that the letters of administration, stated in the declaration and set out on oyer, are sufficient to entitle the plaintiff to maintain his action: that the plea shows nothing to invalidate them, and shows no other jurisdiction by which administration could have been granted, or by which it ought to have been granted, in order to entitle the plaintiff to maintain this action: and that the plea is bad for uncertainty, and does not show that the deed on which the action is brought was, at the time of the intestate's death, within any specified diocese or ecclesiastical jurisdiction in the United Kingdom of Great Britain and Ireland, other than the province of Canterbury, or that it was out of the jurisdiction of the Archbishop of Canterbury."

(c) See S. C. (before the Lords Commissioners) 1 Mylne & C. 59

of such part of them as are, at the testator's death, within the jurisdiction of the spiritual judge by whom it is granted;" per Lord LYNDHURST, C. B., in *The Attorney General* v. *Dimond*, 1 Cr. & J. 356, 370; S. C., 1 Tyrwh. 243, 258. The history and principle of the prerogative administration do not warrant any assumption of the right to dispose of goods in Ireland. The origin of the bishop's power is merely local and territorial: it was originally in the king as parens patriæ; *Hensloe's Case*, 9 Rep. 36 b, 38 b: the bishop used to take the goods, to distribute *in pios usus*, as king's almoner; 2 Black. Comm. 494. Then the statute of Westminster 2, (1 stat. 13 Ed. 1, c. 19,) compelled the ordinary to pay debts; and, afterwards 1 stat. 31 Ed. 3, c. 11, provided that he should appoint the next and most lawful friends to administer. The prerogative administration was probably introduced to save trouble: it is mentioned first by Lyndwood,(a) who wrote in the *fifteenth century: but the jurisdiction [*503 must have existed much earlier. The amount of *bona notabilia* liable to it is fixed at 5*l.* by the ninety-third canon, (A. D. 1603.)(b) The ordinary, whether archbishop or bishop, interferes, not as personal representative, but in respect of the property. No reason can be assigned why the Archbishop of Canterbury, rather than of York, should go out of his province. The administrator stands only in the place of the ordinary; when the administration is granted, it is as if there were no mesne occupation in the ordinary, but the administrator had held from the death; per *Fortescue*, in C. P. Yearb. Mich. 18 H. 6, fol. 23, B. pl. 7. (*Fortescue* was counsel for the plaintiff.) [Lord ABINGER, C. B. Can we discuss the propriety of the prerogative grant on this record?] In *Gold* v. *Strode*, 3 Mod. 324, (S. C. Carth. 148, with some variation,) scire facias, on a judgment recovered in an action in Somersetshire, was brought by an administrator under letters from the Bishop of Bath and Wells: the defendant was taken in execution and escaped: on action against the sheriff, it was objected, in arrest of judgment, that the original judgment was erroneous, because it made *bona notabilia* in Middlesex; and it was held that the original judgment was erroneous on this ground, but that the sheriff could not then take advantage of the objection. That shows that the courts of common law may incidentally notice the question of jurisdiction. Administration granted by the wrong court is void; though, if granted by the wrong person, it is voidable only; *Blackborough* v. *Davis*, 1 P. W. 41, 44. *Simpson* v. *Tresler*, Bul. N. R. 141, is to *the [*504 same effect. In *Huthwaite* v. *Phaire*, 1 M. & G. 159, 164, TINDAL, C. J., recognises the correctness of the proposition in Com. Dig. *Administrator*, (B. 3,) that for *bona notabilia* in Ireland there must be an Irish administration, and for *bona notabilia* in England an English one. [TINDAL, C. J. We were there deciding only the question before us.] In *Lysons* v. *Barrow*, 2 New Ca. 486, the record raised the issue in fact, whether a metropolitan administration was good, it being alleged that the goods were within a peculiar: the court held it voidable, but not void. In *Bingham* v. *Smeathwick*, Cro. Eliz. 455, it was determined that an administration by the Archbishop of Canterbury is void, unless there be bona notabilia in divers dioceses in his province, or the goods be within the diocese of Canterbury; and that this must be averred. In *Allen* v. *Andrews*, Cro. Eliz. 283, the court assumed that, where debt is brought by an administrator under a prerogative administration, the defendant may

(a) Provinc. p. 174, lib. iii. tit. 13, not. (m), (ed. 1679.)
(b) See 1 Gibs. Cod. p. 472, tit. xxiv. c. 4. (2d ed.)

show that the goods were in London only. In *Price* v. *Simpson*, Cro. Eliz. 718, in an action of trespass, the court held that, where there were goods within the diocese of York and also within a peculiar, there could not be a prerogative administration. In *Farringdon* v. *Clerk*, 3 Doug. 124, it was held that a party who had taken out administration in Bengal as attorney to A. could not pay over money obtained under that grant to parties claiming under an administration in England. [Lord ABINGER, C. B. That was only because he obtained the money as A.'s attorney. It seems to me that your argument goes too far, and would show that no administration in England could give a right over goods anywhere out of England.
*505] A man may sue here in his own *right, naming himself as executor or administrator under a foreign probate or grant; but does a man ever sue here in the character of executor or administrator under such a probate or grant?] If there be bona notabilia in two dioceses in different provinces there can be no prerogative administration; *Burston* v. *Ridley*, 1 Salk. 39. The form of the letters of administration confines the authority to goods within "divers dioceses or jurisdictions." 1 Will. Ex. 346, (3d ed.)

The argument from inconvenience cannot be supported. If a foreign probate be good, the courts here will give it due effect.(a) The distinctions suggested on the other side, as to some cases in favour of the defendant in error, are not sufficient to explain them: *Daniel* v. *Luker*, Dyer, 305 a, pl. 58, s. 6. Dalison, 76, is recognised in 1 Rol. Abr. 908, *Executor*, (G), pl. 1: and the passage in Rolle, as well as *Shaw* v. *Stoughton*, 2 Lev. 86, S. C., 3 Keb. 163, is recognised in Com. Dig. *Administrator*, (B 3.) No inconvenience therefore could arise; for those cases show that the effective administration may be given in each country, confining it to the *bona notabilia* in each. In *Currie* v. *Bircham*, 1 D. & R. 35, the foreign administration prevailed, as to foreign goods, against the English administration. *Lunn* v. *Dodson*, 1 Rol. Abr. 908, *Executor*, (G), pl. 4, shows that the locality of the deed fixes the locality of the debt.

The administration here cannot add to the authority derived from the administration in Ireland. The courts here would, indeed, in granting probate
*506] for English *administration, be regulated by the grant of probate abroad, as in *Larpent* v. *Sindry*, 1 Hag. Ecc. Rep. 382. [ROLFE, B. If property came to England after the death, would the foreign administration give a right to it? PARKE, B. Suppose, after a man's death, his watch be brought to England by a third party, could such party, in answer to an action of trover by an English administrator, plead that the watch was in Ireland at the time of the death?]

J. W. Smith, in reply. *The Attorney General* v. *Dimond*, 1 Cr. & J. 356, S. C. 1 Tyrwh. 243, shows only that probate duty is not payable for property out of the country at the time of the death. *Farringdon* v. *Clerk*, 3 Doug. 124, is a case of estoppel merely; it is much like *Gosling* v. *Birnie*, 7 Bing. 339. The cases in which administration by a wrong ordinary has been held void rest upon 1 stat. 31 Ed. 3, c. 11, which, it has been shown, does not apply to Ireland. The form of the letters proves nothing. When the property comes to England it falls within the description.

Cur. adv. vult.

TINDAL, C. J., in the vacation after last Hilary term, (Feb. 7,) delivered the judgment of the court.

The question raised upon this record is, whether the plaintiff below, to

(a) See note (x) to 1 Will. Ex. 270, (3d ed.)

whom letters of administration had been granted by the Archbishop of Canterbury, of the goods and chattels of one Ellen Davy, an intestate, who died in Nova Scotia, can maintain an action against the defendant in an English court of law, upon a bond given to the intestate in her lifetime, it being averred, in the defendant's plea, that such bond, at the time of *the death of the intestate, was without the province of Canterbury, to wit, at Dublin, in the kingdom of Ireland, and that it was not then, at the time of the death of the intestate, to be administered within the diocese of Canterbury; "but, on the contrary thereof, was then of the notable goods of the said Ellen to be administered within the kingdom of Ireland." [*507

It is well established that, in the case of a British subject dying intestate in the colonies or in foreign countries, a prerogative administration extends to all the personal property of the intestate wherever situate at the time of his death, whether in Great Britain, or in the colonies, or in any country abroad: and, indeed, from the late case of *Scarth* v. *Bishop of London*, 1 Hag. Ecc. Rep. 625, it appears that, where the intestate dies abroad, not having goods in divers dioceses in England, but only in the diocese of London, administration granted to such intestate by the Consistory Court of the Bishop of London will be equally effectual.

It is also well established that, in order to sue in any court of this country, whether of law or equity, in respect of the personal rights or property of an intestate, the plaintiff must appear to have obtained letters of administration in the proper spiritual court of this country. See the judgment of Sir JOHN NICHOLL in *Spratt* v. *Harris*, 4 Hagg. Ecc. Rep. 405; and see also the judgment of the Lord Chancellor in *Price* v. *Dewhurst*, 4 Mylne & Cr. 76. So that, if the plaintiff in the case now before us had in the first instance taken out administration in the proper spiritual court in Ireland, for the purpose of administering this bond which was found in Ireland (as it is contended he *ought to have done,) he could not have sued in England upon such letters of administration, but must have also taken out administration in England from the proper spiritual court there. This latter point was expressly decided in *Carter and Crost's case*, Godb. 33, where the court say that an administrator made by an Irish bishop could not bring an action *here*, as administrator. [*508

The question, therefore, is reduced to this single point, whether the plaintiff suing a defendant in England in an English court of law, having clothed himself with a prerogative administration, must also shew, in addition thereto, that he has taken out letters of administration in the spiritual court of Ireland, or whether the *bona notabilia* found in Ireland are not in contemplation of law the same as if found in any other place out of the realm, as Scotland, for instance, or the colonies, or France, or any other foreign country.

And we think no difference can exist, in point of law, whether the suit relates to assets of such intestate which are found in Ireland at the time of his death, or in any foreign country.

Before the union of Great Britain with Ireland, Ireland was, to many purposes, considered as a foreign country. It was beyond the seas, within the meaning of the statute of limitations, (21 Ja. 1, c. 16, s. 2;) it was beyond the seas with respect to the exceptions of disabilities under the statutes relating to fines, the expression "beyond the seas" being used as synonymous with the expression "out of the realm" in the statutes relating to fines, (4 stat. 18 Ed. 1, and stat. 4 H. 7, c. 24.) There never was, in fact, any

*509] more connection *between the courts of Westminster Hall and the ecclesiastical courts of Ireland, than between those courts and the ecclesiastical courts of any foreign country. No prohibition ever lay from any of the English courts of law: no certificates from the bishops of Ireland were ever receivable here. And that the union of the two kingdoms has made no difference in this respect will appear sufficiently from the judgment of the Court of Common Pleas in the case of *Battersby* v. *Kirk*, 2 New Ca. 584; S. C. 3 Scott, 11, where it was held that in the Bristol Dock Act 43 G. 3, c. xi., (local and personal, public) s. 38, passed since the union Ireland was still, notwithstanding the union, to be considered in parts beyond the seas.

Unless, therefore, some direct authority could be produced upon this point we see no ground or principle for holding the Irish administration to be necessary in the English court. But no such authority has been cited. The case of *Shaw* v. *Stoughton*, 2 Lev. 86; S. C. 3 Keb. 163, upon which reliance appears to have been placed, does not appear to us to bear out the proposition contended for by the defendant below. In one sense, indeed, it is properly laid down in that case that, under the circumstances therein supposed, several administrations must be committed, one for the goods in England, another for the goods in Ireland; for no administrator could sue in the English courts, in respect of the personal estate, wherever it was found at the death of the intestate, without an English administration. Nor, again, could any administrator sue in the courts of Ireland without an Irish administration. And, in that sense, and to that extent, it is true there must be two administrations. But, supposing the Irish debtor to come within the
*510] *jurisdiction of the English courts, whether the administrator under a prerogative administration in England must take out letters of administration in Ireland also, to enable him to sue in England because the debt due from the defendant was *bona notabilia* in Ireland, is a point on which the case cited furnishes no decision. Upon the authority of that case, indeed, if the administrator under an Irish administration had received this debt, and given a release for it, it would have been a bar to any demand on the part of the administrator in England, as is laid down in *Danyel* v. ——, Dalison, 76, S. C. as *Daniel* v. *Luker*, 3 Dyer, 305 a, pl. 58; but, not having done so, the question is still open whether the administrator under the English letters of administration can recover the debt.

And, upon the general ground before stated, that assets in any diocese in Ireland are to be considered as assets abroad, when the administrator sues in an English court under a prerogative administration, we think the plea is bad; and, consequently, that the judgment of the court below should be reversed. Judgment reversed.

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*511] *IN THE EXCHEQUER CHAMBER,

(Error from the Queen's Bench.)

BOORMAN and Others *v.* BROWN.

Declaration, in case, stated that defendant was an oil broker, and that plaintiffs, linseed crushers, retained him, as such broker, to sell and deliver for them 30 tuns of linseed oil, according to the contracts of sale, to such persons as should purchase, for commission and reward to defendant in that behalf; which retainer he accepted: That he, as such broker, in pursuance of the retainer, made a contract between plaintiffs and

P., by which plaintiffs sold to P., and he bought of them, the 30 tuns, at the price, &c., to be delivered by parcels at a place and times named in the declaration, each parcel to be paid for in ready money: That plaintiffs consigned two of the parcels to defendant, and he delivered them to P., on payment: And that, after the making of the contract, and in pursuance thereof, and of the retainer, plaintiffs consigned to defendant, as such broker, the residue of the 30 tuns, to be delivered by him to P., on payment: that the oil arrived, &c., of which defendant had notice, and took upon himself the delivery according to the contract: *and thereupon it became and was defendant's duty, as such broker as aforesaid, to use all reasonable care that the oil should not be delivered to P. or any other person without the price being paid to defendant according to the contract:* Yet defendant, not regarding such duty, did not use reasonable care, &c., that the oil should not be delivered, &c., without the price being paid, but neglected and refused so to do, and so negligently and carelessly behaved in the premises, that, by defendant's mere carelessness and negligence, the last-mentioned oil was delivered to H. and Co., without the price being paid, by P., or any person, to defendant: by reason whereof, and of P. having become bankrupt and unable to pay, plaintiffs lost the said oil, and the price thereof, &c.

Held by the Court of Queen's Bench, after verdict for plaintiffs:

That the duty was laid in the declaration as resulting from the defendant's character of broker: but that the duties of a broker as defined by statute and common law did not include those said to have been violated by the defendant. Judgment arrested.

Held by the Court of Exchequer Chamber on error:

That the duty resulted from an express contract described in the declaration, and did not arise simply from the defendant's character of broker.

And that, for the breach of such duty, an action of tort lay.

Judgment reversed.

THE plaintiffs in error declared in the Queen's Bench against the defendant in error:

For that, whereas before and at the time of the committing, &c., the said plaintiffs carried on the trade or business of linseed crushers, at Branbridges, in the county of Kent, and defendant during all that time carried on the trade or business of an oil broker, at London aforesaid; and whereas also, before the time of the committing, &c., *to wit, on, &c., plaintiffs had retained and employed defendant, as such broker as aforesaid, to sell at London aforesaid, for and on behalf of them, plaintiffs, certain quantities, to wit, 30 tuns, of linseed oil, and to deliver the same in the port of London aforesaid, according to the terms of the contract or contracts of sale, to such person or persons as should become the purchaser or purchasers thereof, for certain reasonable commission and reward to defendant in that behalf, which retainer and employment defendant then accepted: and whereas also, before the committing, &c., to wit, on, &c., defendant, as such broker as aforesaid, in pursuance of the said retainer and employment, and being duly authorized by plaintiffs and one James Graham Peacock in that behalf, made a certain contract between the said plaintiffs and the said J. G. Peacock, whereby plaintiffs sold to the said J. G. P., and the said J. G. P. purchased of plaintiffs, the said 30 tuns of linseed oil at the price of 42*l*. 10*s*. per tun, usual allowances, to be delivered in the river Thames, 10 tuns the last fourteen days in March then next, 10 tuns the last fourteen days in April then next, 10 tuns the last fourteen days in May then next, and the amount of each parcel to be paid for from delivery in ready money less 2½ per cent. discount; which said contract the said plaintiffs and J. G. P. then respectively accepted: and whereas also, after the making of the said contract, plaintiffs, in pursuance thereof, consigned to defendant, at London aforesaid, in the last fourteen days of March and April, respectively, two several parcels of linseed oil of 10 tuns each, to be delivered by him to the said J. G. P., upon the price of the amount thereof being paid by the said J. G. P., to defendant in ready money, less 2½ per cent. *discount, and defendant then delivered the same respectively to the said J. G. P. upon such [*512 → *513]

payment thereof being so made: and whereas also, after the making the said contract, and in pursuance thereof, and of such retainer and employment as aforesaid, to wit, on, &c., plaintiffs consigned to defendant, as such broker as aforesaid, at London aforesaid, by a certain barge or vessel called the Barham, 10 other tuns of linseed oil, being the residue of the said 30 tuns comprised in the said contract, to be delivered by said defendant to the said J. G. P. upon payment of the price thereof by the said J. G. P. to defendant; and the said last mentioned 10 tuns of linseed oil, being so consigned, afterwards, to wit, on, &c., arrived in London aforesaid on board of the said barge or vessel, of all which the defendant then had notice, and then took upon himself the delivery of the last-mentioned 10 tuns of linseed oil according to the terms of the said contract; *and thereupon it became and was the duty of the defendant, as such broker as aforesaid*, to use all reasonable care and diligence that the said 10 tuns of linseed oil should not be delivered to the said J. G. P., or any other person, without the price thereof being paid to him, defendant, according to the terms of the said contract: Yet defendant, not regarding his said duty, but contriving and intending to defraud and injure plaintiffs, did not nor would use reasonable care and diligence that the said last-mentioned 10 tuns of linseed oil should not be delivered to the said J. G. P., or any other person, without the price thereof being paid to defendant, but wholly neglected and refused so to do; and so negligently and carelessly behaved in the premises, that, by and through the mere carelessness and negligence of defendant, the said last-mentioned 10 tuns
*514] *of linseed oil, after the arrival thereof at London aforesaid, to wit, on, &c., were delivered to certain persons carrying on trade under the firm of Messrs. John Hare and Co. at Bristol, without the price for the same or any part thereof being paid by the said J. G. P., or any other person, to defendant; by reason whereof, and of the said J. G. P. having become a bankrupt, and being unable to pay for the said oil, plaintiffs have lost and been deprived of the said oil, and the price and value thereof: to the damage, &c.: and therefore, &c.

Pleas. 1. Not guilty. 2. That plaintiffs did not consign to defendant, nor did defendant take upon himself the delivery of the said last-mentioned 10 tuns of oil in manner, &c. 3. That plaintiffs had not retained or employed defendant as such broker as in the declaration mentioned, to sell the said linseed oil in the said declaration mentioned, and to deliver the same for commission or reward to defendant in that behalf, nor did defendant accept such retainer and employment, in manner, &c. Issues thereon.

On the trial, before Lord DENMAN, C. J., at the sittings in London after Hilary term, 1839,(a) the plaintiffs had a verdict. Sir *J. Campbell*, Attorney General, in Easter term, 1839, obtained a rule to show cause why the judgment should not be arrested. In Michaelmas term, 1840,(b) *Cresswell* and *Cleasby* showed cause, and Sir *J. Campbell*, Attorney
*515] General, *Kelly* and *Butt*, supported the *rule. The argument in error, fully stated in the sequel of this report, makes it unnecessary to detail the argument in the Court of Queen's Bench. *Cur. adv. vult.*

Lord DENMAN, C. J., in Trinity term, 1841, (May 29th,) delivered the judgment of the court. After having stated the pleadings, his lordship proceeded as follows.

(a) The cause had been tried before, and a new trial granted; *Boorman* v. *Brown*, 9 A. & E. 487.

(b) November 19th. Before Lord Denman, C. J., Littledale, Williams, and Coleridge, Js.

The issues have been twice found for the plaintiffs: but we are moved to arrest the judgment for the insufficiency of the declaration.

The argument brought under our review the whole doctrine relating to the different forms of action, in tort and in contract. But it is unnecessary for us to consider how that doctrine ought to be applied generally, because we find this declaration defective in an essential point, even supposing that an action on the case may be a proper remedy under such circumstances as are disclosed. For it must be founded on the violation of some duty; but here the duty described is that of keeping the goods consigned till they were paid for, and is asserted as resulting solely from the defendant's character as broker. Now the character of a broker is well known to the law: his duties are defined by statutes and by common law, and certainly embrace none to the effect here assumed.

The objection is not answered by saying that the acceptance and the terms of it are fully set forth independently of the averment of the defendant's duty as a broker. That statement is but an introductory narrative; and the declaration carefully abstains from charging that the duty resulted from those facts, by confining it to the *duty of a broker. [*516
Therefore no breach of duty is alleged; and no ground of complaint appears on the record.

The rule for arresting the judgment must of course be made absolute.

Rule absolute.

The plaintiffs brought error in the Exchequer Chamber; and the case was argued in last Hilary vacation.(a)

Cleasby for the plaintiffs in error, (plaintiffs below.) Two objections were taken in the court below: the first, on which the argument at the bar proceeded, that the action should have been assumpsit, not case: the second, which was suggested by the court, and was the ground of their judgment, that the duty supposed to have been violated was declared upon as resulting solely from the defendant's character of broker, but that the obligations of a broker were defined by law, and did not involve any such duty.

As to the latter objection. The declaration states that the defendant was employed as broker, but does not allege that it became his duty, simply as broker, to take care that the goods were not delivered without payment. It sets forth all the circumstances of the employment, and then states that, by reason of them, "it became and was the duty of the defendant, as such broker as aforesaid," (that is, such broker, employed as aforesaid,) to use reasonable care, &c. The duty alleged may not be inherent in the character of broker, but is not inconsistent with it. And, if the duty stated be not strictly *enough connected in averment with the [*517
previous allegations, that is no objection after verdict, provided that a duty and the breach of it can be collected, by inference of law, from the whole statement of facts on the record. On this principle the Court of Exchequer Chamber, in *The Lancaster Canal Company* v. *Parnaby*, 11 A. & E. 230, inferred a duty and a breach from the whole narrative in the declaration. If all the allegations be looked to here, the same result follows. The defendant is retained by the plaintiffs for certain commission and reward; he is employed to sell and deliver goods for them according to the employers' contract; the plaintiffs contract with

(a) February 7th. Before Tindal, C. J., Erskine, and Maule, Js., and Alderson, Gurney, and Rolfe, Bs.

Peacock to sell him goods, which are to be paid for on delivery: part of the goods are consigned to the defendant: he acts upon the retainer, and delivers those goods in pursuance of it, and of the contract: the residue is then consigned to him, to be delivered to Peacock on payment of the price: and the defendant takes upon him to deliver these goods also according to the contract. The bailment to defendant, under these circumstances, of itself raised a duty, to take care that the goods should not be delivered to Peacock or to any other person without payment. By his neglect they were delivered without payment; and by that delivery the price of them become lost to the plaintiffs. The goods were indeed delivered to Hare and Co., not Peacock; but this is immaterial, the gist of the complaint being that they were lost by the defendant's negligence in the delivery. The general rule applies, "that in all cases where a damage accrues to another by the negligence, ignorance, or misbehaviour of a person in the duty of his trade or calling, an action on the case will lie; *518] as if a farrier kill my horse *by bad medicines, or refuse to shoe him, or prick him in the shoeing, &c.;" Bull. N. P. 73.

It will be objected that the action is really grounded on a contract, and should have been brought in assumpsit. This, however, was not, strictly speaking, a contract, but an employment. A contract cannot be revoked without consent of both parties: an employment, before it is acted upon, may be revoked by the employer. Here it may be said that a contract arose on the defendant's part to deliver only for ready money; but that contract resulted, by implication, from the duty, which grew out of the retainer. Where a party simply refuses to perform his part of a contract, that is a nonfeasance, and the action will be properly founded on contract; as if a man undertakes to build a house, and does nothing towards building it. But if he begins to perform the duty, and does it ill, as if the builder constructs the house badly, that is a misfeasance, and the action lies as well on the duty as on the contract. To exercise reasonable care and skill is the general duty of a broker, as appears by the statutes regulating their trade, (2 Jac. 1, c. 21; 6 Ann. c. 16,) and is not the subject of particular contract. But suppose that, in addition to the duty, a contract had arisen; there are many such cases in which, if there has been misfeasance, a plaintiff may sue either on the breach of contract or on the failure in duty. Actions upon false warranty, against attorneys for negligence,(a) against ship owners, not being common carriers, and against bailees generally, are among the in- *519] stances. In *Marzetti* v. *Williams*, 1 B. & Ad. 415, *the action was framed in tort, against bankers for refusing to pay their customer's check though furnished with funds; the court held it to be rightly brought, though the tort arose out of a breach of contract, and assumpsit would have lain: and the law of that case was recognised in *Godefroy* v. *Jay*, 7 Bing. 413. In *Govett* v. *Radnidge*, 3 East, 62, Lord ELLENBOROUGH said: "What inconvenience is there in suffering the party to allege his gravamen, if he please, as consisting in a breach of duty arising out of an employment for hire, and to consider that breach of duty as tortious negligence, instead of considering the same circumstances as forming a breach of promise implied from the same consideration of hire. By allowing it to be considered in either way, according as the neglect of duty or the breach of promise is relied upon as the injury, a multiplicity of actions is avoided; and the plaintiff, according as the convenience of his case requires, frames his principal count in such a manner as either to join a count in trover therewith, if

(a) See *Howell* v. *Young*, 5 B. & C. 259, judgments of Bayley and Holroyd, Js.

he have another cause of action for the consideration of the court other than the action of assumpsit; or to join with the assumpsit the common counts, if he have another cause of action to which they are applicable." And, though the principal decision in that case, as to nonjoinder of parties, has been questioned, *Powell* v. *Layton*, 2 New Rep. 365, the doctrine of the last cited passage is supported by other authorities, and particularly by the observations of HOLT, C. J., on "the sixth sort of bailment," in *Coggs* v. *Barnard*, 2 Ld. Ray. 909, 918, "the reasons are," et seq. *Pozzi* v. *Shipton*, 8 A. & E. 963, an action against *carriers, is an instance in which [*520 the action was brought in case, but might have been treated as arising on contract. In *Burnett* v. *Lynch*, 5 B. & C. 589, the injury complained of resulted directly from the defendant not keeping his covenant; yet it was held that tort lay for the breach of duty. *Hancock* v. *Caffyn*, 8 Bing. 358, is a similar case; and there *Burnett* v. *Lynch* was relied upon.

Corbett v. *Packington*, 6 B. & C. 268, and *Orton* v. *Butler*, 5 B. & Ald. 652, were cited for the defendant in the court below. But the first of these was a case of misjoinder of counts; one being in case, the other distinctly framed in assumpsit. In *Orton* v. *Butler* the plaintiff had attempted to frame a count as in trover for money had and received.

Butt, contrà. First: the ground of action here is no misfeasance, but a nonfeasance merely, in not obtaining payment when the last parcel of goods was delivered. *Elsee* v. *Gatward*, 5 T. R. 143, shows the materiality of this distinction. The obligation here arose out of contract only, not from any relation between the parties independent of it; and the declaration should have been in assumpsit. In Com. Dig. *Action upon the case for misfeasance*, (A 3), instances are collected in which the action lies "if any one act contrary to his undertaking:" but none of the cases mentioned resembles this. It is true that where there is a common law duty there may also be a duty by contract, as in the case of a surgeon or of a carrier. But here, if all that relates to contract be struck out, nothing remains. The cases collected in Com. Dig. *Action upon the case for a deceit*, *(A 7), (A 11), (F 3), [*521 also differ from this. Here no deceit is alleged, but only an omission to obtain money as the defendant was required by contract to do. Nor can the wrong here complained of be ranked with the instances of negligence enumerated in Com. Dig. *Action upon the case for negligence*, particularly (A 4). The acts there stated as examples are in the nature of misfeasance in respect of the particular thing to be done. Here no neglect is alleged in respect of the thing which the defendant had taken upon him to do, namely the delivery of the 10 tuns of oil. The duty alleged, and which is said to have been violated, goes farther than the defendant's undertaking. There is no complaint of a misdelivery; the omission complained of is not obtaining the money for the goods on delivery. It does not appear that, if that had been done, the delivery to Hare and Co. would have been objectionable. All the cases cited for the plaintiffs come within one or other of the descriptions of misfeasance exemplified by *Comyns* under the heads referred to. In *The Lancaster Canal Company* v. *Parnaby*, 11 A. & E. 230, a common law duty arose, which, though not properly averred in the declaration, was sufficiently assigned in substance. Here no duty, independent of contract, is shown: and to contend that, wherever there is a contract from which a duty is to be inferred, an action of tort lies, would break down those limits which the courts have always been anxious to preserve between the several forms of action. [ALDERSON, B. What more than nonfeasance was there in *Marzetti* v. *Williams*?] The question arising here was not raised in

*522] that case, the disputed point being whether *the action was maintainable without special damage: and the first count of the declaration grounded the duty on a custom of the bankers in London to honour checks; which distinguished the case from an ordinary one of nonfeasance. *Rogers* v. *Head*, Cro. Jac. 262, was cited for the plaintiffs in the court below: the marginal abstract (4th ed. 1791) is, that, "if a man undertake to carry the goods of another to a certain place for hire, and he neglect to do so, an action on the case lies against him, although he is not a common carrier." But the action there was assumpsit; and the question discussed was, whether the defendant could be charged upon his promise safely to convey and deliver, without an averment that he was a common carrier. "Action on the case," in that abstract, must mean an action of assumpsit, according to the mode of expression often used in the older books. In *Burnett* v. *Lynch* there was no covenant between the lessee and assignee, nor any written contract between them which the Statute of Frauds, 29 Car. 2, c. 3, s. 4, would have allowed to be enforced. The duty arose independently of contract, (as in *Kinlyside* v. *Thornton*, 2 W. Bl. 1111, which was cited;) and case was the only remedy. In *Govett* v. *Radnidge* the defendants had the loading of a hogshead of treacle, and were guilty of misfeasance in the act of loading. In *Pozzi* v. *Shipton* the defendant against whom the plaintiff recovered was a common carrier; and the ground of decision was, that the action might be considered as founded on the custom of the realm. In *Corbett* v. *Packington*
*523] the second count stated an agreement *by the defendant to take care of the pigs, and redeliver them on request; and LITTLEDALE, J., said: "If this count were in tort, it would be bad in itself, for in that case the whole of defendant's duty would have been to take care of the pigs, but the undertaking goes beyond that, it is therefore larger than the purposes for which the pigs were delivered. Suppose a written agreement had been entered into in the terms of this count, it would never have been contended that a breach of it might be laid in tort, it would be as reasonable to lay in tort a breach of an agreement to convey a house or land." And BAYLEY, J., said: "The obligation to redeliver arose out of the agreement alone." *Orton* v. *Butler*, 5 B. & Ald. 652, shows the necessity of keeping forms of action distinct; but, according to the argument for the plaintiffs in this case, the last count there might have been well framed.

Secondly: the duty, as here described, would result from the defendant's character of broker; but, striking out all that is matter of mere contract, there does not appear any duty which the defendant is alleged to have violated. [TINDAL, C. J. It is admitted that the present obligation does not arise from the defendant's general character of broker.] Then it will be sufficient merely to refer, on this point, to the observations of the court below. (He then read the latter part of the judgment in B. R., antè, p. 515.)

Cleasby, in reply. There is a fallacy in using the word "nonfeasance" as if it meant simply omission. A charge of negligence is commonly made in
*524] such *general terms as are used here; but it is not to be assumed that the delivery itself was proper, and that the only ground of complaint was not receiving payment. That the defendant "negligently and carelessly behaved in the premises" implies a misfeasance. Nonfeasance of a man's duty, where the fault lies in conduct and not in mere omission, is misfeasance: as in some instances in which an action of tort has been held to lie against an attorney; 1 Bac. Abr. 115, (7th ed.), tit. *Actions on the case*, (F) 2. [ALDERSON, B., mentioned *Godefroy* v. *Jay*, 7 Bing. 413.] In Com. Dig. *Action upon the case for misfeasance*, (A 3), it is put as an

example of misfeasance by acting contrary to the party's undertaking, "if any one undertake to carry goods, &c., for others, and they miscarry, or are lost by his default." "Though he carry them without hire." Yet this might seem a case of mere nonfeasance. In Com. Dig. *Action upon the case for negligence*, (A 1), it is said: "So an action upon the case lies for a negligence in a man's duty, though it be a nonfeasance; as, if by the negligence of a servant, cattle perish." And, under the same head, (A 4), "For a neglect to do that, which he has undertaken:" "If a man lend his horse, or other profitable cattle to another gratis, he is bound to a strict care; and therefore, if he neglect to take due care of it, an action upon the case lies." The principle of liability is, in these latter cases, that, the plaintiff having acted in the confidence that the defendant would do something on his part, the defendant's omission is a misfeasance. Permissive waste has the apparent character of nonfeasance, but is actionable as a misfeasance.(a) It is *true that in *Marzetti* v. *Williams*, 1 B. & Ad. 415, the custom [*525 of London was alleged in one count of the declaration: but the ground of the judgment was a breach of duty for which the defendant was liable because of a contract. *Cur. adv. vult.*

TINDAL, C. J., now delivered the judgment of the court.

The judgment for the plaintiffs in the court below (who are also the plaintiffs in error) having been arrested on the ground of the insufficiency of the declaration, the whole question before us turns on the form of the action brought, and on the declaration itself.

The defendant makes two objections to the plaintiff's right to recover in this action. First, that the action is brought for a nonfeasance only, not for a misfeasance, and on that account it should have been, as he contends, an action of contract, not an action of tort: and, secondly, that the duty stated in the declaration does not arise from the facts therein alleged.

That there is a large class of cases in which the foundation of the action springs out of privity of contract between the parties, but in which, nevertheless, the remedy for the breach, or non-performance, is indifferently either assumpsit or case upon tort, is not disputed. Such are actions against attorneys, surgeons, and other professional men, for want of competent skill or proper care in the service they undertake to render: actions against common carriers, against ship owners on bills of lading, against bailees of different descriptions: and numerous other instances occur in which the action is brought in *tort or contract at the election of the plaintiff. And as [*526 to the objection, that this election is only given where the plaintiff sues for a misfeasance and not for a nonfeasance, it may be answered that in many cases it is extremely difficult to distinguish a mere nonfeasance from a misfeasance; as in the particular case now before us, where the contract stated in the declaration on the part of the broker is, in substance, to deliver the goods of the plaintiffs to the purchaser on payment of the price in ready money, and where, if the broker delivers without receiving the price, the breach of his direct undertaking is as much a wrongful act done by him, that is a misfeasance, as it is a nonfeasance, the distinction between the two being, in that case, very fine and scarcely perceptible. But, further, the action of case upon tort very frequently occurs where there is a simple nonperformance of the contract, as in the ordinary instance of case against ship owners, simply, for not safely and securely delivering goods according to their bill of lading; and as in the case of *Coggs* v. *Bernard*, 2 Ld. Raym

(a) Butt here referred to the note (e) on *Kinlyside* v. *Thornton*, 2 W. Bl. 1113, Elsley's edition.

909, where an undertaking is stated in the declaration as the ground of action: and, to give no further instance, the case of *Marzetti* v. *Williams*, where the decision, that the plaintiff was entitled to nominal damages without proof of any actual damage, rests entirely on the consideration that the action, an action on the case, was founded on a contract, not on a general duty implied by law.

The principle in all these cases would seem to be that the contract creates a duty, and the neglect to perform that duty, or the nonfeasance, is a ground of action upon a tort.

*527] *As to the second objection, we cannot but think the duty, upon the breach of which this action is founded, arises by necessary inference from the terms of the contract between the plaintiffs and the defendant as set forth in the declaration. The defendant is there stated to have been retained by the plaintiffs as their broker to sell certain goods, and to deliver the same according to the terms of the contract to such person as should become the purchaser: and the declaration then proceeds to allege that the defendant, as such broker, made a certain contract between the plaintiffs and one Peacock, whereby he sold to Peacock, and Peacock purchased of the plaintiffs, the oil therein mentioned, at certain times of delivery, *the amount of each parcel to be paid for from delivery in ready money:* and, coupling together the terms of the particular contract made by the defendant with the terms of the defendant's retainer by the plaintiffs, we think it amounts to an express contract on the part of the defendant to deliver what he sold on the payment of ready money only; and that the duty of the broker arose from this express contract so stated in the declaration, and not simply from his character of broker, which the Court of Queen's Bench appears to have considered to be the meaning of the declaration.

We therefore think the plaintiffs are entitled to the judgment of the court in their favour. Judgment reversed.

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*528] *IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

The QUEEN, on the Prosecution of the Trustees of the MANCHESTER, OLDHAM, and AUSTERLANDS Turnpike Roads, *v.* The MANCHESTER and LEEDS Railway Company.

Where a statute authorizes a company to alter turnpike roads, but not to lower any such road unless they lower its whole breadth, and they, in executing such alteration, have lowered a turnpike road in the carriage way only, leaving the footpaths at their former level, whereupon a mandamus issues, requiring them to lower according to the statute:

Held, by the Courts of Queen's Bench and Exchequer Chamber, not a good return, that the carriage and footways, as they now exist, are more convenient to the public and to the occupiers of the houses beside and near the road than if lowered as the writ requires.

And, where, on traverse of such return, and issue thereon, a jury had found that the road, as then existing, was more convenient, &c., the Court of Queen's Bench awarded a peremptory mandamus non obstante verdicto, and refused to put the prosecutors to seek their remedy by indictment.

Judgment having been given in B. R. that such peremptory mandamus should issue, and the prosecutors recover their costs, the Court of Exchequer Chamber (before stat. 6 & 7 Vict. c. 67,) reviewed such judgment on writ of error, and reversed it, differing from the court below on the construction of the local act.

MANDAMUS to the above company, incorporated and invested with certain powers by stat. 6 & 7 W. 4, c. cxi., local and personal, public, "for

making a railway from Manchester to Leeds." The writ recited this act, (parts of sects. 1 and 3,) and also sects. 2 and 38 of stat. 7 W. 4 & 1 Vict. c. xxiv., local and personal, public, "for enabling the Manchester and Leeds Railway Company to vary the line of such railway, and for amending and enlarging the powers and provisions of the act relating thereto." Sect. 2 empowers them to vary the line; and, by sect. 38, after reciting that "the new line of the said railway will cross the turnpike road leading from Oldham to Rochdale at a different place from that specified in the said recited act, and near to the new branch of the Rochdale Canal *in the parish of Rochdale, where the said turnpike road is nearly on a level, and it will be necessary to lower the bed of the said turnpike road at the place where the said railway will cross the same, in order to maintain a proper level in the line of the said railway, and to allow of a sufficient space under the bridge whereon the said railway is to be carried across the said turnpike road for the passage of coaches, wagons, and other carriages along the said road, and it is expedient that provision should be made for preserving a proper level in the line of the said turnpike road:" it is enacted "that it shall not be lawful for the said company to carry the line of the said railway, or to make the same across the said road, unless the same shall be carried and made at their own expense over the said road, by means of a bridge of the width of thirty feet at the least, for the purpose of forming a clear carriage road of twenty-four feet wide, and a footpath of six feet wide, exclusive of the pillars or piers which may be placed between the footpath and the carriage road, and of the height of eighteen feet at least from the surface of the said road, to the under side of the said bridge, so as to leave a clear and uninterrupted headway under the said bridge of eighteen feet at the least, and the said bridge on the under side thereof shall be made horizontal and not arched, for the whole space of twenty-four feet wide at the least over the said carriage road, and in case it shall be expedient to lower the surface of the said road, for the purposes aforesaid, then it shall not be lawful for the said company to lower or alter the present bed of the said road, unless the same shall be lowered at their own expense on both sides of such bridge, so that when the alteration shall be completed, the ascent on the said *road southwardly from the said bridge, so far as the alterations therein shall extend, shall not exceed one foot in height for every fifty feet in length, and so that the ascent of the said road northwardly from the said bridge shall not exceed one foot in every hundred feet on any part of the said road so to be made or altered, and the said company shall at their own expense make all new fences, drains, and works, and alter all existing ones, and relay and reform the said road, and perform all other matters and things that may be rendered necessary for the forming of the said railway," &c. The writ then stated that the defendants had built such bridge or viaduct, and had excavated and lowered the said road underneath it for the purpose of affording a passage with a requisite headway for carriages under the same, for the distance of two hundred and thirty-six yards northwardly from the said bridge, and two hundred and one yards southwardly: that the road, before such excavation, was of the breadth of forty-two feet throughout; and that defendants, in their excavations, had in no part lowered and excavated the said road to its former breadth of forty-two feet, but to the breadth of thirty-five feet only, northwardly, and twenty-four feet southwardly, and had commenced building walls along the sides of the road so lowered, &c., without having made and excavated it to its former and proper width: and that

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defendants had not reformed the said road in a proper and substantial manner, &c. And the writ (after stating a demand by the road trustees, and refusal) commanded the defendants to make and excavate the said road on both sides of the said bridge or viaduct, for so far in length as the excavations thereof by them extended, the whole width of forty-two feet, and
*531] to make such alterations in their *works when executed as might be requisite for making and effecting such excavations as aforesaid, and to reform the said road in a proper and substantial manner, according to the act; or to show cause, &c.

The return set forth sect. 94 of stat. 6 & 7 W. c. cxi., which gave power to the company to enter lands, and carry on various works specified, "and to do and execute all other matters and things necessary or convenient for constructing, maintaining, altering, or repairing, and using the said railway, and the other works by this act authorized; they, the said company, their deputies, contractors, agents, servants, and workmen, doing as little damage as may be in the execution of the several powers to them hereby granted," and making full satisfaction, &c.(a) Also sect. 1 of stat. 7 W. 4, & 1 Vict. c. xxiv., which extends the powers, authorities, regulations, &c., of the former act to this act, except as they are hereby repealed, &c. The return then stated, in substance, that the defendants had lowered the road underneath the said bridge for affording a passage with requisite headway, &c., making the ascent northwardly and southwardly as required by the act of 7 W. 4, & 1 Vict. That the Oldham turnpike road, in the writ mentioned, did not before the excavation exceed forty-two feet in width including footpaths on the east and west sides: that defendants had lowered and excavated the carriage road to its full former breadth northward and southward from the bridge, (thirty feet three inches to thirty-six feet,) but had left the footpaths on each side of the road at their former
*532] height and level, and as they existed before *the excavation commenced: that they had reformed the road in a proper and substantial manner, &c.: "that the said carriage road and footpaths respectively, as now made and completed, and as they now exist, are more commodious and convenient to the public and the inhabitants and occupiers," of the messuages, &c., beside and near to the said road, "than the same would be if the same were excavated and lowered to the full breadth of forty-two feet as required by the said writ." And that defendants have fully complied with the acts of parliament as to the making of the alterations and excavations in the said road and reforming the same, &c., doing as little damage as may be in the execution of the powers for those purposes granted, &c. (Some other matters were returned, which it is not thought necessary to state.) And for these reasons, &c.

The replication tendered several issues, of which the following only are material. 2 and 3. That the defendants have not lowered or excavated the carriage road to its full former breadth, northward or southward of the bridge, in manner and form, &c. 12. That the company have not reformed the road in a proper and substantial manner, &c., in manner and form, &c. 13. That the said carriage road and footpaths, as made and completed by the said company, and as they now exist, are not more commodious and convenient to the public, &c., in manner and form, &c.; but, on the contrary, are much less commodious, &c. 14. That the company have not fully complied with the said acts, &c., as to the making of

(a) On the part of the crown, reference was also made in argument to sect. 97, which will be found in p. 544, *post*.

the said alterations and excavations in and the reforming of the said road, in manner, &c. Issues being joined, the return was tried before ROLFE, B., at the Liverpool Summer assizes, 1840, when a verdict was *found for the defendants on the 10th, 11th, 13th and 15th issues;(a) also on the 12th and 14th, with an exception, not material here, as to drains: and for the Crown on the other issues. And the jury assessed the damages of the prosecutors at 1s., and their costs at 40s. [*533

Cross rules for judgment, non obstante veredicto, were obtained in the ensuing term, and were set down in the Crown paper for argument. The case was argued in Trinity term, 1841.(b)

Sir *W. W. Follett*, *Cresswell*, *R. C. Hildyard*, and *Tomlinson*, for the defendants. Assuming that the defendants have not done what stat. 7 W. 4, & 1 Vict. c. xxiv. s. 38, requires, still it is found "that the said carriage road and footpaths, as made and completed by the said company, and as they exist as in the said return above mentioned, are more commodious and convenient to the public, and the inhabitants and occupiers of the said messuages," &c., "respectively, than the same would be if the same were excavated and lowered to the full former breadth of forty-two feet, as required by the said writ, in manner and form as in the said return alleged." The court will not issue a peremptory mandamus to make the road less convenient to the public than it is. "A peremptory mandamus is not a judicial writ, founded upon a record, but a mandatory writ, which the court grants when they are satisfied of the parties' right:" Com. Dig. *Mandamus*, (D 6.) The granting it is discretionary; and the court need not award it, even when the return is insufficient, if it appear that the writ would not have any useful effect: **Rex.* v. *Griffiths*, 5 B. & Ald. 731. Stat. 3 & 4 Vict. c. 97, "for regulating railways," enacts, (sect. 11,) that the Board of Trade may direct prosecutions when it shall appear to them that the provisions of the several acts of parliament regulating any railway company have not been complied with, "and that it would be for the public advantage that the due performance of the same should be enforced:" thus implying that they ought not to be enforced where it would not be advantageous to the public. The prosecutors may proceed by indictment if they think it expedient: the objection raised in *Rex* v. *The Severn and Wye Railway Company*, 2 B. & Ald. 646, that an indictment would not secure the object, for which a mandamus was prayed, of reinstating the road, would not apply here, if the public are entitled to a carriage road of the width contended for. [PATTESON, J. I do not see what the form of indictment could be in this case. Lord DENMAN, C. J. It might be difficult to indict for making the road more convenient. If the public have a right to what the act gives, I do not see how we can substitute the opinion of a jury for the legislative regulation.] [*534

(The arguments on the obligation to excavate to the full width, turning entirely on the words of the local act, are omitted.)

Sir *J. Campbell*, Attorney General, *Kelly* and *Starkie*, contrà. If the legislature had intended to make the jury judges of the width to be required, they would have said that the former width might be reduced provided the road were made as commodious to the public as it was before. The London and Birmingham railway act, 3 & 4 W. 4, c. xxxvi., local and personal, public, *had a clause of this kind, sect. 67, which was under consideration in *Regina* v. *The London and Birmingham* [*535

(a) No point material to the report arose on this finding.
(b) June 2d. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.

Railway Company, 1 Railway Ca. 317, but the balance of convenience to the public from different causes cannot be satisfactorily left to the jury. [Lord DENMAN, C. J. I asked the jury there whether they had any doubt that contracting a road made it less convenient.] A jury might be disposed to take into consideration some partial convenience, which would be no answer if the rights of the public in general were interfered with; *Rex* v. *Russell*, 6 B. & C. 566, judgment of Lord TENTERDEN; *Rex* v. *Ward*, 4 A. & E. 384. The argument that a mandamus ought not to go because the prosecutors might indict, was urged in *Regina* v. *The Bristol Dock Company*, 2 Q. B. 64; but the court said: "We think, even if such an objection did not come too late after the writ had issued, that it is entitled to no weight. Those who obtain an act of parliament for executing great public works are bound to fulfil all the duties thereby thrown upon them, and may be called upon by this court so to do. If this breach of contract causes a public nuisance also, that cannot dispense with the necessity of a specific performance of the obligation contracted by them."

Cur. adv. vult.

Lord DENMAN, C. J., in the ensuing vacation, (June 14th,) delivered the judgment of the court.

This question comes before us upon a return to a mandamus directing the Manchester and Leeds Railway Company to excavate a certain part of the Oldham and *Rochdale turnpike road, taken by them to complete their said railway, to the whole breadth of the old road. From the mandamus and return it appears that the said Oldham and Rochdale turnpike road was, at the place where the said railway crosses the same, of the breadth of forty-two feet, viz., thirty-six carriage and six feet foot way: and further that, by stat. 7 W. 4, & 1 Vict. c. xxiv. s. 38, the said company were to construct the bridge, by which the road was to be crossed, of the width of thirty feet at the least, and also as the road was to be curved, that the same should be done so that the ascent from the bridge should not exceed the specified amount. The bridge has been constructed of a width exceeding the directions of the act; and the road has been excavated on each side of it, but not to the whole extent of its ancient width.

*536]

Upon the said return various facts were traversed; and issues thereon raised have been found by the jury.

Those upon which reliance is chiefly placed on behalf of the prosecution are the second and third, wherein it is found that the said company have *not* lowered or excavated the said carriage road *to the full former breadth* of the said carriage road: and, upon the part of the defendants, the twelfth and thirteenth issues are relied on, upon which the jury have found that the company have *reformed the said road* in a proper manner, except as to the drains, and that the road, as it now is, is *more commodious and convenient* than if lowered or excavated to the full former breath of forty-two feet. And the question resolves itself into this, whether the excavation or lowering of the road should be extended to the whole original breadth of forty-two feet, or whether what has been done, which by the return appears to fall short of *that, in the proportion therein specified, is sufficient to satisfy the provisions of the act. On the one side it has been contended that (as is true) there is no express provision upon the subject; some discretion is necessarily left to the company; and that the finding of the jury upon the thirteenth issue, to which we have adverted, shows that such discretion has been fairly and beneficially exercised. On the other it has been argued that, as no width is specified except so far as the bridge itself is con-

*537]

cerned, it follows that, as to the rest, the road, after the excavation or lowering rendered necessary for the purposes of the company, should remain of its original width, and that the abridgment of the width (where intended) being expressed is in favour of the latter construction. It follows, therefore, that we are called upon to put an interpretation upon the clause of the act itself. That clause (7 W. 4, & 1 Vict. c. xxiv. s. 38,) authorizes the company to make the new line of their railway across the road in question, and prescribes the terms and conditions upon which they are permitted to do so. It is declared to be "expedient that provision should be made for preserving a proper level in the line *of the said turnpike road;*" and further that, in case it shall be necessary to lower the surface *of the said road* for the purposes aforesaid, it shall not be lawful for the company to lower or alter *the bed of the said road* except upon the terms specified. Those terms are, that *the same* shall be lowered *on both sides of the said bridge* (the bridge prescribed) with a certain ascent each way. It is observable, therefore, that wherever in this clause the road is mentioned, and more particularly in the clause last cited, the *whole* road, and not any part of it, is spoken of; and the road is to be lowered on both *sides of the bridge to its full width, for none other than that is alluded to. We must also observe [*538 that throughout the clause no mention is made of lowering the road in such manner as to render the same "more commodious and convenient to the public," so as to supersede the necessity of a literal compliance with the terms prescribed by the act itself.

We cannot, therefore, consider the finding of the jury upon the thirteenth issue, so much relied upon on behalf of the defendants, as sufficient to dispense with a compliance with the language and meaning of the act.

Judgment, notwithstanding the verdict, &c., that a peremptory mandamus issue. And that the prosecutors do recover against the defendants their damages, costs, and charges, &c.(*a*)

The defendants brought a writ of error in the Exchequer Chamber, assigning as a cause that the judgment ought to have been given for them, with costs, notwithstanding the verdict on the issues found for the crown. *The prosecutors joined in error; and the writ of error was argued [*539 in this vacation(*b*) by *Tomlinson* for the defendants below, and *Starkie* for the Crown, who mentioned, besides the cases cited below, *Regina* v. *The Birmingham and Gloucester Railway Company*, 2 Q. B. 47. In addition to the argument (which it is not thought necessary to report) on the effect of the local acts(*c*) before referred to,

(*a*) Judgment was entered up in the following form. "And hereupon," &c., "because it appears to the said court here that, notwithstanding the verdict found for the said Manchester and Leeds railway company on the several issues tenthly," &c., "above joined, still a peremptory writ of mandamus ought to issue in this behalf to the said Manchester and Leeds railway company: Therefore it is considered and adjudged by the said court here that such peremptory writ of mandamus do issue in this behalf to the said Manchester and Leeds railway company. It is further considered and adjudged that the said trustees do recover against the said Manchester and Leeds railway company their said damages, costs and charges, by the jurors aforesaid in form aforesaid assessed, and also the sum of —— for their costs and charges by the said court here adjudged of increase to the said trustees and with their assent, according to the statutes in such case made and provided, which said damages, costs and charges, amount to ——: and the Manchester and Leeds railway company in mercy," &c.

(*b*) June 20th. Before Tindal, C. J., Coltman, and Maule, Js., Parke, Alderson, and Rolfe, Bs.

(*c*) Reference was also made, on both sides, to stat. 2 & 3 Vict. c. lv., local and personal, public, ("for extending and for altering the line of the Manchester and Leeds

Starkie contended that error did not lie on the award of a peremptory mandamus; and he cited *Dean, &c. of Dublin* v. *Dowgatt*, 1 P. Wms. 348; *Rex* v. *The Dean and Chapter of Trinity Chapel, in Dublin*, 8 Mod. 27; *The Dean and Chapter of Dublin* v. *The King*, 1 Bro. P. C. 73, (2d ed.); *Rex* v. *Hearle*, 1 Stra. 625, 628; *Bishop of St. David's* v. *Lucy*, 1 Ld. Ray. 539, 545.

Tomlinson, in reply. If the Court of Queen's Bench merely award a peremptory mandamus on the return, or hold the return good, error does not lie, because there is no record. *Rex* v. *Hearle*, in this court, was merely a decision upon the return. But it is otherwise where a special pleading takes
*540] place on the return. *This appears from *Dean, &c. of Dublin* v. *Dowgatt*, and from the argument in *The Dean and Chapter of Dublin* v. *The King*. It was observed in the latter case that "here were no costs or damages, which the party was adjudged to pay; and therefore the writ of error could give the party suing it no benefit to be restored to any thing which he had lost." Here "it is considered" that the prosecutors recover their costs: so far, at least, the defendants are entitled to their writ of error; and, if the judgment is reversed as to costs, either it will follow that the whole must be reversed, or the court below will have to deal with the writ as they in their discretion may think fit after such reversal. In a matter of temporary urgency it may often be necessary for the court to grant a peremptory mandamus without waiting the result of a writ of error; but it does not follow that error cannot in any such case be brought.(*a*)

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court. After stating the object of the mandamus, the material facts of the case, and the finding of the jury, his lordship proceeded as follows.

Upon this state of facts the main question in the case arose, viz., whether the company were bound by the act of parliament referred to in the return to excavate the road to the full width of the former road. On the part of the prosecutors it was contended that not only the carriage road but the footpath also ought to be excavated to the full former width of the road: and
*541] the *judgment of the Queen's Bench is in conformity therewith. The question, so far as this point is concerned, appears to be whether the expression in the thirty-eighth section of stat. 7 W. 4, & 1 Vict. c. xxiv., "the bed of the said turnpike road," is confined to that part of the road which in another part of the same section is called the carriage road, or whether it comprises not only the carriage road but the footpath also. And we are of opinion that, looking to the object and purpose for which the bed of the turnpike road is directed to be lowered, the statute intends no more by that expression than *the carriage road*. That purpose is to enable carriages to pass with perfect safety by giving them a clear and uninterrupted headway of eighteen feet at the least under the bridge; an object that is perfectly attainable without making, and is wholly independent of, a corresponding alteration in the level of the footway.

But a further question remains; and it was urged that, however the case

railway," &c.,) sect. 23, which empowers the company, with the consent of the trustees of any turnpike road, to alter the position or form of any bridge over or under any such road from the position, &c., required by former acts or this act, "provided that such alterations shall be equally or more convenient to the public," and that the general directions of the said acts be observed.

(*a*) The Court of Error did not specifically notice the question whether error would lie or not, though they disposed of it by reversing the judgment. See now stat. 6 & 7 Vict. c. 67, s. 2.

may be with respect to the footway, the carriage road ought at all events to be lowered to the full width of the former carriage road, which is found by the jury not to have been done. If the section just referred to had contained any express enactment to that effect, it could not be contended that the superior convenience to the public of the road as made would furnish an excuse for a deviation from the express enactment of the statute; but it is admitted that there is no express provision to this effect; nor does it appear to us that there is any sufficient ground for holding that such a provision is to be implied; the expression, "unless the same shall be lowered at their own expense on both sides of such bridge," upon which the Court of Queen's Bench appears to have placed some reliance as tending to show *that the whole road was included, appearing to us to apply, not to the right hand side and the left hand side of the bridge as a person passes under it, but to the part of the road lowered as it descends to the bridge on one side and ascends from it on the other. [*542

The company are undoubtedly bound, in making their alteration, to make it in the manner most convenient to the public. This is required, not only by the nature of the powers confided to them, but by the express condition annexed to the exercise of those powers by the statute 6 & 7 W. 4, c. cxi. s. 94. That statute authorizes them amongst other things to raise or sink any roads or ways, and to do and execute all other matters and things necessary or convenient for constructing the railway and works, doing as little damage as may be in the execution of the several powers granted to them: and by the subsequent statute 7 W. 4, & 1 Vict. c. xxiv. s. 1, those powers are continued, and rendered applicable to all the objects of the latter act; but, subject to this restriction, of consulting as far as possible public and private convenience, we see no sufficient reason for implying any condition not expressly required by the terms of the thirty-eighth section. As to any argument arising from a notion of inconvenience from the mode in which the works have been performed, that matter is concluded by the finding of the jury, which is full and explicit on the point. (The subsequent part of his lordship's judgment, which relates to the finding of the jury as to drains, is omitted. The Court of Error held that this part of the verdict could not affect the case.)

Upon the whole, therefore, we think the judgment of the Court of Queen's Bench ought to be reversed. Judgment reversed.

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*The QUEEN v. SCOTT and Others. [*543

The Manchester and Leeds Railway Company were empowered by statute (6 & 7 W. 4, c. cxi.) to make obstructions in public or private roads, for the purposes of their undertaking, doing as little damage as might be: and a subsequent section enacted that wherever it was found necessary to use that power, they should, before any such road should be cut through, &c., make a good and sufficient road instead thereof, *as convenient for passengers as the road to be cut through, or as near thereto as may be.*

The company having obstructed a public road without making a new one equally convenient or as nearly so as might be: *Held*, that they were indictable for a nuisance on the old highway.

The company, on obstructing the old highway, made a branch in place of it, less convenient in some respects than the former road; but, from the nature of the levels, greater convenience could not have been obtained without an expense very disproportionate to the increase of accommodation. The judge left it to the jury to say whether the company had made a new road as convenient as the old, or as nearly so as might be; observing that the company were not bound to make it absolutely as

convenient if that could be done only by a very disproportionate and unwarrantable expenditure. Verdict, Guilty.

On motion for a new trial, on the ground that such finding, under the circumstances, was not a reasonable application of the statute,

***Held*, that no ground appeared for disturbing the verdict.**

INDICTMENT for a nuisance by unlawfully placing rubbish and stones, and erecting a wall, on a public highway in the township of Rastrick in the parish of Halifax, Yorkshire, and keeping and continuing the rubbish, &c., so placed and the wall so erected. There were three other counts, which it is not material to state. On the trial, before MAULE, J., at the York Spring assizes, 1841, it appeared that the prosecutor was the surveyor of the highways of the township of Rastrick, and the defendants were an engineer and other persons acting on behalf of the Manchester and Leeds Railway Company, under stat. 6 & 7 W. 4, c. cxi., local and personal, public, "for making a railway from Manchester to Leeds."

Sect. 94 of that act empowers the company, for the purposes of the act, to make, "in, under, upon, across, or over any lands," or any "streets, roads," &c., "such inclined or other planes," &c., "roads, ways," &c., "cuttings and fences; and also to erect and construct such houses," &c., "and other buildings, engines, machinery, apparatus, and other works and
*544] conveniences, *for the purposes of this act, as they shall think proper;" to divert, and to raise and sink roads, &c., "in order the more conveniently to carry the same over, or under, or by the side of the said railway;" "and to do and execute all other matters and things necessary or convenient," &c., "doing as little damage," &c.;(a) and making satisfaction to persons interested: "subject nevertheless to such provisions and restrictions as are herein mentioned and contained."

Sect. 97 is as follows: "Provided also, and be it further enacted, that in all cases wherein, in the exercise of any of the powers hereby granted, any part of any carriage or horse road, or foot road, railway, or tramroad, quay, or wharf, either public or private, shall be found necessary to be cut through, raised, sunk, taken, or so much injured as to be impassable or inconvenient for passengers or carriages, or for the transporting, carrying, conveying, landing, shipping, or depositing, of any goods or merchandise, or to the persons entitled to the use thereof, the said company shall, at their own expense, before any such road, quay, or wharf, shall be so cut through, raised, sunk, taken, or injured as aforesaid, cause a good and sufficient carriage or horse road, railway, or tramroad (as the case may require) to be set out and made instead thereof, as convenient for passengers and carriages, or for the transporting, carrying, conveying, landing, shipping, or depositing of any goods or merchandise, as the road, quay, or wharf to be cut through, raised, sunk, taken, or injured as aforesaid, or as near thereto as may be, and shall
*545] cause the same to be put into good and substantial *order and condition where the former road cannot be more easily restored; and where the road cut through, raised, sunk, or injured, shall be a turnpike road, the substituted road, if temporary, shall be set out and made as aforesaid, and the principal road shall be restored within six months after the commencement of the operation." Then follows a provision for fencing the railway where it crosses or runs near a turnpike road.

The company, when making their railway, stopped up the public highway mentioned in the indictment, called Goodier Lane, and made a branch, restoring the communication between the termini formerly connected by that

(a) See p. 531, antè.

lane, but by a different line. The new road was stated to be in some respects more convenient to the public than the old, but in others less so. The levels of the adjacent land made it impracticable to give a more convenient line consistently with the regulations of the act, unless at an expense which, it was said, would be unreasonably great, and quite disproportioned to the benefit which would accrue from it to any part of the public.

MAULE, J., directed the jury to find a verdict of Not guilty, if they thought that the company had done no more damage than was necessary, and had made the road as convenient as the former one, or as nearly so as might be: intimating, as his own opinion, that the road made by the company could not be deemed absolutely as convenient, even after allowing for the advantages which the public might have gained from it. But he stated that the company were not, in his opinion, bound to lay out enormous sums of money to procure a slight accommodation to some persons; and that the proper rule seemed to be, that, if they *could not make the road as convenient as before without a very disproportionate and unwarrantable expenditure, they should make it as nearly so as they could. And he left it to them to say whether the new road was as convenient as before, or, if not, as nearly so as it might be. The jury found a verdict of Guilty on two counts, (including that first mentioned,) and Not guilty on the others. [*546

Cresswell, in Easter term, 1841, moved for a new trial, on the grounds that, as to some of the defendants, there was no case for the jury, and that, upon the whole evidence, the verdict was not justifiable on the principles laid down by the learned judge. He also contended that an indictment would not lie, because the act charged was one which the statute permitted, and the only ground of complaint was a neglect to fulfil the condition on which the doing of that act was allowed. He argued, that an injunction might have issued to prevent the execution of the work, or a mandamus to fulfil the requisitions of the statute; but that no nuisance had been committed. The court granted a rule nisi. In last Trinity term,(a)

Sir *F. Pollock*, Attorney General, *Atcherley*, Serjt., *Joseph Addison* and *W. H. Watson*, showed cause. The law was laid down clearly by the learned judge: and the jury have applied it to the facts, and found a proper verdict. It is contended that a mandamus might have issued; but, if that be so, it does not follow that an indictment will not lie also. And, if a mandamus had gone, to make a road as convenient as the former, "or *as near thereto as may be," the return would have raised precisely the question which was tried on this indictment. On general principles of law, the company became liable for a nuisance when they obstructed an ancient highway: the statute, however, justified them, provided they had fulfilled certain conditions; but, if those had not been fulfilled, they were without justification. No authority has been cited to show that such an indictment as this will not lie. *Rex* v. *The Regent's Canal Company*,(b) proves, on the contrary, that, if a company acting on statutory powers deviate from them, and in so doing obstruct a highway, they may be indicted. [WILLIAMS, J., mentioned *Rex* v. *Pease*, 4 B. & Ad. 30.] There the local act gave an express and unqualified protection. Here the protection is conditional, and the company have violated the condition. It is as if no statute existed. [*547

(a) June 4th. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.

(b) Cited in *Regina* v. *The London and Birmingham Railway Company*, 1 Railway Cases, 323. See 2 Q. B. 55, and note (c), Ibid. And see, as to proceedings against a corporation, *Regina* v. *Birmingham and Gloucester Railway Company*, p. 223, antè.

Sir *W. W. Follett*, Solicitor General, *Baines* and *Tomlinson*, contrà. On the undisputed facts, the verdict was wrong. The jury were bound here to apply the same reasonable rule of construction as was adopted by this court in *Rex* v. *Pease*, judging of the intention of the legislature by the subject matter and the circumstances of the case. And it is for the court to say, whether the jury have properly done so in the present instance. The making of this railway was the paramount object of the legislature: the provisions as to other ways were subordinate. The case was not like those in which the whole proceeding contemplated is to replace one road
*548] by another *equally good. Here the principal object was to be accomplished; the secondary ones as nearly as circumstances would admit. As to the form of proceeding: by stat. 6 & 7 W. 4, c. cxi. sect. 94, the company were empowered to disturb the ancient highways; and then a distinct section (97) directs how, in the case of their so doing, they shall provide for the public accommodation. The words used are, "before any such road," &c., "shall be so cut through," &c.; and this may apply to a temporary diversion; but the permanent substitution of a new road equally convenient with the former cannot, from the nature of the thing, be a condition precedent to any obstruction of the old road. [PATTESON, J. There is a distinct provision in sect. 97 for the case of a road temporarily substituted.] The indictment here is, in effect, not for doing the acts pointed out in sect. 94, but for disobeying the directions of sect. 97; and the indictment should have been preferred, if at all, for the latter offence, in the terms of the act, and according to the truth. As this indictment is framed, the defendants are charged with obstructing the former road, but tried for not making a new one equally convenient. The prosecutor might have obtained an injunction, or might have proceeded by mandamus, as was done in *Regina* v. *The London and Birmingham Railway Company*, 1 Railway Ca. 317; and *Regina* v. *The Birmingham and Gloucester Railway Company*, 2 Q. B. 47.

The court suggested that the parties should consider of an arrangement.

Cur. adv. vult.

No agreement having been come to,

*549] *Lord DENMAN, C. J., now delivered the judgment of the court.

The defendants were convicted of a nuisance in obstructing a highway. They pleaded Not guilty, and proved, on the trial at York, that the obstruction was caused by the exercise of certain powers conferred on the Leeds and Manchester Railway Company by their act of incorporation. Their offer to remedy the evil appeared to us so reasonable that we pressed the prosecutors to accept it, and hoped to be spared the necessity of deciding the question of law by which the defendants sought to show that what they have done is lawful. The prosecutors, however, who are the surveyors of the highways, crave our judgment on this point.

The work complained of as a nuisance, and undoubtedly making one, is the *cutting through* of the carriage road. Now there is no question as to their right to do this; and, though they are required, when they do it, to cause another road to be set out and made instead of it, they argue that they are no longer indictable for a nuisance in doing the lawful act, however they may for disobedience of the law in neglecting to substitute another. The prosecutors reply by referring to the section (97) which requires the company to cause the new road to be made before they cut through the old. But the company rejoin that, from the state of the earth

there, it was impossible to do this, and could not be intended by the legislature. This argument we think inadmissible, for reasons too obvious to require a full statement of them. The company have done what the act legalizes only on a condition which they have not performed. They stand convicted of the nuisance, and show no justification. The verdict will therefore not *be disturbed: but we still hope that the parties may consent to an arrangement useful to the public. [*550

Rule discharged.

The QUEEN v. The Mayor, Aldermen, and Citizens of the City of YORK.

The Sheriff's Court of York held plea of civil actions arising in the city; and, at the time of the passing of stat. 5 & 6 W. 4, c. 76, four persons only (appointed by the corporation) were permitted to practise there as attorneys. They were employed at the option of the suitors, and received no emolument but the fees paid by them.

Held, that the place of such an attorney was an office of profit in the corporation, for the loss of which compensation might be claimed under sect. 66.

After the passing of stat. 5 & 6 W. 4, c. 76, the court continued to be held; but by sect. 119 every attorney of the superior courts at Westminster had liberty to practise there.

Held, that the mere opening of the court was not an abolition of the former office of attorney, entitling the original attorneys to compensation under sect. 66.

MANDAMUS. The writ recited that the city and borough of York is one of the boroughs mentioned in a certain act, &c. (5 & 6 W. 4, c. 76.) That, long before and until and at the time of the passing of the said act, and continually from thence until December 26th, 6 W. 4, one Robert Clayton, of, &c., "was an officer of the said city and borough in a certain office of profit within the same, that is to say, the office of one of the attorneys of the sheriff's court of the said city and borough of York, and, during all the time aforesaid, was and acted as one of the attorneys of the said sheriff's court, and received the fees and emoluments of and pertaining to such office." That the said office was abolished under the said act; and thereupon Clayton became entitled to an adequate compensation, to be assessed by the council, &c., for the said fees and emoluments. The writ then stated a claim preferred to the council by Clayton for such compensation; refusal by them; appeal to the Lords of the Treasury, and an order made by them, awarding to Clayton an annuity of 57*l*. "for the loss of the fees and emoluments of the said office of one of the attorneys *of the said sheriff's court," to commence from the abolition, and to continue for his life. [*551 The writ then recited that such annuity ought to be secured to Clayton by bond, &c.; the execution of which bond Clayton had demanded of the defendants, but they had refused. The writ therefore commanded them to prepare and execute, and deliver to Clayton, such bond, as a compensation, &c., or to show cause, &c.

Return. "That the said court within mentioned, called the Sheriff's Court of the said city and borough of York, hath, from the time of the passing of the within mentioned act intituled," &c., "continued, and still doth continue, to be held; and that the same court was not in any manner abolished or altered in its jurisdiction by the said act; and that the same court hath always had, and still hath, jurisdiction of civil actions, real and personal, to any amount, in respect to causes of action arising within the said city and borough; and that the suitors of the said court, before and at the time of the passing of the said act, and ever since, have been accus-

tomed to prosecute and defend, and still do prosecute and defend, actions pending in the same court, by their respective attorneys; and that, before and at the time of the passing of the said act, there were certain persons, that is to say four persons, permitted to practise as attorneys of and in the said court; and that the within mentioned R. Clayton was one of persons so permitted to practise as an attorney of and in the same court; and that the said R. Clayton and the said other attorneys so practising in the said court as aforesaid were respectively paid by the suitors of the said court by whom they were respectively retained and employed; and in no other man-
*552] ner did such *attorneys of the said court or any of them derive any profit or emolument from their practice as such attorneys in the said court. And that the said R. Clayton and the other attorneys of the said court were retained and employed to prosecute and defend actions in the same court at the option and according to the selection of the suitors of the said court. And that the same attorneys are still permitted to practise in the said court, and that the said R. Clayton, ever since the passing of the said act, hath continued to practise as an attorney of and in the said court in like manner as he did practise before and at the time of the passing of the said act. And that he the said R. Clayton at the time of the passing of the said act was not an officer of the said city and borough, nor was in any office of profit of or in the said city and borough, otherwise than as being an attorney of and practising in the said court in manner aforesaid. And that the said court hath not been abolished by the said act; and that the said R. Clayton hath never been deprived of the privilege of practising as such attorney of and in the said court under the provisions of the said act. Wherefore the said mayor, aldermen and burgesses humbly submit that the Lords Commissioners of Her Majesty's Treasury had no jurisdiction, power or authority to make the said order in the said writ within mentioned, for awarding to the said Robert Clayton the said annuity," &c. And that they, the said mayor, &c., ought not to, and cannot according to law, execute and deliver, &c., as in and by the said writ they are within commanded.

Plea (after protesting that the said return and the several matters there mentioned are wholly insufficient in law): That the said city and borough
*553] of York is *an ancient city and borough, incorporated under divers names of incorporation; and that the said court in the said writ and return mentioned is an ancient court of and belonging to the said borough: and that the officers of, and practising in, the same court have from time whereof the memory of man is not to the contrary until the making and passing and coming into operation of the said statute, (5 & 6 W. 4, c. 76,) been elected, appointed, and removed by the said body corporate. Verification.

Special demurrer. The grounds insisted upon will appear sufficiently by the sequel of this report. Joinder.(a) The demurrer was argued in last Trinity term.(b)

(a) After the joinder in demurrer, Sir *J. Campbell*, Attorney General, obtained a rule nisi to allow the prosecutor to withdraw the plea on payment of costs, in order to raise the question simply by an exception to the return. In Trinity term, (June 12th,) 1841, *Cresswell* and *Joseph Addison* showed cause; and contended that the prosecutor, having made his election, ought not to be allowed to withdraw the question from the record. Sir *J. Campbell*, Attorney General, was heard in support of the rule. The court (Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.) said that the advantage which the prosecutor had given to the defendants, by placing the question in the record, was one of which they ought not to be deprived; and that it would be desirable, in all cases, that there should be the means of raising the disputed points on demurrer. Rule discharged. See now stat. 6 & 7 Vict. c. 67.

(b) May 28th. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.

Sir *F. Pollock*, Attorney General, for the defendants. The record shows that this was not an office for which compensation is claimable under stat. 5 & 6 W. 4, c. 76, s. 66. The attorneys had merely a permission to practise: there was not, as to this borough court, any formal admission or enrolment. It does not appear by the pleadings that there was any ancient right in a limited number to practise, or that the corporation itself could *not, at any time, have thrown the court open to a greater number. [*554
In *Rex* v. *The Sheriffs of York*, 3 B. & Ad. 770, a rule nisi was obtained for a mandamus to admit an attorney to practise in this borough court; the answer was, that, under a by-law, the number was limited to four, and that four were already practising: but it was never objected that the right of so practising constituted an office; which, if true, would have defeated the application at once, unless the prosecutor could have shown his right to be admitted as an officer. Secondly, if this were an office, it is not abolished by admitting others to practise: the statute, sect. 119, (*a*) only regulates the court, and breaks up the monopoly. So the office of alderman is only regulated, not abolished. The meaning of sect. 66 may be interpreted by sect. 65, which provides for the removal of certain officers, not including such cases as this. Where the legislature has put an end to monopolies of this kind, and the compensation has been deemed necessary, it has been granted expressly, as in the case of counsel practising in the Marshalsea Court. Here no ground appears for presuming such an intention. Thirdly, on the principle laid down in *Regina* v. *The Corporation of Warwick*, 10 A. & E. 386, the Lords of the Treasury were incompetent to decide the question of fact, whether or not this was an office of profit within the borough, for which compensation was claimable.

Sir *W. W. Follett*, Solicitor General, contrà. The mandamus alleges expressly that this was an office, and *was abolished: the return [*555
contains only an argumentative denial of these facts. *Rex* v. *The Sheriffs of York*, 3 B. & Ad. 770, shows that the place of attorney in the borough court, if not strictly an office of profit in the borough, was sufficiently so to answer the liberal construction put upon stat. 5 & 6 W. 4, c. 76, s. 66, in *Rex* v. *the Mayor*, *&c.*, *of Bridgewater*, 6 A. & E. 339. But "an attorney's place in the court of Canterbury" was held to be an office in respect of which a mandamus to restore might issue; *Hurst's Case*, 1 Lev. 75. So, in *Parker's Case*, 1 Ventr. 331, a mandamus went "to restore an attorney to his liberty of practising" in a local court. The prosecutor is, therefore, undoubtedly an officer; and, being so, he is an officer of the borough. The corporation appointed him; and he takes the office exactly as a prothonotary of the court would do. Again, the office is in effect abolished by sect. 119, which, by admitting all attorneys to practise, does away with the office, which was that of exclusive practitioner. The freemen, but for sect. 2 of stat. 5 & 6 W. 4, c. 76, would have ceased to exist in all corporations within the act, because the burgesship was thrown open. And, if all the exclusive privileges of the freemen were put an end to, as the exemption from toll is by sect. 2, that would have been an abolition of the right of the freemen. The office of alderman has been alluded to: but, first, that is not an office of profit; and, secondly, if it were, there would clearly be a claim for compensation; for it is absolutely abolished. Aldermen of the old kind do not exist. So there are now no attorneys of this

(*a*) Which provides "that, unless disqualified as herein provided, every attorney of His Majesty's superior courts at Westminster shall have full liberty to practise as an attorney in every such court" (of record in a borough for trial of civil actions).

*556] court, properly speaking. The prosecutor, if he practise at *all there, will practise as an attorney of Westminster Hall. [COLERIDGE, J. Before the statute, the corporation might have removed him from his office.] They might so: now he will practise independently of their sanction. The office probably was purchased. If the Palace Court were opened, the legislature would provide compensation for the practitioners, as parties deprived of a privilege. The operation of sect. 66 is not confined to the officers mentioned in sect. 65: that relates only to the officers who are to be appointed under sect. 58.

Sir *F. Pollock*, Attorney General, in reply. It does not appear that the prosecutor is an attorney of the superior courts: he will still practise in virtue of his old right, whether he be so or not. The nature of the place in *Hurst's Case*, 1 Lev. 75, does not appear: it is called only an "attorney's place." That case is perhaps explainable on the same principle as *Parker's Case*, 1 Vent. 331, where the mandamus was, not to restore to an office, but to allow liberty of practice. No analogy can be shown between this privilege and the exemption from toll which is taken away from freemen under sect. 2: the exemption was a positive right, like that to the enjoyment of lands or funds, which, but for sect. 2, would now be enjoyed by nobody: whereas here nothing is taken away; all that is done is to extend the right to a larger body of persons.(a) *Cur. adv. vult.*

*557] *Lord DENMAN, C. J., now delivered the judgment of the court.

This case comes before us on a demurrer to the plea to a return to a mandamus, and raises the question, whether one Robert Clayton is entitled to compensation under the sixty-sixth section of the Municipal Reform Act as the holder of an office abolished by that act. The writ recites that he "was an officer of the city and borough in a certain office of profit within the same, that is to say, the office of one of the attorneys of the sheriff's court of the said city and borough," "and received the fees and emoluments of and pertaining to such office;" and that such office was abolished under the provisions of that act. The return alleges that the court still continues to be held as before the act passed, and that Robert Clayton continues to practise as an attorney *of and in it:* that there were four attorneys of the court, of whom he was one, who were employed by the suitors at their pleasure, and who derived no other profit than the fees and emoluments of such employment; and it denies that, except as such attorney, he was an officer of the borough, or in any office of profit of or in the borough. The plea merely alleges that the court was an ancient court of and belonging to the borough, and that the officers of and practising in it were immemorially, until the act came into operation, elected, appointed, and removed by the body corporate. It appears, therefore, that this was a borough court, the practitioners in which were limited in number, and were appointed and removable by the body corporate. We think these facts sufficient to constitute an attorney of the court an officer of the borough, within the liberal construction which we have always
*558] given to those words *in the clause in question. Indeed, the cases cited at the bar from 1 Levinz, 75, *Hurst's Case*, and 1 Ventris, 331, *Parker's Case*, establish that the place of an attorney in courts like this is strictly an office for restoration to which a mandamus will lie; and Mr. Robinson informs us that there are several in-

(a) The Solicitor General stated that Mr. Robinson, of the Crown office, had furnished him with a precedent, 5 W. & M., of a mandamus to restore an attorney of York. The Attorney General suggested that it probably was similar to *Parker's Case*, 1 Vent. 331.

stances in which the writ has issued for such purpose. If the place is an office, it is certainly an office of that body in whose court the duties are performed, and by whom the officer is appointed and removeable. Neither can there be any doubt that, within the same construction, it was an office of profit. Though no regular salary was incident to it, and no suitor was compelled to retain any one of the four attorneys in particular, yet it is reasonable to presume that each attorney did in fact practise, and that, from such practice, profits arose referable only to the office which enabled him to earn them.

But the question still remains, whether this office has been abolished. Now upon this head the return remains entirely unanswered, which avers that the court continues to be held, and that Robert Clayton continues to practise as an attorney, *of and in it*, as he did before and at the passing of the act. There is, then, no formal abolition. But it was argued that the 119th section of the act had worked its virtual abolition: that, whereas, before the act passed, he was one of four attorneys who alone shared all the profits of the business transacted in the court, by that section it was provided that every attorney of the superior courts at Westminster, unless disqualified as therein provided, should have full liberty to practise in it; whence it was inferred that, with respect both to the tenure and the profits, it had *ceased to be the same office as before, and that Robert Clayton's present practice there was not as an officer *of* the court, but in virtue of his admission as an attorney of the superior courts. [*559

The answer to the last inference is short: that it is a direct contradiction to the averment in the return; and that it nowhere appears on the record that Robert Clayton ever was, or is, an attorney of any one of the superior courts. Upon the first we were pressed with our decision, and the language we used, in *Rex* v. *The Mayor*, &c. *of Bridgewater*, 6 A. & E. 339. These have been repeatedly acted on; we see no reason to depart from them; and, if the present case can be brought within them, it must be governed by them. The question there arose on the office of clerk to borough justices. That was not in itself a borough office, and was not abolished by the act; but it had been held by the claimant as incidental to a borough office or offices of common clerk, prothonotary and clerk of the peace, which he had held during good behaviour. These offices were abolished; and he was appointed, on the passing of the act, town clerk during pleasure; and, in a few weeks after, another person was appointed clerk to the justices. The claimant, subsequently, upon the grant to the borough of a commission for a separate court of quarter sessions, was appointed clerk of the peace, with which office that of clerk to the justices was incompatible. Here there was so total a change in the nature and tenure of the offices existing before the act as amounted to an abolition. In the present case, as regards Robert Clayton, there is, for all that appears, no change: he is still an attorney of and *in the court; and the jurisdiction of the court is the same. We do not know that he practises in it by any other right than that of his original appointment. Other attorneys may now by law practise in it, and perhaps in fact do; but perhaps also they do not; or the standing or experience which he has acquired may preserve his former practice unimpaired; or the business may have so increased by the opening of the court as to countervail the loss to him which the competition of other attorneys may occasion. All these circumstances are left in uncertainty upon the pleadings. At first sight they might seem immaterial, and to bear only on the amount of compensation, not the right to it, with which alone we have [*560

to do: but, where there is no formal abolition or removal, where the office in the individual remains, and the individual remains in the office, he cannot make out the substantial abolition or removal, on which he relies, without showing de facto that change of circumstances which he says amounts to abolition or removal. If, without this, we were to hold that the office is abolished in this case, we must be prepared to hold also that the 119th section has deprived the corporation of the power of appointing any more attorneys of the court. Now this would be contrary to the words, and to the spirit, of the section. The result is, that the office remains, with a value most probably much diminished; and this is a case in which the statute has not provided a compensation for the officer. Our judgment, therefore, must be for the defendants. Judgment for defendants.

*561] *GARDNER v. M'MAHON.

Defendant having pleaded the Statute of Limitations, plaintiff proved, in answer, that before six years had elapsed from the contracting of the debt, and within six years before action brought, defendant wrote to him as follows.

"I do not desire that you or any one of my creditors should lose what I owe them; on the contrary, it is very much my wish not only to pay my debts but interest upon them if I can. As you have mentioned the Limitation Act, I answer at once, that I am ready to put it out of my power to take advantage of that act, and will immediately give you my note for whatever amount is due to you. To pay you now or within the year I am utterly unable. I really have not, as you imagine, received 600*l*." "It is of course indispensable that the exact sum I owe you should be fixed, whether you accept my note or not. I have clearly shown you, in a former letter, that your account is not in accordance with the estimate upon which you agreed." "If you really cannot produce the original estimate, or the rough draft of it, it certainly is reasonable that some (and considerable) deduction should be made from your charges." (Details as to this were then stated.) "You will perhaps say, what deduction you are prepared to make: and I shall be glad if it be such as will allow me, with justice to my other creditors, to give you my note for the amount, or, if it be possible, to borrow it from a friend, which I have a hope of doing, and wipe the account entirely out of your books." "I am fully sensible of, and thankful for, the forbearance you have shown; but I cannot move a step in the way to give you satisfaction, and do justice to my other creditors, until the sum actually due to you be ascertained."

Held, that the letter contained an unconditional promise to pay, and prevented the Statute of Limitations from operating.

DEBT for work and materials, and on an account stated. Plea, (among others,) that the causes of action did not accrue within six years. Issue thereon. On the trial, before PATTESON, J., at the Middlesex sittings in Michaelmas term, 1841, it appeared that the plaintiff's claim was for the expenses of engraving and preparing for publication a map of the island of St. Christopher's, in 1830 and 1831; and it became a question whether or not the following letter, written by defendant to plaintiff within the six years, (October 28th, 1835,) was sufficient to prevent the operation of the statute.

"Sir: Mr. Anderdon has been so obliging as to mention what passed between you and him some days ago; which is the occasion of my troubling you with this letter.

"I do not desire that you or any one of my creditors should lose what I owe them; on the contrary, it is very much my wish not only to pay my debts but interest upon them also if I can. As you have mentioned
*562] *the Limitation Act to Mr. Anderdon, I answer at once, by saying that I am ready to put it out of my power to take advantage of that act, and will immediately give you my note for whatever amount is due to

you. To pay you now or within the year I am utterly unable. I really have not, as you imagine, received 600*l*. for the proceeds of the map, nor any thing like that sum, the subscribers in the West Indies, with very few exceptions, having failed to pay their subscriptions.

"It is of course indispensable that the exact sum I owe you should be fixed, whether you accept my note or not. I have clearly shown you in a former letter that your account is not in accordance with the estimate upon which you agreed to the work. That estimate, I again say, I have almost a distinct recollection of having, at your request, returned to you, in order that you might make a copy for yourself. The amount of it, exclusive of the extra charges mentioned in your account, was a sum, as nearly as I recollect, between 120*l*. and 130*l*. Now, if you really cannot produce the original estimate, or the rough draft of it, it certainly is reasonable that some (and considerable) deduction should be made from your charges. It is impossible not to see the necessity for this if you refer to the estimate you sent in, (and which I still have,) when it was contemplated to publish upon eight sheets of copper, and compare that estimate with the charges you have made when only four sheets of copper were used, and a proportionate quantity of paper. This being the case, the expense would of course be reduced nearly one half, as you yourself said at the time, and as your missing estimate afterwards clearly showed. Under these circumstances, you will perhaps say, what deduction you *are prepared to make: and I shall be glad if it be such as will allow me, with justice to my other creditors, to give you my note for the amount, or, if it be possible, to borrow it from a friend, which I have a hope of doing, and wipe the account entirely out of your books. I will not close this letter without repeating that I am fully sensible of, and thoughtful for, the forbearance you have shown; but I cannot move a step in the way to give you satisfaction, and do justice to my other creditors, until the sum actually due to you be ascertained. Please to direct your answer to me at," &c. "I am," &c. [*563]

(Signed by defendant.)

"P. S. I have referred to the estimate you sent me when it was designed to publish upon eight sheets of copper:

The expense was then to be - - - - - -	£242	5	0
Your charges, (exclusive of extras,) when only four sheets of copper and half the quantity of paper were used, amount to	234	13	0
Making a difference of - - - - - - - -	£ 7	12	0

"I put it to yourself, can this be right?"

The learned judge thought the letter sufficient upon the whole; though he admitted that the latter part, from the words "but I cannot move," &c., raised a question whether the promise implied was not conditional: and he reserved leave to move to enter a nonsuit. Verdict for plaintiff. *Cowling*, in Michaelmas term, 1841, obtained a rule nisi for entering a nonsuit.

Kelly and *Barstow* now showed cause. [Lord DENMAN, C. J. The defendant acknowledges a debt, but *says it is not so much as the plaintiff claims. Is not that an admission, subject to the opinion of the jury as to amount?] *Colledge* v. *Horn*, 3 Bing. 119, is in point. *Morrell* v. *Frith*, 3 M. & W. 402, which was cited in moving, is distinguishable. There the letter contained neither a promise nor even an [*56

acknowledgment; and, when it was written, the six years had expired. An acknowledgment made after the six years, if accompanied by a condition, cannot take effect as a new promise, unless it be shown that the condition has been fulfilled. But here the six years had not elapsed; and the defendant's declaration, that he will put it out of his own power to take advantage of the statute, prevents any subsequent part of the letter from operating as a condition. *Bird* v. *Gammon*, 3 New Ca. 883, shows that, where there is a direct acknowledgment, with a promise to pay, the statute is barred, though the sum be not ascertained, and though the debtor professes to rely upon particular means of payment which may or may not prove available.

Cowling, contrà. An acknowledgment, to take a case out of the statute, must imply such a promise as would give a new cause of action. It need not ascertain the amount to be paid; but it must be unconditional, or, if there be a condition, it must have been fulfilled: *Tanner* v. *Smart*, 6 B. & C. 603. Here the defendant annexes a condition, that a proper estimate be taken of the amount due. He does not express willingness to have that point settled by a jury, but puts himself forward as the person to be satisfied before the promise shall have any effect. There is no ground for
*565] the distinction *taken between promises made before and after the six years have elapsed. *Morrell* v. *Frith* shows that the acknowledgment ought to raise a promise on which an immediate action could be founded. Here it cannot be said that an action would have lain immediately; and, if not, when would the right have accrued? In *Colledge* v. *Horn* the defendant said that he was then ready to pay what might be really due, not interposing, as here, any previous condition. That case went perhaps to the full extent of the law; and *Tanner* v. *Smart* had not then been decided: but the ruling is consistent with the distinction now taken. Here the defendant says, in effect, "Tell me what deduction you will make; and I will then give you a note, if the amount of deduction enables me to do so with justice to my other creditors." In *Bird* v. *Gammon* there was a promise to pay at all events; at least, the court so understood it. [Lord DENMAN, C. J. The defendant declares himself ready to put it out of his power to plead the Statute of Limitations, and offers to give his note immediately.] He states afterwards that he can do nothing till he is satisfied as to the amount. *Waters* v. *The Earl of Thanet*, 2 Q. B. 757, shows that a party cannot, by the most direct undertaking, prospectively waive the Statute of Limitations. This case is like *Poynder* v. *Bluck*, 5 Dowl. P. C. 570, where the supposed acknowledgment was, "I will see Davis, or write to him. I have no doubt he has paid it; if by chance he has not paid it, it is very fit it should be:" and WILLIAMS, J.,
*566] held this insufficient. *Lloyd* v. **Maund*, 2 T. R. 760, shows the laxity which formerly prevailed on this subject, and which will be again introduced, unless the court, in a case like this, insist upon seeing a promise which the plaintiff has a right to enforce. It was, indeed, held, in *Hartley* v. *Wharton*, 11 A. & E. 934, that the ratification of an infant's promise might be valid, under stat. 9 G. 4, c. 14, s. 5, though it had no date, and did not state the amount of debt or the creditor's name: but COLERIDGE, J., expressed regret that a statute should be so frittered away by successive cases. The decision here contended for by the plaintiff would have the same tendency.

Lord DENMAN, C. J. The question is, whether the letter of October 28th contained an acknowledgment implying such a promise to pay as

would take this case out of the Statute of Limitations. I think there was such a promise, and that it was not necessary to limit it by terms fixing a time of performance. When the debtor says, before the six years have elapsed, (which appears to me an important circumstance,) "I will waive the statute," it may well be supposed that the creditor on his part has forborne to sue, relying upon this undertaking as preserving his right of action in future if it should be wanted. The defendant here may have meant, by some expressions in the letter, "As soon as I know the amount which will be due, I will give you my note: so that the promise, as far as this part goes, may have been, not a promise to pay, but a promise to give a note on being satisfied as to the amount: and the question will then be, whether the letter contains a promise independent of that condition. I think *it does, and that the rest of the statement is only a mode of settling how the defendant shall provide at the same time for paying this party and his other creditors. Our present decision may be open to comment hereafter; but, where ambiguous expressions are used, we must give them the best interpretation we can: and, if an acknowledgment and a promise appear, they must have their effect in preventing the operation of the statute. [*567

PATTESON, J. I thought at the trial that there was enough in this letter to take the case out of the statute; and I think so still. The defendant admits something to be due, though he does not agree with the plaintiff as to the amount: but he says, "I will not avail myself of the statute, and will put it out of my power to do so." That, if taken alone, makes a promise. The expressions which follow do not qualify that promise. They only contain a proposal to put the matter into some course of settlement which may be beneficial to all parties: but the effect of the whole is, that, even if the proposal be not accepted, the defendant undertakes to pay. If indeed an action had been brought for not giving the note, it might have been contended that a settlement of amount was a condition precedent. But in the mean time there is the debt itself due, which the defendant acknowledges and promises to pay.

WILLIAMS, J. This letter contained a promise to pay, though no precise sum was fixed: and it is consistent with the cases that such a promise will prevent the operation of the statute. *Colledge* v. *Horn*, 3 Bing. 119, is an *instance, the authority of which is not disputed. It is in vain to attempt laying down a rule which shall govern all cases: the court must interpret each instrument as it comes before them. Difficulties will continually arise, though *Tanner* v. *Smart*, 6 B. & C. 603, is supposed to have settled these questions. [*568

WIGHTMAN, J. I have had some doubt whether this letter contained more than a conditional promise. But I am of opinion that it does. The defendant admits directly that something is due; only he wishes the amount ascertained. But, if there is an admission of the debt, and a difference only upon the amount, *Colledge* v. *Horn* shows that the operation of the statute is barred. Even as to the mode of payment, I think there is no condition stated, but only a suggestion of the course which will be most convenient.

Rule discharged

CHURCHILL v. SUSANNA BERTRAND, Administratrix, &c., of PATEMAN.

Intestate granted an annuity to plaintiff. After his death, his administratrix caused the annuity to be vacated for a defect in the memorial. Plaintiff, to recover the balance of consideration money, brought indebitatus assumpsit against the administratrix for money had and received by the intestate to plaintiff's use, stating promises by intestate and by defendant.

Held **that, although a right to recover the consideration money became vested in plaintiff on the refusal to continue the annuity, such right did not go back, by relation, to the time when that money was originally paid: and therefore counts in the above forms were not applicable.**

DECLARATION in assumpsit, May 6th, 1841. The first count stated that the intestate was indebted to plaintiff for money had and received, and
*569] on an account stated, and in consideration thereof promised *plaintiff, &c. The second count stated the intestate to have been indebted as above, and alleged promises by the defendant, as administratrix, after his death. The third count was on promises by defendant, as administratrix, in respect of moneys found due from her as administratrix on an account stated between plaintiff and defendant as administratrix.

Pleas, (among others not now material,) to the whole declaration, that neither the intestate nor defendant as administratrix did promise, &c.; conclusion to the country: issue thereon. And that the causes of action did not, nor did any of them, accrue within six years, &c.; verification. Replication, that the causes of action did accrue within six years, &c.; conclusion to the country: issue thereon.

On the trial, before WIGHTMAN, J., at the sittings in London after Trinity term, 1841, it appeared that the intestate had granted an annuity to the plaintiff in 1823, and paid it until 1830, when he died. The defendant, as administratrix, continued to make the payments till 1838, when she procured the annuity to be set aside for a defect in the memorial. This action was brought to recover back the balance of consideration money. A verdict was found for the plaintiff, but leave reserved to move to enter a verdict for the defendant on the pleas of non assumpsit and the Statute of Limitations.

Butt, in Michaelmas term, 1841, moved accordingly; contending that, if the Statute of Limitations began to take effect from the time of the grant, the six years had elapsed before action brought: if from the time of refusal to pay, as was held in *Cowper* v. *Godmond*, 9 Bing, 748, the
*570] *money had and received within six years was not to the use of the intestate but of the administratrix. A rule nisi was granted.

Warren now showed cause.(*a*) The plaintiff is entitled to recover on the counts alleging promises in consideration of money had and received by the intestate. If the supposed annuity was no annuity, "the sums paid on either side were money had and received by the one party to the other's use;" *Hicks* v. *Hicks*, 3 East, 16. And, if an action lies in the present case on that ground, then, as TINDAL, C. J., laid down in *Cowper* v. *Godmond*, "the cause of action comprises two steps. The first is the original advance of the money by the grantee; the second is the grantor's election to avail himself of the defect in the memorial of annuity. The cause of action, therefore, was not complete till the last step was taken."

(*a*) Before Lord Denman, C. J., Patteson, Williams, and Wightman, Js.
Butt restated the ground of motion, and suggested that a count might have been framed charging the administratrix in her own right. He referred to *The Dean and Chapter of Bristol* v *Guyse*, 1 Wms. Saund. 111.

The refusal, in this case, gave a complete cause of action to the administratrix for money had and received by the grantee. It makes no difference that the intestate died before there had been any election to treat the annuity as void: his representative made that election; and it may be presumed that, if he had lived, he would have taken the same step. That money paid to a defendant may, by a subsequent contingency, become money had and received from the first to the use of the party paying, is a doctrine fully recognised in *Chappell* v. *Poles*, 2 M. & W. 867. [PATTESON, J. That *doctrine would carry the cause of action here to [*571 a period before the six years. Lord DENMAN, C. J. Why might not you have alleged a receipt to the plaintiff's use by the administratrix?] *Cowper* v. *Godmond* shows that the cause of action accrued on the memorial being set aside; and it resulted from a payment to the intestate. That he died in the mean time made no difference in principle. [PATTESON, J. You might as well say that, if the administratrix committed an assault, the intestate committed it.] The administratrix is estopped from saying that the money was not received to the intestate's use. [PATTESON, J. She is not estopped from saying that the party is dead.] An analogous case to this, as to the liability of representatives, is cited in Toller's Law of Executors. "Where A. received with an apprentice the sum of 250*l.*, and died about two years afterwards, having employed the apprentice, during that period, in inferior affairs, the executors were decreed in equity, after payment of the debts by specialty, to repay the money as a debt due by simple contract, deducting the rate of 20*l.* a year for the maintenance of the apprentice during the time he lived with his master:" *Soam* v. *Bowden*.(*a*) [PATTESON, J. The case, as stated there, does not show by whom the money was said to have been had and received: and no point arose on the Statute of Limitations. It was not so much a question here whether an action would lie, as whether the declaration is properly framed.] It seems that an administrator cannot be charged on promises made by him in that capacity, in respect of money had and received by him as administrator. [WIGHTMAN, J. The *objection is, that that would make [*572 him liable though he had no assetts.] A special count here, stating the facts and charging the administratrix, would have been liable to the same objection. But, having vacated the annuity, she is not at liberty to deny that the money was had and received by the intestate to the plaintiff's use; and, as Lord ELLENBOROUGH said in *Hicks* v. *Hicks*, "If the consideration of the annuity be money had and received, it must be money had and received with all its consequences." The refusal to pay the annuity, here, remits the parties to the state of things existing on the original payment. [PATTESON, J. That is directly contrary to *Cowper* v. *Godmond*, where *Walker* v. *Liscarray*, 6 Esp. N. P. C. 98, was overruled.] The act of the administratrix herself, here, distinguishes the case from *Walker* v. *Liscarray*. She is no more at liberty to deny that the money was received to the plaintiff's use than the grantor would have been. If she can, an injustice may be committed without remedy. [PATTESON, J. There may perhaps be a form of action in which she might be reached. But I cannot see how she can be bound to the admission you contend for.] The right to the consideration money was a right in abeyance: on the election to vacate the annuity, the money became money had and received to our use. [PATTESON, J. I cannot see how it could be in the grantor's option that this should be, from the first, money received to a particular use.]

(*a*) Ch. Ca. temp. Finch, 396. Cited, Toller on Executors, 286, 6th ed.

The Court thought it unnecessary to hear arguments in support of the rule, but took time for consideration. *Cur. adv. vult.*

*573] *Lord DENMAN, C. J., in this vacation, (June 25th,) delivered the judgment of the court.

The count in the declaration on which this case turns was a count for money had and received by the *defendant's intestate* to the use of the plaintiff, and on a promise by the defendant as administratrix to pay. The defendant pleaded Non assumpsit and the Statute of Limitations.

An annuity was granted to the plaintiff by the defendant's intestate in 1823, the memorial of which was defective. The intestate paid the annuity till his death in 1830. The defendant paid it afterwards till 1838, when she procured it to be set aside for the defect in the memorial. The rule in this case was to enter a verdict for the defendant on the two pleas above stated.

The Court of Common Pleas, in *Cowper* v. *Godmond*, distinctly held that, under circumstances similar to the present, the money paid to the grantor of a defective annuity is not money had and received to the use of the grantee until the grantor has elected to vacate the annuity; and then such election does not make the money had and received to the use of the grantee from the time of the grant by relation.

That being the law, the money in this case was not had and received *to the use of the plaintiff* till 1838, at which time the intestate had been dead eight years; and so could not be money had and received by *him* to the use of the plaintiff: and the rule must be absolute to enter a verdict for the defendant on the plea of Non assumpsit. Rule absolute.

*574] *BATEMAN and Others, Executors of BATEMAN, *v.* PINDER.

An acknowledgment of debt bars the Statute of Limitations, because it amounts to a new promise; and therefore, if made after action brought, it is no bar.

ASSUMPSIT on a promissory note. Plea, the Statute of Limitations. Issue thereon. On the trial, before WIGHTMAN, J., at the Liverpool Summer assizes, 1841, it appeared that the note was joint and several; and that, on the 4th of August, 1841, after plea pleaded in the present action, Joseph Binns, one of the makers, paid the attorney for the plaintiffs 1*l.*, saying that he brought it on account of the note. It was objected that a payment after action brought was no answer to a plea of the statute; and *Tanner* v. *Smart*, 6 B. & C. 603, was cited: but the learned judge, on the authority of *Yea* v. *Fouraker*, 2 Burr. 1099, directed a verdict for the plaintiffs, giving leave to move to enter a nonsuit.

Joseph Addison, in the ensuing term, moved accordingly. *Yea* v. *Fouraker* is now virtually overruled. The decision there "that an acknowledgment of the debt, after the commencement of the action, takes it out of the Statute of Limitations," can be supported only on the ground that the new acknowledgment draws down the original promise to a period within the six years. But it is now settled that the acknowledgment operates only as evidence of a promise at that time to pay: *Pittam* v. *Foster*, 1 B. & C. 248, judgment of ABBOTT, C. J.; *Gowan* v. *Forster*, 3 B. & Ad. 507, and dictum of

*575] *PARKE, J., there, (p. 511): and a promise, after action brought, could not avail.

A rule nisi was granted.

John Henderson now showed cause. In *Thornton* v. *Illingworth*, 2 B. & C. 824, where it was held that a ratification by promise after action brought was no answer to a plea of infancy, the court distinguished that case from *Yea* v. *Fouraker*, which was not denied to be law. BAYLEY, J., said, "There the debt continued from the time when it was contracted, but without the new promise it could not have been recovered, the defendant relying on the protection given by the Statute of Limitations. The ground on which that statute proceeds is, that after a certain time it shall be presumed that a debt has been discharged. A new promise rebuts that presumption, and then the plaintiff recovers, not on the ground of having a new right of action, but that the statute does not apply to bar the old one." And HOLROYD, J., added: "Where the Statute of Limitations has run, a new promise revives the debt ab initio, and that is equally the case whether the promise is made before or after the commencement of the action." LITTLEDALE, J., expressed himself to a similar effect.

Lord DENMAN, C. J.(*a*) This case, when we consider it, is very clear. *Yea* v. *Fouraker* is acknowledged as an authority in *Thornton* v. *Illingworth*; but the judges distinguish it from that case. *Yea* v. *Fouraker* was rightly decided, if, as BAYLEY and *HOLROYD, Js., lay it down in the subsequent case, the Statute of Limitations takes effect upon the [*576 ground that after a certain time it shall be presumed that the debt has been discharged. For, if that be so, an acknowledgment made at any time will rebut that presumption. But in *Tanner* v. *Smart*, 6 B. & C. 602, the earlier cases were revised, and the doctrine as to presumption of payment repudiated; and it was held that, to prevent the operation of the statute, a distinct promise was necessary. That promise must be before action brought.

PATTESON, J. It is clear, since the decision in *Tanner* v. *Smart*, that the acknowledgment must be before action brought.

WILLIAMS, J., concurred.

WIGHTMAN, J. Part payment is an acknowledgment; and an acknowledgment, though not a promise in terms, may amount to one virtually: but, where it is not made till after action brought, it cannot prevent the operation of the statute. Rule absolute.

(*a*) No counsel in support of the rule was present.

*EMERY v. The Alderman and Capital Burgesses of MALMESBURY. [*577

To a mandamus, commanding a corporation to admit the prosecutor as a commoner, on his qualification within an alleged custom, the corporation made a return, denying the custom, and also denying the alleged qualification, on two independent grounds of fact. The prosecutor, by his plea, took three traverses on these points severally; and the corporation joined issue. On trial, the jury negatived the custom, but found for the prosecutor on the last two issues.

Held, that the prosecutor was not entitled to costs on the issues on which he had succeeded, either under stat. 4 Ann. c. 16, s. 5, stat. 9 Ann. c. 20, s. 5, R. Hil. 2 W. 4, I. 74, or R. Hil. 4 W. 4, *General Rules and Regulations*, 7.

MANDAMUS to the alderman and capital burgesses of Malmesbury, to admit John Emery a commoner of that borough. The defendants made a return. Pleas, offering three traverses to the return; on which traverses the defendants joined issue. One issue was found for the defendants, going to the whole merits: the other issues (each also going to the whole merits) were found for the plaintiff. In last Hilary term *Bere* obtained a rule, on

behalf of the plaintiff, for taxing costs for the plaintiff on the issues in which he had succeeded, and for the defendants on those in which they had succeeded. In last term,(a)

Crowder and *Barstow* showed cause, and *Erle* and *Bere* supported the rule. The facts of the case, and the course of argument, will appear fully from the judgment. *Kynaston* v. *The Mayor, &c. of Shrewsbury*, 2 Str. 1051, *Regina* v. *Fall*, 1 Q. B. 636, *Rex* v. *The Mayor, &c. of Stafford*, 4 T. R. 689, Statute of Gloucester, (1 Stat. 6 Ed. 1, c. 1,) Stat. 1 W. 4, c. 21, s. 6, and *Bird* v. *Higginson*, 5 A. & E. 83, were cited.

Cur. adv. vult.

Lord DENMAN, C. J., in this vacation, (June 21st,) delivered the judgment of the court.

*578] *The writ of mandamus in this case states a custom in the borough of Malmesbury, that any son of a free burgess or commoner in his own right, being twenty-one and married, and a parishioner, and inhabitant householder in an entire tenement, and not an inmate, within the borough, has a right to be admitted a freeman or burgess. It then states John Emery to be twenty-one, and married, the son of a burgess, and a parishioner and inhabitant householder in an entire tenement. The return denies the custom; also denies that John Emery was a parishioner; and also denies that he was an inhabitant householder in an entire tenement. John Emery traversed this return, re-asserting the three matters denied by the return: on which issues were joined. The jury found for John Emery on two of the issues, and for the corporation on the third.(b)

The corporation are therefore entitled to the general costs; which, however, they have not taxed. And Emery has obtained this rule to have his costs of the issues found for him. He contends that he is to be considered as plaintiff, and the corporation as defendants: and that he is entitled to these costs, either under the statutes of 4 Ann. c. 16, s. 5, and 9 Ann. c. 20, s. 5, or under the rule of court, Hil. 2 W. 4, I. 74, 3 B. & Ad. 385, or Hil. 4 W. 4, *General Rules and Regulations*, 7, 5 B. & Ad. iv.

We are of opinion that the corporation cannot be considered as defendants within stat. 4 Ann. c. 16, s. 5, so far as regards the return which they made. It was not made under the authority of that act, but at common law, and would have been just the same if that act had never been passed: and there is, in truth, no *pleading of the corporation in this case, except the joining of *similiter* to the traverses. *579]

Neither is Emery entitled under stat. 9 Ann. c. 20, s. 5; for that act gives the party suing out the writ of mandamus his costs only where he succeeds upon the whole, so as to have damages and the general costs, as if he had brought an action for a false return; whereas here, if he had brought such action, he would have failed, and would not have had the general costs.

The rule Hil. 2 W. 4, I. 74, 3 B. & Ad. 385, does not apply; it relates only to the defendant's costs of issues found for him, leaving the plaintiff to his rights under the statute 4 Ann. c. 16, s. 5. Now Emery is not the defendant in this case. Although the person suing out the writ of mandamus seems to be so treated by the statute 9 Ann. c. 20, which enables him (sect. 2) to traverse the return, yet the same statute gives him damages as in an action on the case; and he is clearly in the nature of a plaintiff, if not actually plaintiff.

(a) June 11th. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.
(b) The existence of the custom.

If then Emery be entitled to costs at all, it must be under the early part of the 7th Rule of Hil. 4 W. 4, *General Rules and Regulations*, 5 B. & Ad. iv. That rule was framed against several counts or pleas professing to be on the face of them distinct, but which in truth are not so, and provides that, if on the trial "the party pleading fails to establish a distinct subject matter of complaint in respect of each count, or some distinct ground of answer or defence in respect of each plea, &c., "a verdict and judgment shall pass against him upon each count, plea," &c., which he shall have so *failed to establish, and he shall be liable to the other party for all the costs occasioned by such count, plea," &c. [*580

The penalty is on the *party pleading* several counts or pleas, and failing to *establish one or more*. Here the corporation are not a party pleading at all: they have not pleaded any counts or pleas, nor failed to establish any: they did not by the record take upon themselves to establish any thing: but, Emery having traversed the three matters negatived by the return, the affirmative of all which three it was necessary for *him to establish*, they have joined issue, as they were obliged to do.

It is very true that the corporation are in fault for having denied, by their return, two matters which have been proved against them: but we have already expressed our opinion that the return cannot be considered as a pleading in this cause; and, therefore, we cannot find any statute, rule of court, or practice, which will authorize us in giving Emery the costs which he seeks.

The rule must be discharged without costs.

Rule discharged without costs.

*CARR v. FOSTER and Others. [*581

The "interruption" which defeats a prescriptive right under stat. 2 & 3 W. 4, c. 71, is an adverse obstruction, not a mere discontinuance of user by the claimant himself.

In a case under section 1, if proof be given of a right enjoyed at the time of action brought, and thirty years before, but disused during any part of the intermediate time, it is always a question for the jury whether, at that time, the right had ceased or was still substantially enjoyed.

The inference to be drawn from the facts proved, on this point, is not a "presumption" within sect. 6.

Where a commoner had ceased to use the common during two years of the thirty, having no commonable cattle at the time, but had used it before and after:

Held, that a jury were justified in finding a continued enjoyment of the right during thirty years.

CASE. The declaration stated that the plaintiff, "before and at the time of the committing," &c., "was, and from thence hitherto hath been, and still is" possessed of a messuage and land, situate, &c.; and, by reason thereof, during all the time aforesaid of right ought to have had, and still of right ought to have, common of pasture for all his commonable cows and heifers levant and couchant, &c., in a certain place, waste, or common, called Newby Moor, in the parish of Clapham in Yorkshire, every year, at all times, &c., as to the said messuage, &c., appertaining, &c.: the count then alleged a disturbance by driving plaintiff's cattle off the common.

Pleas. 1. Not guilty. 2. That plaintiff was not lawfully possessed of the said messuage and land, &c., in manner, &c. Conclusion to the country. Issue thereon. 3. That plaintiff ought not, by reason of the possession of the said supposed messuage and land, of right to have had, nor still of right ought, &c., common, &c., in the said place, &c., in manner, &c. Conclusion to the country. Issue thereon.

On the trial, before Lord DENMAN, C. J., at the York Summer assizes, 1841, it appeared that the plaintiff claimed the above mentioned right of common in respect of a farm called Mealingscales, of which he was tenant: and he proved a continued user of such right by the tenants of Mealing-
*582] scales for forty years next *before the commencement of this action, except that, about eighteen years back, the owner of the farm had it, for two years, in his own hands, and, having no commonable cattle, made no use of the common during that period. For the defendants it was urged that this cesser of enjoyment during two years defeated the plaintiff's case, which required that the profit should, according to stat. 2 & 3 W. 4, c. 71, ss. 1 and 4, "have been actually taken and enjoyed," "without interruption for the full period of thirty years," "next before" action brought. The Lord Chief Justice overruled the objection, giving leave, however, to move to enter a nonsuit; and he left it to the jury to say whether the tenants of Mealingscales had, substantially, enjoyed the right of common for thirty years next before the commencement of the action. Verdict for plaintiff. *Cresswell*, in the ensuing term, obtained a rule to show cause why a nonsuit should not be entered, or why there should not be a new trial on the ground that the verdict was against the weight of evidence.

Dundas and *Wortley* now showed cause. There was a substantial enjoyment of the right during thirty years next before action brought. The tenants of Mealingscales turned on cattle while they had them, and ceased exercising the right only when they had no occasion for it. The statute requires an "interruption" to defeat the title; but that word implies an adverse act of obstruction, not a voluntary intermission. Sect. 4 provides "that no act or other matter shall be deemed to be an interruption," unless "submitted to or acquiesced in for one year after the party interrupted shall
*583] have had or shall have notice thereof, and of the person *making or authorizing the same to be made:" language wholly inapplicable to the case of a voluntary cesser. The words of sect. 1, referring to the "right of common" previously mentioned in that clause, are that "such right" shall have been enjoyed; the language differing, so far, from that of sect. 2, where it is required that "such way or other matter" shall have been enjoyed. Common is not, in its nature, a thing to be enjoyed continuously: the user must be limited by seasons, and must depend upon the quantity and description of stock which the commoner possesses. The right, therefore, may continue, though enjoyment of the common be suspended. In *Bailey* v. *Appleyard*, 8 A. & E. 161, and note p. i., in same vol., the enjoyment of pasture was adversely obstructed by a physical impediment; and PATTESON, J., there left it to the jury to say whether there had been, substantially, an enjoyment for thirty years, or for twenty-eight only. TINDAL, C. J., in *Flight* v. *Thomas*, 11 A. & E. 688, notices that "the fourth section uses the expression of the 'party interrupted;' which may well denote that the interruption is an obstruction to the exercise of the right, and not necessarily an interruption of the period." And PARKE, B., in the course of the argument, expressed himself to the same effect.(a) In *Payne* v. *Shedden*, 1 M. & Rob. 382, PATTESON, J., held that there might be an enjoyment, without actual exercise, of a right of way; saying, "If there be ten years' enjoyment of a right of way, and then a cessation under a temporary agreement for another ten years, yet this may be a sufficient enjoyment of the
*584] old right for twenty years to make it indefeasible under the statute; for the *agreement to suspend the enjoyment of the right does not

(a) 11 A. & E. 699.

extinguish, nor is it inconsistent with, the right." And he added that the user, by agreement, of a substituted line between the original termini might "be considered as substantially an exercise of the old right, and evidence of the continued enjoyment of it." The defendants here may rely on *Parker* v. *Mitchell*, 11 A. & E. 788, where a mere non-user for four years was held to defeat the case of prescriptive title. But there the question was not much considered; the decision turned on sect. 2, not sect. 1, the right claimed being a way, not a right of common; and there had been an absolute cesser for the four years, not accounted for, as the intermission is here, and without resumption of the right. Further, the plaintiff here was not obliged to rely upon the statute, but might use the evidence as establishing a prescriptive right as at common law, there being no proof on the other side that his enjoyment had commenced within legal memory. (The arguments on the motion for a new trial are omitted.)

W. H. Watson and *Hugh Hill*, contrà. The plaintiff's case, at the trial, was rested on the statute, not on a common law prescription. Then, the common, here, was not "actually" "enjoyed" for thirty years next before action brought. It could not be so if there was a cesser for two years during that period, whether by interruption or from any other cause. The argument for the plaintiff would apply even if the years in which no user appeared were the first two of the thirty, at least where a previous enjoyment could be shown; or if the right had been intermitted for seven years; or had been *exercised only during the first and thirtieth years, and intermitted during the other twenty-eight. It is hard to say where a line could be drawn. [*585] [Lord DENMAN, C. J. The same difficulty may be raised by asking how short a period will defeat the right. PATTESON, J. Would you say that it must be exercised every hour of the day?] It must at least be supposed that a right of common will be used at certain periods of the year. [Lord DENMAN, C. J. By those who have cattle to turn on.] Sect. 6 excludes all presumption in favour of any claim from proof of the right having been enjoyed for "any less period of time or number of years" than the previous clauses require in the respective instances. There must be an actual taking and enjoying of the right, profit or benefit for the entire period, without interruption. As to this, *Parker* v. *Mitchell* is in point. It is true that the plea there alleged an enjoyment for forty years next before the commencement of the suit: but the ground of decision was that a period of non-user defeated the prescriptive right. [PATTESON, J. The case turned on sect. 4, which requires the time to be computed back from the commencement of the action. That could not be done, because the user was not brought down by proof to the time of commencing the action. The present case does not turn on sect. 4.] *Payne* v. *Shedden* shows that the right may be exercised constructively, but not that all exercise of it may be dispensed with. [PATTESON, J. I thought there that, if I have a right over another's land, and he, for a time, gives me a consideration for ceasing to exercise it, I enjoy the right while receiving the compensation. The Court *of Common Pleas in *Hall* v. *Swift*, 4 New Ca. 381, lay down the law in a manner which seems at variance with *Bailey* v. *Appleyard*: but the case seems to have received slight consideration; and the language of the act is not discussed.] [*586] In principle, the shortest intermission should be as fatal to the right as the longest: but, if it were necessary to draw a line, the manner in which the words "year" and "years" are used in sects. 4 and 6, and other parts of the statute, seems to point out that, if an entire year be wanting to the requisite period, then at least the right is incomplete.

The act, being express in its language, must receive the literal construction notwithstanding any inconvenience or inconsistency which may be suggested as the consequence: this is expressly laid down by Lord Abinger, C. B., in *Wright* v. *Williams*, 1 M. & W. 77, 98, 99; S. C. Tyrwh. & Gr. 375, 399. There is no ground for the distinction suggested on the other side between the words "right, profit, or benefit" "taken and enjoyed," in sect. 1, and "way or other matter" "enjoyed," in sect. 2. The clauses merely introduce separate provisions for the case of a profit à prendre and that of an easement.

Lord Denman, C. J. I am of opinion that the thirty years' enjoyment was sufficiently made out. There must be some interval in the enjoyment of all such rights; and it must be a question for the jury, in each case, whether the right was, substantially, enjoyed for the requisite period. It has been ingeniously argued that a thirty years' enjoyment cannot have
*587] taken place where *there has been a two years' intermission. But the words of sect. 1, are "without interruption," not "without intermission." And the intermission must be a matter open, in every case, to explanation. Sect. 6 enacts that no presumption shall be made in favour of any claim, on proof of the right having been exercised for a less period than that prescribed by the act in the particular case. But that provision is meant only to encounter presumption, from an exercise of the right during such an imperfect period, that it was exercised in older times. The effect of the clause is, that a claimant, proving enjoyment for less than the specified time, shall not, on that ground, carry back his right to a period before that which his proof extends to. But this does not effect the mode of proof: and, where actual enjoyment is shown before and after the period of intermission, it may be inferred from that evidence that the right continued during the whole time.

Patteson, J. I think there is no difficulty in the construction of the statute. "Interruption," in sect. 1, must clearly mean an obstruction by the act of some other person than the claimant, not a cessation by him of his own accord. And, when, especially, we refer to sect. 4, which provides that no act shall be deemed an interruption unless "acquiesced in" for one year after the party interrupted shall have had notice, there cannot be the slightest doubt on the point. Indeed the defendants' counsel did not rest the case so much on interruption as on sect. 6. By sect. 4, it is enacted that the period to be relied upon must be one immediately pre-
*588] ceding the commencement of the action; and sect. 6 *excludes any presumption from proof of the exercise of right during a less period than the previous clauses require. Formerly an immemorial enjoyment was presumed from proof going back to the extent of living memory; now, by sect. 6, that is no longer permitted. But no difference is made as to the proof of an intermediate user. It is always for the jury to say whether, during any intermediate part of the period, an actual enjoyment has been had. How many times the right has been exercised is not the material question, if the jury are satisfied that the claimant exercised it as often as he chose. It is suggested that the argument for the plaintiff might apply equally if there were a cesser for seven years. I am not prepared to say that it would not. It might be that, under the circumstances, the party had no occasion to use the right. The question would always be for the jury. So long an intermission would be a strong piece of evidence against the continued right: but it would be for them to determine. The act makes no provision for such a case, sect. 6 relating only to the non-pre-

sumption of right at a period antecedent to that over which the proof extends.

WILLIAMS, J. I am of the same opinion. "Interruption" means an obstruction, not a cesser or intermission, or any thing denoting a mere breach in time. There must be an overt act, indicating that the right is disputed. Before the statute, in cases relating to common, it was very usual to explain the ceasing to turn on cattle by the fact that there were not, at the time, commonable cattle to turn on. No necessary inference arises from a cesser during two, three, or seven years. *In this particular case enjoyment for the requisite period was abundantly [*589 made out.(a) Rule discharged.

(a) Wightman, J., had left the court.

The QUEEN v. THOMAS and Another, Chapelwardens of HAWORTH.

By custom in a parish, church rates were made by the parishioners of the whole parish in vestry assembled, but were paid in certain customary proportions by the several townships of which the parish was composed.

The court refused a mandamus to compel the officers of a township to raise the proportion, in the township, of an alleged rate which had been made by the churchwardens and minority of the parishioners in vestry, after the majority had refused the rate with the intention, as was suggested, of having no rate at all.

Although the vestry meeting was held in obedience to a monition from the Consistory Court, whereby the churchwardens and parishioners were admonished to hold the meeting and lay a rate.

SIR *W. W. Follett*, Solicitor General, in last Easter term, obtained a rule, calling on Enoch Thomas and Robert Taylor, chapelwardens of the township of Haworth, in the parish of Bradford, in Yorkshire, to show cause why a mandamus should not issue, commanding them to make and assess a rate upon the inhabitants of the township, for levying and raising the sum of 76*l*. 12*s*. 10*d*., being the proportion payable by the said inhabitants of the church lay or rate of 383*l*. 4*s*. 2*d*., made, on 14th May, 1841, upon the inhabitants of the parish, to repay the necessary repairs and expenses of the parish church of the said parish; and to proceed to collect the said sum of 76*l*. 12*s*. 10*d*.; and, when collected, to pay the same over to the churchwardens of the township of Bradford, in the said parish.

The case on the part of the crown was, that Haworth was one, and Bradford township another, of several townships of the parish of Bradford, in the West *Riding of Yorkshire. That, by immemorial custom,(a) all [*590 church rates laid on the parish by the body of the parishioners of the whole parish in vestry assembled were raised in the several townships in certain definite proportions, and paid over to the churchwardens of the township of Bradford, who, so far as regarded the parish church, acted as churchwardens of the whole parish. Then the proportion always paid by Haworth was one-fifth of the whole. That it was the duty of the chapelwardens of Haworth to raise and collect this fifth, and pay it over to the churchwardens of Bradford township. That a decree, dated 31st March, 1841, had issued from the Consistory Court of York, against the churchwardens of the township of Bradford and the parishioner of the parish, commanding them to show cause why a monition should not issue against them to take the necessary steps towards putting the parish church in repair, and

(a) The custom was before the court in *Stead* v. *Heaton*, 4 T. R. 669, and in *Rex* v. *The Chapelwardens of Haworth*, 12 East, 556, and also in *Regina* v. *Pickles*, post, note (b) p. 599.

(amongst other things) to call a vestry meeting for making a rate for such repair, and also against the parishioners to meet and make the rate, with intimation that, if cause were not shown, the vicar general and official principal, or some other competent judge, would decree the monition to issue. That, no cause being shown, the monition issued, on 6th May, 1841, to the churchwardens and parishioners accordingly, naming 14th May then instant for the vestry meeting; and the churchwardens were further monished to return the names of the parishioners, present at the vestry, who should refuse to make the rate, to the vicar general and official principal, or his lawful
*591] surrogate, *&c. That the churchwardens, in obedience to the monition, summoned a vestry meeting for the 14th May; which was accordingly held. That, at the meeting, one of the churchwardens proposed a resolution for a rate, which was seconded, but negatived by a majority. That the intention of the majority was to refuse a rate altogether. That the churchwardens and a portion of the parishioners then present, being a minority of the meeting, thereupon laid the rate which was the subject of this motion. That the chapelwardens of Haworth had been called upon to collect and pay the one-fifth, but had not done so.

The affidavits in answer stated that, upon the churchwardens and minority laying the alleged rate, the majority of the meeting protested against it. Two rateable parishioners of Haworth township deposed that they had threatened, and did intend, to institute legal proceedings against any party attempting to enforce the alleged rate: and, by another affidavit, it appeared that a parishioner of the township of Bradford had been summoned before justices, under stat. 53 G. 3, c. 127, s. 7, and had been by them ordered to pay his rateable proportion of the sum due from Bradford township; that, upon his not doing so, a warrant had issued from the justices, under which his goods had been seized; and that, under the advice of counsel, he had brought an action for such seizure, which action was now depending.(a)

The affidavits in answer also disputed some of the facts relied upon for
*592] the crown, and stated other *matters by way of defence; but, as the court, for the purpose of the point decided, assumed only the truth of the facts above stated, it is considered sufficient to confine the report to these, and omit the argument as to the other points in dispute.

In last Trinity term,(b)

Jervis, *Baines*, and *T. F. Ellis* showed cause. This is an attempt to compel the chapelwardens of Haworth to try, at their own expense, the question whether, when a majority of a vestry meeting refuse to lay a rate in obedience to the order of an ecclesiastical court, the churchwardens and the minority have the power to raise it. The question seems to have originated from a passage in the judgment in *Veley* v. *Burder*, 12 A. & E. 265, 308,(c) where the learned judges of the Court of Exchequer Chamber felt it expedient to volunteer an unanimous expression of an absence of all opinion upon this point, which, as they stated, was not then before them. Since that judgment was delivered, the question has been raised in the Consistory Court of London, in the case of *Veley* v. *Gosling*, 3 Curt. Ecc.

(a) *Dale* v. *Pollard and Others*, in replevin. The action was tried before Lord Denman, C. J., at the Yorkshire Summer assizes, 1842; when a verdict was taken for the plaintiff, subject to a special case.

(b) June 11th, 1842. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js

(c) See post, p. 595.

Rep. 253, 266,(a) where Dr. Lushington decided that the churchwardens and minority had no such powers. If the defendants were here called upon in a dispute affecting themselves only, the court would perhaps require them to return the matter of law: but, where parties are called on to proceed against others, a mandamus never goes if the right to proceed be doubtful; *Rex* v. **Dyer*, 2 A. & E. 606; *Rex* v. *Greame*, 2 A. & E. 615; *Rex* v. *Morgan*, 2 A. & E. 618, note (a); *Rex* v. *Mirehouse*, 2 A. & E. 632. [*593] In *Rex* v. *Dyer*, LITTLEDALE, J., said: "It is a pity that acts of parliament like that in question do not contain a clause indemnifying magistrates for whatever they shall do in obedience to the mandate of this court: the court would then take upon itself to see whether the thing required were within the provisions of the act."(b) This shows that the mandamus will not protect the parties from an action; and the affidavits show that an action is probable. In *Burder* v. *Veley*, 12 A. & E. 233, and *Veley* v. *Burder*, 12 A. & E. 265, the rate was held to be not simply informal or bad, but absolutely void: and the court held that the plaintiff was entitled to a prohibition, and ought not to be put to his appeal in the spiritual court, because there was no rate upon which the spiritual court could adjudge; therefore, the parties setting in motion any process to enforce such a rate would be liable to an action, as in *Painter* v. *The Liverpool Gas Company*, 3 A. & E. 433. The law, however, since the decision in *Veley* v. *Gosling*, is worse than doubtful. It appears therefore that the defendants cannot safely obey: and it is not reasonable to call upon them to make a return, merely to try the question, in a case where they are without the option of safely complying with the command in the first instance. If it be argued that the prosecutors are without any other remedy, the answer is, first, that this is no ground for granting a remedy which will work injustice, and is contrary to precedent; and, *secondly, that there are other remedies. If the duty be a legal [*594] one, the defendants may be indicted; if a spiritual one, they will be liable to spiritual censures. The spiritual censure is the specific punishment for the breach of an ecclesiastical duty: if this remedy is now of less force than formerly, that does not authorize this court in introducing a new principle: it must be left to the legislature, if the established proceeding be ineffectual, to provide fresh modes of enforcing the duty or punishing the neglect.

Sir *W. W. Follett*, *Wortley*, and *Tomlinson*, contrà. The mandamus is not asked for on the ground that the point is free from difficulty: it certainly is one of great doubt. But, the Court of Exchequer Chamber having voluntarily suggested the point, the question now is whether this court will refuse to put in motion the only process which will effectually settle the law. The parishioners, if a valid rate has been laid, have a clear right to call on the officers to perform their duty by raising it. The present defendants can incur no risk. They may raise the question by a special return: the law will then be solemnly settled: and, after that, if the decision be in favour of the rate, they may safely obey the peremptory mandamus; if against the rate, they will not be called upon to act farther There is no remedy in the Spiritual Court, because the whole proceeding is founded on a custom: and an indictment can only inflict punishment for the supposed neglect, not enforce a specific performance of the duty. In *Rex* v. *The Chapelwardens of Haworth*, 12 East, 556, a mandamus would

(a) See the same case in the Arches Court, 3 Curt. Ecc. Rep. 304, where, on appeal the judgment of Dr. Lushington was reversed by Sir H. Jenner Fust, after the decision of the case in the text.

(b) See now stat. 6 & 7 Vict. c. 67.

*595] have issued, though the custom was impugned, if the rate *had not clearly been bad, as being retrospective. In *Rex* v. *Simpson*, 2 Selw. N. P. *Mandamus*, 1071, (10th ed.,) a mandamus issued to swear in a churchwarden on a doubtful title. But, further, if the chapelwardens, under stat. 53 G. 3, c. 127, s. 7, call any recusant parishioner before the justices, the validity of the rate must be admitted or disputed. If it be admitted, the decision is final, and the chapelwardens of the township, or churchwardens of Bradford township, will safely levy under the warrant of the justices: if it be disputed, the case must go to the Spiritual Court; in which case also the chapelwardens will be free from any risk of an action. But, until the chapelwardens act, there are no means of raising the question. *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the court.

Supposing all preliminary difficulties surmounted, we are required to enforce the collection of a rate made on the principle thrown out by TINDAL, C. J., in the Court of Exchequer Chamber, when he pronounced the judgment affirming that of this court on the great question respecting church rates, raised in *Burder* v. *Veley*, 12 A. & E. 233.(*a*) His lordship, after giving the reasons which decided the unanimous opinion of the judges present against the rate then questioned, made the following observations. "We do not enter into the discussion, whether a rate so made by the churchwardens, at the parish meeting where the parishioners were then met, would have been valid or not; or how far such case may be
*596] analogous to that of the members of a corporation aggregate, who, *being assembled together for the purpose of choosing an officer of the corporation, the majority protest against, and refuse altogether to proceed to, any election; in which case they have been held to throw away their votes, and the minority, who have performed their duty by voting, have been held to represent the whole number. It is obvious, indeed, that there is a wide and substantial difference between the churchwardens alone, or the churchwardens and minority together, making a rate at the meeting of the parishioners where the refusal takes place, and the churchwardens possessing the power of rating the parish by themselves at any future time, however distant. It is unnecessary, however, to discuss this point, as the facts of the present case do not bring it before us; it is sufficient to say, whilst we give no opinion upon it, we desire to be understood as reserving to ourselves the liberty of forming an opinion whenever the case shall occur."

Now church rates are matters of ecclesiastical cognisance: the proper place, therefore, to originate an argument on this doctrine, a doctrine whereon the judges of the court of error gave no opinion, but scrupulously reserved the consideration for a fit opportunity, is the Spiritual Court. But it happens, in the present instance, that the township of Haworth appears to be contributory by custom to the church rate imposed on the whole parish of Bradford in which it is situate.

This custom may undoubtedly be the means of bringing into the temporal courts matters that could otherwise have originated in none but a spiritual jurisdiction. The learned counsel for the rule urged us to make it absolute in order that the township officers, acting in obedience to our
*597] writ, may take some step towards enforcing *the rate, and may be resisted, and so the doctrine may be brought hither for our consideration; or rather, perhaps, in order that the officers of the parish at

(*a*) See *Veley* v. *Burder*, 12 A. & E. 265, 308.

large may proceed in the spiritual court against defaulters, and so have the doctrine regularly discussed before that its proper forum.

If the writ should go for the former purpose, it will confessedly involve the chapelwardens in a litigation attended with the utmost doubt and difficulty: and no instance, though called for, was adduced, of a mandamus issuing to compel any parties to place themselves in such a position. If the writ should go for the latter purpose, we should in the result enable parties, at their own request indeed, to originate proceedings in like manner doubtful and uncertain, and should create a new precedent, not only in that respect, but also as an example of ordering a questionable act to be done that it may lead to the adoption of proceedings in another court endowed with the power of deciding upon its legality.

But there are other considerations. The Lord Chief Justice, in the sentence quoted, raised an entirely novel point, in which he studiously avoided committing himself or any of his brethren. The distinction between this imaginary case and the actual case then calling for judgment was hardly known: no argument or remark had been founded on it, either in this court or in the Court of Error. Looking back to the allegations in the libel, we do indeed discover that a rate was refused on the 6th June, and the rate was made on the 10th. Certainly this was the act of the churchwardens taking upon themselves alone to impose the rate, when a majority had voted against it on a former occasion, and *not the act of a minority assuming to perform a duty declined by the majority then present. When [*598 that case occurs, all the judges who acquiesced in the Chief Justice's remark are free to exercise their judgment on this new proposition: and we should have deemed it wrong to deprive ourselves of the same freedom by any proceeding of our own not forced upon us by an unavoidable necessity, even if nothing had since happened.

But a most material change has intervened. The dictum was uttered with full knowledge that it would in all probability be acted upon, and so questioned in the competent court. The hint was taken: the rate was imposed in the same parish by the churchwardens and the minority: it has been the subject of a suit in the Spiritual Court, which has declared it illegal.(a)

Against that decree, most likely, an appeal will be prosecuted: but, till it is reversed, we are as much bound by its authority on the present occasion as we should have been by a judgment of either of the other courts of common law prohibiting the ecclesiastical judge from proceeding with a suit, if his decree had been in favour of enforcing the rate.

We cannot, then, make absolute a rule for mandamus for the purpose of calling in question in some other Spiritual Court the decision of another such court of very high authority, which, in the exercise of a similar jurisdiction, proclaims the illegality of the very thing of which we are desired to compel the execution. Rule discharged.

*On the following day, (June 25th,) the court stated that the rule [*599 was to be discharged without costs.(b)

(a) *Veley* v. *Gosling*, 3 Curt. Ecc. Rep. 253, in the Consistory Court of London. Judgment reversed in the Arches Court, and the rate held good, (25th March, 1843,) 3 Curt Ecc. Rep. 304.

(b) The following is the case referred to at note (a), p. 590, ante.

The QUEEN v. PICKLES and ANDERSON.

The churchwardens of a parish church, having made a church rate, obtained a rule nisi for a mandamus to the officers of a township within the parish to make a rate on the inhabitants of that township, for raising a specified portion of such church rate The affidavits showed a custom that the township and another should jointly con

tribute twice that portion, but did not show how much of the amount was contributable by each. The court discharged the rule with costs, considering the defect substantial, and refusing to mould the rule.

The churchwardens having afterwards, without reference to the former proceedings, obtained a second rule on fresh affidavits, showing that the two townships contributed in equal portions, the court discharged the rule with costs.

The rule against making a second application on fresh materials without new facts, after a first application has failed, applies to public officers as well as individuals.

Cresswell, in Michaelmas term, 1841, obtained a rule calling on William Pickles and William Anderson, the chapelwardens of the township of Wilsden, in the parish of Bradford, Yorkshire, to show cause why a mandamus should not issue, commanding them to make and assess a rate upon the inhabitants of the said township for levying and raising the sum of 13*l.* 12*s.* 6*d.*, being the moiety, payable by the said inhabitants, of the sum of 27*l.* 5*s.*, the customary share or proportion payable by the said inhabitants and the inhabitants of the township of Allerton, in the said parish, of the church lay or rate of 383*l.* 4*s.* 2*d.*, made, on the 14th day of May then last, upon the inhabitants of the said parish, to defray the necessary repairs and expenses of the parish church, &c.; and to proceed to collect the same, and, when collected, to pay the same over to the churchwardens of the township of Bradford, in the same parish.

The application was made by the churchwardens of Bradford township. The affidavits in support of the rule (so far as is material to the present decision) stated the same facts as the case in the text: and it was deposed that the township of Haworth, by the custom, paid one fifth of the whole rate, the township of Bradford one third of the remaining four fifths, the townships of Allerton and Wilsden together two fifteenths of the remainder (or $\frac{16}{225}$ of the whole,) and other townships in proportions specified. A demand in writing had been made upon "each of the respective chapelwardens of the said several townships or districts," according to the affidavits, which set out the documents, leaving blanks for the particular sums; and it was deposed that these blanks and the sum due were "properly filled up:" but the amount was not stated in the affidavits.

In Hilary term, (20th January,) 1842,

Sir *W. W. Follett*, Solicitor General, (with whom were *Baines* and *T. F. Ellis*,) showed cause; and (besides other objections) pointed out that the rule did not follow the custom, inasmuch as, by the custom, the townships of Wilsden and Allerton jointly paid the two fifteenths, but there was nothing to show that each paid one fifteenth. That the custom, as deposed to, would authorize only raising 27*l.* 5*s.* by an equal rate *throughout the two, whereas the mandamus, as prayed for, would authorize raising 13*l.* 12*s.* 6*d.*, by rate on Wilsden alone, which would be unjust, unless the value of the rateable property in each happened to be exactly the same. That this application would not be entertained at all, unless it were grounded on a custom; *Rex* v. *The Churchwardens of St. Peter's, Thetford*, 5 T. R. 364; *Rex* v. *Wilson*, 5 D. & R. 602. That the two townships ought to have been called upon jointly to contribute the two fifteenths; but the township of Allerton was no party to the rule: and that the officers of Allerton might have good cause to show, or might have complied.

*600]

The court then called on the other side to answer this objection.

Cresswell and *Tomlinson*, in support of the rule. It is not necessary to call upon the officers of Allerton by the same rule as that which calls on the officers of Wilsden. The former have no authority in Wilsden: the officers of each township must perform their duty severally. Even if all had to perform the duty jointly throughout the two townships, the rule may be against those who have made the default. If the chapelwardens of Wilsden are ready to perform their duty, but cannot obtain assistance from those of Allerton, that may be a good return to the mandamus. Or, if the officers of Allerton are willing to act, the mandamus may go against the officers of Wilsden alone to compel them to join. [Lord DENMAN, C. J. I do not know that. I think that, where one essential party refuses to act, but the other is willing, the mandamus usually goes against both.] That may be so where the duty is not, as here, purely ministerial. [PATTESON, J. But whether you direct the mandamus to the officers of one or both townships, it is to levy a certain amount; and you do not show that the inhabitants of Wilsden are liable to this amount.] The rule in that respect may be moulded. [PATTESON, J. But what is the mandamus to be?] To assess and levy on the township its usual proportion of the rate: what that is, must be in the knowledge of the township itself.

Per Curiam. (Lord DENMAN, C. J., PATTESON, COLERIDGE, and WIGHTMAN, Js. That is very uncertain. If we are called upon to act on a custom, we must see what the customary rights of the parties are. The rule must be discharged.

Sir *W. W. Follett*, Solicitor General, then applied for costs.

Cresswell submitted that the objection was merely technical.

Lord DENMAN, C. J. I think it is a substantial objection. Rule discharged with costs

*Afterwards, in Easter term, 1842, Sir *W. W. Follett*, Solicitor General, obtained (in the Bail Court) a rule to the same effect against the same parties, [*601 on fresh affidavits, stating the custom to be that the townships of Wilsden and Allerton paid the two fifteenths in equal moieties.

In Michaelmas term, 1842, (November 25th,)

Jervis (with whom were *Baines* and *T. F. Ellis*) showed cause, (in full court,) and contended that the rule must be discharged with costs, no new facts having occurred since the discharge of the former rule. He referred to *Regina* v. *The Manchester and Leeds Railway Company*, 8 A. & E. 413, 419; and pointed out that the rule there was discharged without costs, because the court, having their attention drawn to the fact of the former refusal, had, upon consideration, nevertheless granted the second rule nisi: whereas here the rule had been obtained without mention of the former proceedings. (The court then called on the other side.)

Sir *W. W. Follett*, Solicitor General, *Wortley* and *Tomlinson*, in support of the rule. This is an application by the churchwardens of the parish church, not in their individual character, but in the discharge of their public duty. The rule against a second application on fresh affidavits may be reasonable where personal interests only are concerned: but a public duty, such as that of repairing a parish church, is not to be kept unfulfilled because a technical error is made on a first application, by omitting to state a fact which the court thinks ought to have appeared.

Lord DENMAN, C. J. I think the case is exactly within the rule, which is a very wholesome one. Public officers are at least as much bound as private individuals to come prepared with proper materials in the first instance.

WILLIAMS and COLERIDGE, Js., concurred. Rule discharged with costs.

*The QUEEN v. DALBY. [*602

Where a township, being part of a parish, is called upon by mandamus to pay a definite customary proportion of a church rate laid for the whole parish, it must appear that the inhabitants of the township were summoned to consider the rate; for, if the custom requires such summons, fulfilment of that requisite is essential; and, if it does not, it is a bad custom.

SIR *John Bayley*, in last Hilary term, obtained a rule, calling on Thomas Dalby, the chapelwarden of the hamlet, chapelry or township of Foston, in the parish of Long Bennington in Lincolnshire, to show cause why a mandamus should not issue, commanding him to make and assess a rate upon the inhabitants of the said hamlet, &c., for levying and raising the sum of 6*l*., the customary share or proportion, payable by the inhabitants, of a church lay or rate made, on the 14th October last, upon the inhabitants of the said parish, for defraying the necessary expenses of repairing, &c., the parish church of the said parish, and to proceed to collect the said sum of 6*l*., and, when collected, to pay the same over to the churchwardens of the said parish. The case on the part of the crown was an immemorial custom in the parish to make a rate on the inhabitants of the parish, a fixed proportion being payable by the inhabitants of Foston, namely three eighths.

In the last term,(a)

M. D. Hill showed cause, and Sir *John Bayley* supported the rule. Several points, raised upon the affidavits, were discussed: but the court decided on one ground only, the nature of which will appear from the judgment. *Cur. adv. vult.*

*Lord DENMAN, C. J., now delivered the judgment of the court. [*603

In this rule, supported by Sir *John Bayley*, we were struck by some imperfections of language in the affidavit: but I believe there is a substantial defect beyond all cure. Bennington (b) imposes the rate; Foston

(a) June 11th, 1842. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.

(b) On the affidavits, there was a dispute whether, in fact, Foston and Long Bennington were distinct parishes, or Foston was a part of the parish of Long Bennington.

pays a proportion. But it does not appear that the Foston people were summoned to consider of the rate; which would make the rate invalid, if the custom required it. If the custom does not require it, the custom cannot be legal. Rule discharged.

SIR HARFORD JONES BRYDGES, Bart., v. LEWIS.

Defendant being tenant under a lease not sealed, the lessor assigned the reversion to plaintiff, who gave notice to defendant of the assignment. Defendant continued to occupy, and afterwards was sued by plaintiff for breach of certain terms of the lease. The declaration (in assumpsit) alleged that defendant became tenant to plaintiff under the terms, and promised to perform them: the plea denied that defendant became tenant under the terms; and there was no plea of Non assumpsit.

Held, on motion to enter a nonsuit, that the jury were warranted in finding for the plaintiff, and that the existence of a contract was not put in issue.

The defendant had originally pleaded also Non assumpsit, but, a judge at chambers having refused to permit this plea with the other, on the ground that both raised the same questions, elected to retain the plea denying the tenancy. The court, after the above decision, refused to disturb the verdict for the purpose of enabling the defendant to raise the question of contract on Non assumpsit, though they considered that both pleas ought to have been originally allowed.

THIS was an action tried before GURNEY, B., at the Hereford Spring assizes, 1841. The following statement of the case was given by the Lord Chief Justice in delivering judgment in this court on May 31, 1842.

"This was an action of assumpsit, in which the plaintiff declared that
*604] the defendant had become tenant *to him upon certain terms, (stating them,) and, in consideration thereof, promised to perform those terms. The declaration then alleged several breaches. The defendant pleaded, first, that he did not become tenant to the plaintiff upon the terms stated; and then other pleas traversing the breaches.

"The plaintiff put in a lease for seven years, from 25th March, 1836, not under seal, containing the terms stated in the declaration, dated 23d February, 1835, and made between Benjamin Hawkins, agent for Ann Hawkins, and William Holstein and Ann his wife, of the one part, and the defendant of the other part; also indentures of lease and release, dated 14th and 15th January, 1839, whereby Ann Hawkins, widow, and Ann Holstein, widow, conveyed the premises to the plaintiff in fee; also a notice of the 28th of January, 1839, from the plaintiff to the defendant, of such conveyance.

"Hereupon the learned judge was asked to nonsuit, upon the ground that the action should have been in the names of the original lessors. The learned judge refused, but reserved leave to move for a nonsuit. The case proceeded: and the jury found for the plaintiff on the issue as to the tenancy, and on some of the breaches, but on other breaches for the defendant."

In Easter term, 1841, Sir *John Bayley* obtained a rule nisi for a nonsuit.

In last Easter term,(a)

Sir *W. W. Follett*, Solicitor General, *Whateley* and *Whitmore*, showed cause. First, it is not settled that stat. 32 H. 8, c. 34, is confined in its application
*605] to *instruments under seal. (On this point the court pronounced no opinion: *Glover* v. *Cope*, 3 Lev. 326, and Selwyn's Nisi Prius, *Covenant*, V. (page 481, 10th ed.), were referred to in argument.) But, supposing the statute to be inapplicable, at any rate the jury were entitled

(a) April 25th, 1824. Before Lord Denman, C. J., Patteson, Williams, and Wightman, Js.

to find, from the fact of the defendant's continued occupation after the assignment of the reversion to the plaintiff, that a tenancy under the plaintiff was continued on the terms of the original lease. By stat. 4 Ann. c. 16, s. 9, no attornment was necessary. [PATTESON, J. What consideration could there be from the plaintiff, who had no power to turn the defendant out?] That point was not made. But the parties might make a contract for a fresh tenancy on the old terms; and for such new contract there would of course be the consideration of the defendant being permitted to occupy. *Birch* v. *Wright*, 1 T. R. 378; *Buckworth* v. *Simpson*, 1 C. M. & R. 834; S. C. 5 Tyrwh. 344, are instances of such a contract. [PATTESON, J. The landlord in those cases had the power of turning the tenant out.] The issue here is not on the contract, which is admitted on the record, but on the fact of the tenancy, which is a legal result of the original lease and the assignment of the reversion.

R. V. Richards, contrà. First, stat. 22 H. 8, c. 34, is confined, as the recital shows, to deeds under seal. Secondly, the tenancy, which is denied, could be created afresh only by the contract of the parties, express or implied. The tenancy therefore cannot be proved without proof of the legal requisites of a contract. Now there *is no consideration, as was pointed out from the bench. Besides, there is no mutuality: for the plaintiff, having executed no lease, would not be bound. [*Whateley* referred to *Noke* v. *Awder*, Cro. Eliz. 373, 436, cited in *Lincoln College Case*, 3 Rep. 53 *a*, 63 *a*.] [*606

Cur. adv. vult.

Lord DENMAN, C. J., in the last term, (May 31st,) delivered the judgment of the court. After stating the facts, as in pp. 603, 604, antè, his lordship proceeded as follows.

The rule nisi was obtained, and has been argued.

There is no doubt but that the defendant, by the conveyance in January, 1839, and by the operation of stat. 4 Ann. c. 16, s. 9, became tenant to the plaintiff without any formal attornment. Nor can it be doubted that he was tenant upon the terms contained in the lease under which he entered.

The first issue was therefore proved in point of fact. There is no plea of Non assumpsit, nor any other which raises any question as to the existence of a contract between the plaintiff and the defendant.

Therefore, without giving any opinion as to the construction of the statute 32 H. 3, c. 34, or any point of law at all, we must say that this rule for entering a nonsuit must be discharged. Rule discharged.

R. V. Richards, in the same term, obtained a rule to show cause why the rule discharging the above rule nisi should not be discharged, or a new trial be had, with leave for the defendant to plead the general issue, or *why a nonsuit should not be entered. By the affidavits in support of the rule it appeared that the defendant had originally applied for leave to plead Non assumpsit, besides the pleas above mentioned; but that PATTESON, J., the judge at chambers, had stated his opinion that the plea denying the tenancy and that of Non assumpsit could not both be wanted, as they put the same point in issue, and that the defendant must elect to strike out one of the two; and he ordered accordingly: whereupon the defendant struck out the plea of Non assumpsit. [*607

In the same term,(*a*)

Sir *W. W. Follett*, Solicitor General, *Whateley* and *Whitmore*, showed cause. The defendant, when put to his election, chose to plead a plea for which there was no pretence in fact. [PATTESON, J. I should have allowed

(*a*) June 13th. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.

both pleas had I known the whole case: at least I ought to have done so.] The plea of Non assumpsit would have put the tenancy in issue, as well as the promise; *Beech* v. *White*, 12 A. & E. 668.

R. V. Richards and *J. Gray*, contrà. The counsel, in electing the plea, merely acted on the view expressed by the learned judge, namely, that either plea would raise the point. Then a decision is given against defendant, on the ground that only one plea would do so. *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the court.

*608] *In this case the defendant proposed originally to plead Non assumpsit, and also a plea denying that he became tenant to the plaintiff on the terms alleged in the declaration. The judge at chambers considered that the two pleas raised the same issue, and refused to allow them both. In general they would raise the same issue; for the promise is but a legal consequence resulting from the tenancy; but in this peculiar case, of a demise by lease in writing, not under seal, for a term of years, made by a former owner of the fee, who has conveyed his interest to the plaintiff during that term of years, though it be clear that the tenant becomes by such conveyance tenant to the plaintiff on the terms of the lease, yet it is very questionable whether any promise in law results therefrom, or whether any promise in fact would have a sufficient consideration to sustain it.* The issues therefore were clearly different; and both pleas ought to have been allowed. It does not appear whether the peculiar circumstances of the case were mentioned to the judge: and the defendant had the choice of pleading which plea he liked. Doubtless the plea of Non assumpsit would have raised the real question, and the only question in the case; for the other plea denied what was really true, and what the defendant must have known to be true: and, as the defendant might have pleaded Non assumpsit, he was not shut out from any real defence which he had by the judge's refusal to allow both pleas, but by his own mistake in pleading as he did. Whether he would, by adopting the plea of Non assumpsit, have been shut out from denying the tenancy, it is not material to consider; for it is plain that he could not and did not deny it with success.

*609] *Under these circumstances, we think that we cannot, according to the practice of the court, interfere to correct the defendant's own mistake, especially as the defence sought to be set up is merely a technical one, wholly beside the merits of the case. The rule must be discharged.

Rule discharged.

DOE on the demise of the EARL of EGREMONT v. DATE.

On the trial of ejectment against a lessee by a party claiming the reversion, the plaintiff, to prove seisin in G., a late tenant for life, called the executor of G., and required him to produce a book containing an entry, forty years old, of a receipt of rent for the land in question by G.'s steward. It was admitted, on the part of the plaintiff, that the executor (who also was a legatee of large personal property under the will of the tenant for life) would be liable over to the defendant if the plaintiff obtained a verdict, under a covenant for title by G.; and that the action was substantially defended by the executor.

Held that the executor was bound to produce the book.

When a judge at Nisi Prius has compelled the production of evidence by a witness who objects, *quære* whether the decision can be reviewed in banc?

EJECTMENT for lands in Somersetshire. The case was tried before ROLFE, B., at the Somersetshire Spring assizes, 1840. The lessor of the plaintiff, George, Earl of Egremont, claimed under the demise of Charles, late Earl

of Egremont, who died in 1763, leaving his will dated 30th July, 1761. By the will, lands were devised to George O'Brien, late Earl of Egremont, for life, with limitations over in remainder, under which remainder the lessor of the plaintiff was now entitled as tenant in tail. Certain powers of leasing were also created by the will: and the defendant held under a lease made by the late tenant for life, which (as the lessor of the plaintiff contended, and as was ultimately admitted on the part of the defendant) could not be supported as an execution of the power. The counsel for the plaintiff, in opening the case, told the jury that the real defendant was Colonel Wyndham, the executor of the late *tenant for life, and legatee of a large personal property from him, since it appeared by the lease [*610 (which was produced) that the tenant for life, and his executors, were bound to indemnify the lessee under a covenant for title. In order to show that the lands in question were part of the lands devised, and had been the property of the devisor, it was proposed to prove that they had been held by the tenant for life, the late George O'Brien, Earl of Egremont, as landlord. The evidence opened in support of this was a rent book, belonging to the late tenant for life, and now in the hands of his executor, Colonel Wyndham, in which was an entry of the receipt of rent for his property, by the steward of the tenant for life, in 1800. A subpœna duces tecum, to produce the book, was served on Colonel Wyndham: and (by consent of the parties) Mr. Murray, Colonel Wyndham's attorney, appeared for him, with it. The book being called for by the plaintiff's counsel, Mr. Murray declined to produce it, unless the court should be of opinion that he was bound to do so. He was then sworn, and, in answer to the introductory questions of the counsel for the plaintiff, stated that he was attorney for Colonel Wyndham in this action. He objected at first to giving or producing evidence, on the ground of professional confidence: but it was held by the learned judge (and admitted by the defendant's counsel) that he witness, as he appeared in lieu of Colonel Wyndham, was bound to give such evidence as Colonel Wyndham could have been compelled to give. He then objected to produce the rent book, on the ground that it was a document relating to the title of Colonel * Wyndham; but the learned judge overruled the [*611 objection; and the book was produced. Verdict for the plaintiff.

In Easter term, 1840, *Bere* obtained a rule nisi for a new trial on account of this evidence having been produced.(*a*) In this vacation,(*b*)

Sir *W. W. Follett*, *Erle*, *Crowder*, and *Montague Smith* showed cause. First, even if the witness was not compellable to produce the book, that is no ground for a new trial on the application of one of the parties. The book being, in itself, legitimate evidence, what right has the party against whom it is produced to make the objection? The only person injured, if any, is the owner of the book: but he is not the party making the application. [Lord DENMAN, C. J. Surely injustice is done to the defendant if that is admitted in evidence against him which ought not to have been admitted. It seems very difficult to say that such a decision is not to be reviewed.] It is a matter entirely between the court and the witness. If the witness had chosen to produce the evidence without objection, the defendant would not have been entitled to interfere. [COLERIDGE, J. If the judge at Nisi Prius

(*a*) This was one of the several causes tried at the same assizes on the same title, in which the verdict was for the plaintiff. Rules for new trials were obtained in several of them, on various points, some common to more than one of the cases. Such points only are reported as were ultimately relied upon, and considered by the court to be raised on the evidence and rules nisi. See the next case.

(*b*) June 22d, 1842.

sustains such an objection improperly, the adverse party is entitled to a new trial.] There the party to the suit is prejudiced by the rejection of evidence which he has a right to demand: but, where the objection is improperly
*612] overruled, nothing is done to *which the party to the suit has a right to object: and the injury done to the witness, if any, will not be undone by a new trial. [PATTESON, J., referred to *Marston* v. *Downes*, 1 A. & E. 31.(*a*)] But, further, the ruling at Nisi Prius was correct. Colonel Wyndham, who was represented by the witness, was bound to produce the book. It is no ground for refusing to give evidence that such evidence, when given, will subject the witness to a civil liability. It is true that the courts will not compel a witness to produce the title-deeds of his estate; but here the estate does not belong to Colonel Wyndham: nor is the book in the nature of a title-deed; if it were, Colonel Wyndham, as executor, would not be entitled to the custody of it. As to his ultimate interest in the cause, (assuming such interest, for the purpose of argument,) that could give Colonel Wyndham no privilege of withholding the evidence. If he had been asked whether he had seen the tenant for life receive the rents, he could not have refused to answer.

Kelly, *Bere* and *Butt*, contrà. First, the court will take notice of the objection at this stage. Several cases are collected in 1 Starkie on Evidence, 89, third edit.; in which it appears that the propriety of the judge's decision at Nisi Prius on such a point has been discussed in Banc; as *Schlencker* v. *Moxy*, 3 B. & C. 789; and *Doe. dem. Courtail* v. *Thomas*, 9 B. & C. 288. [PATTESON, J. In the former of those cases the evidence had been withheld at Nisi Prius.] The cases at any rate show that the subject is
*613] open to discussion in banc. *Marston* v. *Downes*, *appears, indeed, to be an authority to the contrary; but there the witness had no interest; here the party compelled to give the evidence, through his attorney, is substantially the party now making the application for a new trial. Even where the judge directs the witness to produce the evidence, if the witness still refuse, all that the judge can do is to punish him for a contempt; and yet, if the judge improperly refuse to order the evidence to be produced, it is admitted that this is a ground for a new trial. [PATTESON, J. Taking that to be so, it shows only that a party to the suit has a right to complain that the judge has not exercised on his behalf the power which ought to have been exercised; but, where a judge refuses to protect a witness from giving the evidence, that is not a decision against either party to the cause. COLERIDGE, J. Do you say that Colonel Wyndham was so entirely the party to this cause that secondary evidence might have been given of the contents of this book if he had refused to produce it upon notice? Or could his declarations be given in evidence against the present defendant Date? It is not clear that those consequences would lead to an absurdity: but perhaps they do not necessarily follow from the view which the defendant takes. The case in this respect has some analogy to that of an action brought nominally against the sheriff, who is indemnified by the party really interested. Colonel Wyndham, though not technically a party on the record, so as to be strictly subject to the liabilities incident to that character, is yet shown, by the case set up on the part of the plaintiff, to be so far the party substantially interested as not to be excluded from complaining of the decision at Nisi Prius.

*614] *Then, assuming that the court will entertain the question, Colonel Wyndham ought not, in such a case as this, to have been

(*a*) See *Davies* v. *Waters*, 9 M. & W. 608.

compelled to produce the book. The point has been argued as if the production of such a document and the giving parol evidence were subject to the same rule: but that is not so. In 1 Starkie on Evidence, 88, 3d ed., the law is laid down as follows: "There seems, however, in one respect, to be a distinction between the compelling a witness to answer a question orally, and the obliging him to produce a written document. He must answer questions, although the answer may render him civilly responsible; but it seems that he is not compellable to produce title-deeds, or any other documents which belong to him, where the production might prejudice his civil rights. And this is, as it seems, a rule of legal policy founded upon a consideration of the great inconvenience and mischief to individuals which might and would result to them from compelling them to disclose their titles, by the production of their title-deeds, or other private documents. The same principle applies where the document is in the hands of an attorney; he will not be compelled to produce it to be read where the disclosure would be prejudicial to his client." So far, therefore, as written documents are concerned, the exemption is not confined to criminal responsibility, nor to the case of title-deeds to real property. Now many cases might be put in which the publication of the contents of this book might be prejudicial to Colonel Wyndham, as executor of the late tenant for life; as, for instance, if a question arose respecting rent due in the time of the tenant for life. *Sampson* v. *Swettenham*, 5 Madd. 16, is referred to by Mr. *Starkie:* *and *Cocks* v. *Nash*, 9 Bingh. 723;(a) *Street* v. *Brown*, 6 Taunt. 302; *Miles* v. *Dawson*, 1 Esp. 405; and *Laing* v. *Barclay*, 3 Stark. 38, show the extent of the protection. And the principle is strongly upheld in *Pickering* v. *Noise*, 1 B. & C. 262, and in *Ratcliffe* v. *Bleasby*, 3 Bing. 148. The exemption, it is true, does not exist where the party calling for the document is the party who has the beneficial interest in it; but there is no pretence for contending that the lessor of the plaintiff has any interest in this book. By stat. 46 G. 3, c. 37, a witness cannot refuse to answer a question on the ground that the answer may show that he owes a debt or is otherwise subject to a civil suit; that statute does not, however, refer to the production of documents. In *Rex* v. *Woburn*, 10 East, 395, the Court of Queen's Bench held (before stat. 54 G. 3, c. 170) that a rated inhabitant of a parish could not, in a settlement case in which the parish was appellant, be compelled by the respondents to give evidence, though he was not a party actually named on the record. Here the interest of Colonel Wyndham is not only admitted but insisted on by the counsel for the lessor of the plaintiff. [*615

Lord DENMAN, C. J. With respect to the preliminary point, I may perhaps have expressed myself too strongly during the argument, considering the case of *Marston* v. *Downes*, 1 A. & E. 31, which was not present to my mind at the moment. I must own, however, that *I am not altogether satisfied with the principle of that decision. Perhaps I might be inclined to put the argument thus. A party to a suit has a right to insist that no evidence shall be produced against him, except such as can be given legally. Now, if a witness be compelled by a judge at Nisi Prius to produce a title-deed which he is legally entitled to withhold, it strikes me that the party to the suit against whom the evidence is produced, is affected by that which ought not to have been laid before the [*616

(a) Kelly referred also to the language of Tindal, C. J., at p. 726, as showing that the Court in Banc would review the decision of the judge at Nisi Prius.

jury. One sees that such a question might become of the utmost importance in criminal cases. I consider the authority which the judge exercises to differ materially from that exercised by persons for whom the law is not strictly responsible. I should, therefore, wish to have this question fully discussed, if it should ever arise again. One consequence of holding that the decision of the judge at Nisi Prius cannot be reviewed in banc might be, that on all occasions the judge at Nisi Prius would compel the production of the document; because it is always desirable, with a view to getting at the truth, that all evidence should be produced which is not in itself objectionable, and the judge may feel that, if he compels the production of the document, his decision will be final; but that, if he does not, the whole question will be liable to be raised again.

These observations, however, are only thrown out for the purpose of indicating a doubt upon a question of considerable importance, which seems to me to have arisen quite unnecessarily in this case. For I have not the least doubt that the witness was compellable to produce the book in question. He possessed it in the character of executor of the late
*617] tenant for life; when *produced, it proved the fact of payment of rent to his testator. Why was the witness not to prove that fact, either by his personal knowledge, if the party calling him chose to question him, or by any paper which he might possess? Such a paper was not a title-deed, nor within the protection of the rule which exempts witnesses from producing documents in the nature of title-deeds. The production of the paper was a mode of proving the fact: that this fact might be injurious to some interest of his own, furnishes no reason for his not producing the book. I consider him strictly as a witness. I cannot allow that, because a learned counsel for the plaintiff says, "such a one is the real party to the cause, and I shall put him in the witness box," that deprives the counsel of the right to treat such person as a witness in every respect. He is indeed an interested witness: but he does not therefore possess the privilege, which a party to the cause would have, of refusing to give evidence. In fact that privilege, while it entitled the party to refuse to lay the document before the court, would give the opposite party the right of producing secondary evidence.

It seems to me, therefore, that the preliminary point does not arise; and I am sorry that I have been under the necessity of saying any thing upon a point which is not necessarily before the court: but, it having come before us, I thought it my duty to express the doubt which I have felt upon it. I would not express more than a doubt, considering the great authority of the decision of which I was the organ, and the opinion which my learned brothers entertain on the subject. On the other point I do not feel the slightest doubt.

*618] *PATTESON, J. Colonel Wyndham, if he had been himself the witness, (and of course Mr. Murray stands in the same situation,) would have been bound to produce the document. The learned judge was therefore right in what he did. This is really not a document approaching in character to a title-deed. After all, the matter comes only to this, that Colonel Wyndham was very desirous of keeping back the evidence, because he was bound to indemnify the defendant if the plaintiff got a verdict. But that does not make him a party to the record, nor prevent the lessor of the plaintiff calling him as a witness, though it might preclude the defendant from calling him, on the ground of interest. Under the subpœna duces tecum he must produce such documents as are legiti-

mate in the cause. I can find no rule of law which prevents a man from producing any thing, except in the case of title-deeds. Certainly it is no excuse that the production of the evidence will subject him to a civil action.

As to the question, whether the court can review the decision of a judge at Nisi Prius on such a point, I was anxious in the course of the argument to draw the attention of the defendant's counsel to what appears to me an important distinction. Whether *Marston* v. *Downes*, 1 A. & E. 31, was rightly decided, may be a fit subject for discussion. But it by no means follows that, because the court will review the decision at Nisi Prius when the judge has refused to compel the witness to produce the document, his decision must be reviewed when he has compelled the production. The parties stand in a very different situation in the two cases. The party who calls for the *evidence has an interest in the production of it; but the opposite party has no interest in the privilege of the witness, [*619] and cannot complain of legitimate evidence being brought against himself. If the court will review a decision disallowing the privilege, that will be for the sake of the witness: I do not see how it can be done for the sake of the party.

Williams, J. I decide on the ground that Mr. Murray, representing Colonel Wyndham, was strictly a witness, and not a party to the cause. With respect to the question, how far the decision of the judge at Nisi Prius can be reconsidered in banc, it must be recollected that such a discussion can take place only after the evidence has been received or rejected. Now on this point there are several authorities. The earliest which I recollect was a very well considered case, *Legatt* v. *Tollervey*, 14 East, 302. It was at one time considered that an indictment could not be produced in evidence without the order of the court of which it was a record, or the fiat of the attorney general; and in *Legatt* v. *Tollervey*, the judge at Nisi Prius refused to allow an indictment to be given in evidence for want of proof of such authority, and nonsuited the plaintiff. But the Court of Queen's Bench set aside the nonsuit, on the ground that, although the officer who produced the indictment might be guilty of a contempt, yet the indictment, if he chose to produce it, was admissible in evidence, however obtained. But there is an obvious distinction, as has been pointed out, between cases where the privilege has been allowed and those where it has been disallowed.

*Coleridge, J. I also desire to found my opinion simply on [*620] the consideration, which is enough in the present case, that Colonel Wyndham was a witness, and not a party to the cause. The counsel for the defendant can scarcely maintain that Colonel Wyndham was so far the party to the cause, that his declarations would be evidence against the nominal party, or that secondary evidence could be given of the contents of documents which he might refuse to produce. He was merely a witness very much interested in supporting the defendant, on the ground of the probability (not certainty) that, in the event of a verdict passing against the defendant, damages, or something equivalent, might be obtained against himself. If the counsel for the plaintiff chose to take on himself the risk of calling such a witness, there was nothing to preclude him from so doing. Then we are next to consider the character of the document itself. It was not, in the most extended sense of the word, a title-deed: nor, as I understand the passage cited, can it come within the class which Mr. Starkie designates as "any other documents." The production could

not impeach or weaken the possession of any thing that Colonel Wyndham had; nor was it a document by which he himself could directly recover any thing. It was dated as far back as 1800. The utmost that can be said of it is, that, if Colonel Wyndham were endeavouring to recover rents left unpaid at the death of the late tenant for life, this document might be subsidiary. We do not even in any way prevent him from making use of it hereafter. I feel confident that there can be no authority for upholding the privilege in such a case as this.

*621] But, on the other question, I must say that I *entertain great doubt whether we could have reviewed the decision of the learned judge. There is a very broad distinction between cases where the privilege has been allowed, and those where it has been disallowed. In the former case, a party has been precluded from proving that which he was entitled to prove. In the latter case, the party whose privilege has been disallowed has no locus standi in banc. I recollect a case on the western circuit, in which I was retained as counsel for a witness, to resist his being compelled to produce some evidence. Mr. Justice PARK, who was perfectly familiar with the course of practice at Nisi Prius, would not for a moment allow me to appear in that character. He said, "I must be left to take care of the witness, and I alone; I shall not hear counsel on his behalf." If counsel cannot be heard for a witness at Nisi Prius, certainly he cannot be heard for that witness in banc. And, if the witness cannot call upon us to review the decision, can the party to the cause do so? Legitimate evidence has been produced against him: he is not prejudiced by that, and can have no ground of complaint.

The case stood over for the consideration of other points not reported here.(a) *Cur. adv. vult.*

The Court on this day Discharged the rule.

(a) See note (a), p. 611, antè.

*622] *DOE on the demise of The Earl of EGREMONT *v.* PULMAN.

In ejectment, to prove that the land in question was part of the estate of the lessor's ancestor, a counterpart of a lease, purporting to demise that land, was produced from the ancestor's muniment room: it was dated in the ancestor's lifetime, and appeared to be executed by the person named as lessee, but by no one else. The lease itself was not produced, nor any excuse shown for the non-production. No privity appeared between the lessee and the defendant in the ejectment.

Held, that the counterpart was admissible.

EJECTMENT for lands in Somersetshire. The action was tried before ROLFE, B., at the Somersetshire Spring assizes, 1840. The lessor of the plaintiff, George, Earl of Egremont, claimed under the will of the late Charles, Earl of Egremont, who died in 1763, leaving the will in question, dated 31st July, 1761. By the will, Earl Charles devised lands, described therein as his manors, lands, &c., late the estate of his father Sir William Wyndham, to his second son for life, with remainder over, &c., and with certain powers of leasing. The defendant held under a lease which, according to the case of the lessor of the plaintiff, was not in conformity with the powers. Sir William Wyndham died in 1741. In order to show that the land in question belonged to Earl Charles, and had been part of the estate of Sir William Wyndham, it was proved that the land had been held by lease from parties who, if the lands had been comprised in the above devise, would have been the parties entitled to let it; but no evidence was given

of any actual holding by, or under, Sir William Wyndham, except a deed found in the muniment room containing the documents relating to the property which had belonged to Sir W. Wyndham, and which deed appeared to be a counterpart of a lease, dated in the lifetime of Sir W. Wyndham, purporting to be made by him, and apparently executed by the party therein named as lessee, but by no one else. No *proof of any search for the part executed by the lessor, or of notice to produce it, was offered. The reception of this deed in evidence was objected to; but the learned judge overruled the objection; and a verdict was found for the plaintiff. [*623

In Easter term, 1840, *Bere* obtained a rule for a new trial, on account of the reception of the above evidence.(a) In this vacation,(b)

Sir *W. W. Follett*, Solicitor General, *Erle*, *Crowder*, and *Montague Smith*, showed cause. The evidence was admissible. In *Clarkson* v. *Woodhouse*, 5 T. R. 412, note a, counterparts of old leases, from among the muniments of the lord of the manor, were held good evidence in support of his right. [Coleridge, J. In that case, as reported in 3 Douglas, 189, no distinction is made between counterparts and leases.] In *The Duke of Bedford* v. *Lopes*, *Bart.*,(c) which was an action brought to try the title to the bed of a river, after proof of a grant by Henry VIII., two counterparts of leases were produced from the duke's muniment room, comprehending the soil in question. No payment by a tenant was proved, nor any modern act of ownership; and the documentary evidence was objected to: but Lord Denman, C. J., held that, as the instrument came from the muniment room of the duke, and no circumstance threw suspicion upon it, it was evidence, and the absence of other kinds of proof was mere matter of observation. The counterpart is, in fact, a portion of the *original instrument of demise. The use of it, as evidence, is to show an exercise of ownership over the property in question. To exclude it would, in a great measure, shut out all evidence of this kind: for original leases are seldom returned into the lessor's hands when the term expires; and acts of ownership by the landlord, during a long term, are often rare and difficult of proof. This instrument comes within the rule which lets in documents older than the period of living memory, and coming from the proper place of deposit. Pending the lease, it would have been the lord's only evidence of title. [*624

Kelly, *Bere*, and *Butt*, contrà. The counterpart was no evidence. "A counterpart, which is not a duplicate original, having been executed by one party only, is admissible against the party who executes it, to prove the execution of the other part which it recites, although no notice has been given to produce the original. But as against a third person, unless he claim in privity, a counterpart cannot be read in evidence without accounting for the want of the original, or proving it to be in the possession of the party, and that he has had notice to produce it." 1 Stark. Ev. 405, 3d ed. Here the lease itself was not produced, nor its absence accounted for; nor did the plaintiff adduce evidence of enjoyment, or any other subsidiary proof. "The counterpart of a deed, without other circumstances, is not sufficient evidence, unless in case of a fine." *Anonymous case* in 1 Salkeld, 287: and Lord Hardwicke says, in *Villiers* v. *Villiers*, 2 Atk. 71, that the counterpart may be read, "if an original deed is lost." A counterpart was held *sufficient evidence of the terms of holding in *Roe dem. West* v. *Davis*, 7 East, 363, without notice to produce the origi- [*625

(a) See note (a), p. 611, antè.
(b) June 22d. Before Lord Denman, C. J., Williams, and Coleridge, Js.
(c) Tried at Exeter, March, 1838.

nal; but there it was relied upon by the lessor against one claiming under the lessee, and was admitted on the principle (recognised also in *The Mayor, &c. of Carlisle* v. *Blamire*, 8 East, 487) that the lessee was bound by an instrument which he himself had executed. The point discussed in *Clarkson* v. *Woodhouse* was independent of any question as to original or counterpart; and the report in Douglas treats the documents as leases. Besides, they were adduced only in support of a custom, and might be evidence of reputation, though, if they had been put forward as showing exercise of ownership, some proof of actual possession or control might have been necessary. The distinction between evidence of reputation, and evidence of specific facts, is pointed out in *Crease* v. *Barrett*, 1 C. M. & R. 919, 930; S. C. 5 Tyr. 458, 472.(a) Here, the documents in question were the only evidence of Sir W. Wyndham's seisin. The counterpart of a lease, executed by his lessee, could be nothing more, as between Sir W. Wyndham and a third party, than the admission of a stranger that Sir W. Wyndham was seised. That admission could be no evidence against a third party, unless it came from a person shown to have been in possession; and the counterpart itself could not show that. *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the court.

*626] The question in this case was whether certain evidence *was rightly admitted by my brother ROLFE. The evidence was offered for the purpose of proving that Sir William Wyndham had been seised of certain land. In order to establish this, there was produced, from the muniment room of the property which had descended from Sir William Wyndham, what appeared to be a counterpart of a lease of this land, made by him; but it purported to be executed only by the lessee; and the part executed by Sir William Wyndham was not produced. No proof was given of actual possession under this lease. On this point we thought it right to consult with some of the other learned judges: and all with whom we have consulted are of opinion that the evidence was admissible. The document was found where such an instrument would properly be: if Sir William Wyndham was a landlord really granting such a lease, his muniment room was the fit place for keeping the counterpart. Rule discharged.

(a) See *Regina* v. *Bliss*, 7 A. & E. 550.

*627] *DOE on the several demises of GEORGE, Earl of EGREMONT, and EDMONSTONE, *v.* MARY ANN FORWOOD.

Lands were settled, with a power to lease. A., tenant for life, under the settlement, made, in May, 1807, a lease which was not a good execution of the power, and received rent in conformity with the terms of the lease, by which the rent was payable on Ladyday, Midsummer, Michaelmas, and Christmas days. B., a succeeding tenant for life, also received rent in conformity with the terms, and afterwards, in conjunction with C., remainder man in tail expectant upon B's estate for life, settled the land to such uses as C. should appoint, and, in default of appointment, to C. for life, remainder to a trustee for C., for C.'s life, remainder to the right heirs of C. C. received rent before B.'s death, according to the terms of the lease; and, after B.'s death, gave notice to the lessee, on 21st March, 1838, to quit "on 29th September next, or at the expiration of the current year of your tenancy." On 19th February, 1839, C. appointed to N. in fee.

Held, that, as between C. and the lessee, the notice was good, and determined the tenancy; and that N., at the expiration of the notice, might evict the lessee; for that, if N. held under the creator of the power, B., no notice to quit was necessary as against N., and if N. held under the appointor, C., he might take advantage of the notice at its expiration.

A lease had been granted, conformably to the power. A later lease (the first above

mentioned) was expressed to be granted "for the consideration of the surrender of the present lease, and which is hereby surrendered accordingly," and of a sum of money. The earlier deed of lease was actually given up on the execution of the second. The second lease was not valid, as an execution of the power; but rent was received according to its terms, by successive tenants for life and in remainder under the settlement. *Held*, that the surrender of the first lease was good.

Ejectment for lands in Devonshire. The demises were, first, of George Wyndham, Earl of Egremont, dated 1st October, 1838; secondly, of Neil Benjamin Edmonstone, dated 1st November, 1839. On the trial, before Rolfe, B., at the Devonshire Spring assizes, 1840, a verdict was found for the plaintiff subject to a case, which was stated substantially as follows.

Charles, Earl of Egremont, before and at the date of his will bearing date 31st July, 1761, and from thence to his death, was seised in his demesne as of fee of the premises mentioned in the declaration; and, being so seised, by his will, bearing date as aforesaid, and duly executed, &c., devised all his manors, lands, tenements and hereditaments, and parts and shares of manors, lands, tenements and hereditaments, in the county of Devon, late the estate of his father Sir William Wyndham, (of which the premises mentioned in the declaration were part,) *to the testator's second son, Percy Charles Wyndham, and his assigns, for life; with remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the said Percy Charles Wyndham, respectively, in tail male; remainder to testator's third son, Charles William Wyndham, and his assigns for life; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the said Charles William Wyndham, successively, in tail male; remainder to testator's eldest son, George Lord Cockermouth, and his assigns, for life; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the said George Lord Cockermouth, successively, in tail male; remainder to the fourth, fifth, and all and every other the son and sons of the said testator's body lawfully begotten, or to be begotten, whether born in his lifetime or after his decease, severally, successively and in remainder, one after another, as they should be in priority of birth, and the respective heirs male of the body of such son and sons lawfully issuing. [*628

The will contained a power to the persons to whom any estate for life was devised, when in actual possession, to make leases; which power was set out in the case.

The said Charles, Earl of Egremont, died (*a*) 21st *August, 1763, without having revoked or altered his said will, leaving four sons [*629

(*a*) The following appear to be the material dates.

21st August, 1763. Death of Charles, Earl of Egremont, the testator. Percy Charles Wyndham entered as tenant for life.

11th July, 1785. Valid lease by Percy Charles Wyndham to Heath. This lease, before the next date, assigned to Weech.

11th May, 1807. Invalid lease by Percy Charles Wyndham to Weech, in consideration of the surrender of the former lease. This lease assigned to the defendant before the next date.

5th August, 1833. Percy Charles Wyndham died, and George O'Brien, Earl of Egremont, entered as tenant for life.

25th June, 1835. Receipt of rent from defendant by George O'Brien, Earl of Egremont

24th June, 1836. Lands settled by George O'Brien, Earl of Egremont, and George, Earl of Egremont, the first lessor of the plaintiff, to the appointment of the first lessor of the plaintiff; in default thereof, to the first lessor of the plaintiff, for life, &c.

9th May, 1837. Receipt of rent from defendant by the first lessor of the plaintiff

14th September, 1837. Receipt of rent from defendant by the first lessor of the plaintiff.

11th November, 1837. George O'Brien, Earl of Egremont, died.

born in lawful wedlock, viz.: George O'Brien, his eldest son, in the said will called George Lord Cokermouth, who succeeded his father as Earl of Egremont; the said Percy Charles Wyndham, his second son; the said Charles William Wyndham, his third son, and William Frederick Wyndham, his fourth son, who was born on the 6th of April, 1763.

Charles William Wyndham, the third son, died on the 7th July, 1828, without ever having had issue.

Percy Charles Wyndham, the second son, died on the 5th of August, 1833, without ever having had issue.

William Frederick Wyndham, the fourth son, died on the 18th of February, 1828, leaving the lessor of the plaintiff, the said George, Earl of Egremont, his eldest son, and heir at law, him surviving.

The said George O'Brien, Earl of Egremont, died on the 11th day of November, 1837, without ever having had issue.

On the death of the testator, Percy Charles Wyndham entered into the possession and receipt of the rents of the manors, &c., so devised, as tenant for life, under the said will.

*630] *Percy Charles Wyndham, being such tenant for life, made and executed an indenture of lease, bearing date 11th July, 1785, between the said Percy Charles Wyndham, of the one part, and Benjamin Heath, of the other part. By this lease, a term of ninety-nine years, if any one of three persons named should so long live, was granted to Benjamin Heath. No objection was to be made by the plaintiff to this lease, as not being in conformity to the power.

Another indenture was also made and executed by Percy Charles Wyndham, whilst such tenant for life, under his hand and seal, bearing date 11th May, 1807, between the said Percy Charles Wyndham of the one part, and John Weech of the other part. It purported to be granted "for the consideration of the surrender of the present lease granted of the premises hereinafter mentioned, for the term of ninety-nine years determinable as is therein mentioned, by an indenture dated on or about the 11th day of July, 1785, and which is hereby surrendered accordingly, and of the sum of 157*l.* and 10*s.* in hand paid to the lessor by the said lessee," &c. By this lease of 1807, Percy Charles Wyndham demised the land in question to John Weech, his executors, &c., for ninety-nine years, if any one of three persons therein named should so long live. (It was assumed in the argument that these lives were not all extinct.) A rent was reserved payable at Lady Day, Midsummer Day, Michaelmas Day, and Christmas Day.

John Weech was, at the time of making and executing the last mentioned indenture and counterpart, the assignee of the term and interest of the indenture of the 11th July, 1785; and the said term and interest were *631] vested in him as such assignee: and, on the execution *of such last mentioned indenture, the indenture of the 11th July, 1785, was delivered up by John Weech to Percy Charles Wyndham. Percy Charles Wyndham received the rent reserved by the said indenture of the 11th May, 1807, down to the time of his death. Henry Joseph Thomas Drury, one of the cestuique vies mentioned in the indenture of 11th July, 1785, is still living: the other cestuique vies are dead.

Upon the death of Percy Charles Wyndham, George O'Brien, Earl of

21st March, 1838. Notice to quit given to defendant by the first lessor of the plaintiff.
19th February, 1839. Appointment in favour of Edmonstone, the second lessor of the plaintiff, by the first lessor of the plaintiff.

Egremont, entered into possession and receipt of the rents of the said manors, lands, &c., so devised as aforesaid, as tenant for life under the said will.

By indentures of lease and release, bearing date respectively the 23d and 24th June, 1836, the release between the said George O'Brien, Earl of Egremont, of the first part, the said George, Earl of Egremont, the lessor of the plaintiff, by his then name of George Wyndham, of the second part, and Charles Murray of the third part, for barring the estate tail of the said George Wyndham, and assuring the inheritance in manner thereinafter mentioned, the premises in the declaration mentioned were duly conveyed and assured by the said George O'Brien, Earl of Egremont, and the said lessor of the plaintiff, George, Earl of Egremont, to the said Charles Murray and his heirs, discharged of the life estate of the said George O'Brien, Earl of Egremont, and the said estate tail, and all estates to take effect after the determination of the said estate tail: and it was declared that the said Charles Murray and his heirs should stand seised of the said premises to the use of such person or persons, for such estate or estates, as the said lessor of the plaintiff, George, Earl of Egremont, *then George [*632
Wyndham, by deed should appoint; and, in default of appointment, to the use of the said George Wyndham, and his assigns for life, remainder to the use of the said Charles Murray, during the life of the said George Wyndham, in trust for him; remainder to the use of the right heirs of the said George Wyndham for ever.

By indenture, bearing date 19th February, 1839, and made between the lessor of the plaintiff, George Earl of Egremont, of the one part, and the lessor of the plaintiff, Neil Benjamin Edmonstone, of the other part, by virtue and in due execution of the power contained in the said indenture of 24th June, 1836, the said George, Earl of Egremont, duly limited and appointed the premises in the declaration mentioned to the use of the said Neil Benjamin Edmonstone, his heirs and assigns, for ever.

The defendant, during the life of Percy Charles Wyndham, became the assignee of the term expressed to be demised in the said indenture of 11th May, 1807: and the following (among other) receipts for rent were given to her. Tyler was the agent of the said George O'Brien, and Tripp of the said lessor of the plaintiff, George, Earl of Egremont, formerly George Wyndham.

"*Tiverton*, 25*th June*, 1835.

"Received of Mrs. Mary Ann Forwood the sum of one pound one shilling and sixpence, for one year's rent, of," &c., "up to Lady-day, 1835.

"£1, 1*s*. 6*d*. "WILLIAM TYLER, receiver."

"*Cullompton*, 9*th May*, 1837.

"Received of Mrs. Forwood, by Mr. Wright, the sum of one pound one shilling and sixpence, one year's rent *and land tax due to the [*633
Earl of Egremont at Lady Day last.

"£1, 1*s*. 6*d*. "W. U. TRIPP."

"*Tiverton*, 14*th September*, 1837.

"Received of T. P. Wright, Esq., one pound one shilling and sixpence, being one year's lord's rent due from the trustees of Mrs. Forwood to Captain Wyndham, for," &c.

"£1, 1*s*. 6*d*. "W. U. TRIPP."

Since the date of the last mentioned receipt, no rent has been received for the premises.

On the 21st of March, 1838, a notice to quit the premises was given by the said lessor of the plaintiff, George, Earl of Egremont, to the defendant The notice is as follows:

"Mrs. MARY ANN FORWOOD.

"I hereby give you notice to quit and deliver up the premises which you now hold of me, situate at," &c., "on the 29th day of September next, or at the expiration of the current year of your tenancy.

"Dated the 19th day of March, 1838.

"Yours, &c., "EGREMONT."

The court was to be at liberty to draw the same inferences from the facts as a jury might have done, and, at the request of either party, to turn the facts into a special verdict.

The case was argued in last Easter term.(a)

*634] *_Montague Smith_, for the plaintiff. The defendant cannot claim under the lease of 1807, for that lease is void, not being a valid execution of the power contained in the will of 1761. [This was admitted on the part of the defendant.] Then the defendant will claim as tenant from year to year under the first lessor of the plaintiff and the preceding tenant for life, George O'Brien, Earl of Egremont. But that tenancy is determined by the notice given, on 21st March, 1838, by the first lessor of the plaintiff, which would determine the tenancy in September, 1838, or at Lady Day, 1839, or, at latest, at Midsummer, 1839. On any construction of the notice, the defendant must fail. The appointment to Edmonstone took effect in February, 1839. If the notice to quit expired before the appointment, the tenancy was then determined. If the notice expired after the appointment, then Edmonstone, the second lessor of the plaintiff, may take advantage of it, if his interest derived from the party giving the notice (namely, the first lessor of the plaintiff) takes effect after the notice: but, if, as may be contended on the other side, Edmonstone's interest takes effect, not from the execution of the power to appoint, but from its creation, that is from 1836, then his estate is paramount to any tenancy from year to year under the first lessor of the plaintiff. The tenancies under Percy Charles Wyndham, and under George O'Brien, Earl of Egremont, expired at the respective deaths of these parties: therefore, if Edmonstone's interest takes effect from the creation of the power in 1836, he held the estate discharged of the defendant's interest from 11th November, 1837, the date of the death of George O'Brien, Earl of Egremont.

But it will be argued that the term of 1705 is still outstanding. The *635] lease of 1807 contains an actual *surrender; and the case finds that the lease of 1785 was delivered up. _Roe dem. Earl of Berkeley_ v. _Archbishop of York_, 6 East, 86, will be cited on the other side: but there no express surrender appeared: the subsequent lease there, which was (as here) a bad execution of a power, contained merely a recital of the surrender as part of the consideration: and the attempt was also to show a surrender by way of cancellation. Here the indenture has the words, "which is hereby surrendered accordingly." _Farmer dem. Earl_ v. _Rogers_, 2 Wils. 26, was relied upon there for the plaintiff; and the defendant's counsel distinguished that case on the ground that in it there was an actual surrender in writing by the words, "I do release the said A. B. and discharge the within mortgaged premises from the term of 500 years." The construction admitted by the coun-

(a) April 26th, 1842. Before Lord Denman, C. J., Patteson, Williams, and Wightman, Js.

sel for the defendant in *Roe dem. Earl of Berkeley* v. *Archbishop of York*, is that which the present plaintiff contends for; and the words here are more direct.

Bere, contrà. It is clear, that Edmonstone can neither take advantage of, nor be bound by, the notice of 1838, or any act posterior to the settlement of 1836; for he comes in under the appointment, as if named in the settlement; *Roach* v. *Wadham*, 6 East, 289; *Rex* v. *The Lord of the Manor of Oundle*, 1 A. & E. 283, 291. Then the estate of Edmonstone, dating from 1836, was subject to the then subsisting tenancy from year to year; and nothing has occurred which, as between Edmonstone and the defendant, determines that tenancy. The defendant had an interest which was good by estoppel, or, at any rate, *valid from year to year by the receipt of rent, against the creator of the power and all claiming under him. As to [*636 the notice itself: the defendant held from Midsummer, as tenant from year to year to the first lessor of the plaintiff, that day being the first rent day after the date of the lease, and the terms of the old lease being, in this respect, adopted by the lessor's successor, the first lessor of the plaintiff; *Doe dem. Collins* v. *Weller*, 7 T. R. 478. The tenancy, therefore, existing on the 21st of March, 1838, could not be determined in the September following; nor could any notice have determined it till Midsummer, 1839. Therefore the first demise is laid too early. But, further, the notice is merely void, since the landlord had no power to put an end to the tenancy either on the 29th of September, 1838, or at the expiration of the current year of the tenancy, which would be Midsummer, 1838.

Next, even if the defendant cannot maintain possession under the terms of the lease of 1807, the title of both of the lessors of the plaintiff is defeated by the lease of 1785, which exists still, unless the surrender recited in the indenture of 1807 determines it. But *Roe dem. Earl of Berkeley* v. *Archbishop of York*, 6 East, 86, shows that a surrender in consideration of a void lease is itself void. An attempt is made to distinguish between express and implied surrenders: but they do not differ in effect, though the proof required is different in the two cases. The principle of *Roe dem. Earl of Berkeley* v. *Archbishop of York*, is that, where two transactions take place, one in consideration of the other, if the one be void, the other is so too. There *Wilson* v. *Sewell*, 4 Burr. 1975, 1980, S. C. 1 W. B. 617, 624, and *Davison* **dem. Bromley* v. *Stanley*, 4 Burr. 2210, were cited and recognised. [*637 Indeed there is hardly more ground for calling the surrender in the present case express than there was in *Roe dem. Earl of Berkeley* v. *Archbishop of York*, and the principle of that case is explained by Abbott, C. J., in *Hamerton* v. *Stead*, 3 B. & C. 478, 481, as follows: "the occupation by virtue of the new lease took place under a mistaken idea, that it was a good and valid lease; and when that was discovered to be void, the court very properly held that it should not operate as a surrender of the former lease." In *Zouch dem. Abbot* v. *Parsons*, 3 Burr. 1794, 1807, Lord Mansfield says, that "no surrender, express or implied, in order to, or in consideration of a new lease, would bind; if the new lease is absolutely void: for, the cause, ground, and condition of the surrender fails." [Patteson, J. The cases are collected in *Doe dem. The Bishop of Rochester* v. *Bridges*, 1 B. & Ad. 847.] There the new lease was voidable only and the surrender of the old lease was supported on that ground.

Montague Smith, in reply. As to the notice, the lease under which the defendant held must have commenced on 11th November, 1837, the date of George Earl of Egremont's accession to the estate. In *Doe dem. Collins*

v. *Weller*, 7 T. R. 478, the party giving the notice succeeded immediately to the party granting the lease: here, there was an intermediate tenant for life, who, indeed, must be held to have leased from year to year, but whose death determined the tenancy. But this is not important: because the notice, at any rate, expired *before the date of the second demise; and
*638] therefore Edmonstone is entitled to take advantage of it if he takes the reversion under the appointor, the first lessor of the plaintiff: or, if he takes from the creation of the power, he is not bound by the lease at all, and no notice is wanted. It is said that the notice is merely void: but it must be construed reasonably. "Current year" cannot mean current at the date of the lease; for that would expire before the day previously named in the notice, and (as the argument for the defendant assumes) within three months of the notice. It means the year which will be current on the 29th of September. [Lord DENMAN, C. J. In *Doe dem. Lord Huntingtower* v. *Culliford*, 4 D. & R. 248,(a) it was held that a literal construction of a notice could not be adopted, which would make it expire two days after it was given, because that could not have been the intention of the parties. But here the parties did not know that the current year would expire on the next Midsummer.] The tenant was bound to know the terms on which she held [WIGHTMAN, J. In fact, she is insisting on the tenancy from year to year, which would be determinable, as she says, at Midsummer.]

As to the lease of 1785. The legal consequences of implied and express surrender are certainly the same. But the surrender here is express: and the cases show only that a surrender which is not express cannot be implied from the acceptance of a void lease. [Lord DENMAN, C. J. Lord MANSFIELD's remark, which has been cited from *Zouch dem. Abbot* v. *Parsons*,
*639] 3 Burr. 1807, goes farther.] That *was not necessary to the decision of the case. Here the parties do not leave the matter open to a question of intention: they expressly state the surrender. [PATTESON, J. The lease is *surrendered accordingly*, that is, on the supposition of a new lease being granted. WIGHTMAN, J. You may perhaps say thenew lease is in consideration of the previous surrender; not the surrender in consideration of the lease. But, apparently, it is a single transaction.] *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the court.

The defendant held, and still holds, under a lease which is admitted to be void; he paid rent to the first lessor of the plaintiff in 1837. In 1836, the then tenant for life, with the first lessor of the plaintiff, settled the estate to such uses as the said lessor of the plaintiff should appoint. In 1839, the first lessor of the plaintiff sold the estate to the second, and executed the power of appointment in his favour. On 19th March, 1838, the first lessor of the plaintiff gave the defendant regular notice to quit, which had expired before the date of the demise.

It is argued, for the defendant, that the second lessor of the plaintiff comes in under the deed of appointment in 1836, not under the appointment made to him in 1839, and, consequently, that the notice of 1838 cannot operate on his tenancy from year to year. This argument proves too much; for there was no tenancy from year to year in 1836, to require a notice to quit from any one but George O'Brien, the late Earl of Egremont. The defendant held at first under a lease binding upon the tenant for life who made it, void indeed against the *remainder-men for want of conformity to
*640] the leasing power. The next tenant for life in remainder was George O'Brien, the late Earl of Egremont. He recognised the defendant as tenant

(a) See *Doe dem. Williams* v. *Smith*, 5 A. & E. 350; *Cadby* v. *Martinez*, 11 A. & E. 720

from year to year; but, on his death, the tenancy of the defendant expired. He became, however, tenant from year to year to the present Earl, who treated him as such by receiving the rent in 1837, and thus bound himself and all who may claim under him. But his notice to quit determined that tenancy. If then the second lessor of the plaintiff claim under him, the defendant's right is gone by the notice to quit. If he do not claim under him, but under the deed creating the power of appointment, the defendant had no right against *either* of these lessors of the plaintiff when that deed was executed. And, as, in this view of the case, the second lessor of the plaintiff's right accrued at that time, the tenancy for life of George O'Brien, the late earl, being destroyed by that deed, and as the defendant has never been tenant to the second lessor of the plaintiff at all, he had no right to a notice to quit. Judgment for plaintiff.

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*The QUEEN v. BOUCHER and ELLIS. [*641

A rate by the justices of Warwickshire, whereby lands within the alleged borough of Birmingham were assessed to the county rate, was brought up by certiorari, and objected to, under stat. 5 & 6 W. 4, c. 76, s. 112, on the ground that Birmingham had been incorporated by charter under sect. 141, and a court of quarter sessions granted under sect. 103, and notice thereof given under sect. 112. On a case stated, it was found that such charter and grant had been made in fact, and such notice given, and that quarter sessions had in fact been held under the grants; but (1) that there had been no petition for incorporation by a whole or a majority of the inhabitant householders; (2) that the grant of quarter sessions had been made on a representation to the crown that there was a jail in Birmingham, whereas in fact there was none.

Held,

(1) That the charter of incorporation was nevertheless valid.

(2) That, in this proceeding, the allegation that there was no jail could not be set up against the grant of quarter sessions, no objection being made on the part either of the crown, or any inhabitant of the borough; and that the proper course for raising the objection was by a scire facias to repeal the grant. And this, although the expenses of the quarter sessions of the borough had in part been defrayed by the county rate.

Rate quashed, so far as it extended to the lands within the borough.

AT the Warwickshire quarter sessions, 19th October, 1841, a county rate was laid, under stat. 55 G. 3, c. 51, whereby the messuages, lands, tenements and hereditaments situate within the parish of Birmingham were assessed at 1599*l.* 6*s.* 8*d.*: the sessions ordered the high constable of the hundred within which the parish is situate to demand, collect and receive the same: and the high constable issued his warrant to the churchwardens and overseers of the parish of Birmingham, requiring them to pay him the same. The rate, and the orders of the justices, were, in last Hilary term, removed to this court by certiorari, at the instance of two rateable inhabitants of the parish of Birmingham. A rule being moved for, calling on the county justices to show cause why the rate and order, or so much of them as related to the parish of Birmingham, should not be quashed, the facts, at the suggestion of the court, were stated in a special case, which was substantially as follows.

The parish of Birmingham is situate within the county of Warwick, and, until the granting of the separate court *of quarter sessions hereinafter mentioned, was chargeable with, and liable to contribute to, the county rates of and for the said county. [*642

By stat. 2 & 3 W. 4, c. 64, "to settle and describe the divisions of counties, and the limits of cities and boroughs, in England and Wales, in so

far as respects the election of members to serve in parliament," it was enacted (a) that the borough of Birmingham should, as to the election of members to serve in parliament, include and be comprised within "the respective parishes of Birmingham and Edgbaston, and the several townships of Bordesley, Duddleston and Nechells, and Deritend."

The inhabitants of the borough of Birmingham, comprised within the district hereinbefore described, being, or assuming to be, incorporated by virtue of a royal charter, (hereinafter more particularly mentioned,) dated 31st October, 1838, the council of the said borough presented a petition to her majesty in council, in March, 1839, whereby, after representing to her said majesty "that there was then already a commodious jail in the said borough of Birmingham, which at a trifling expense might be made suitable to the confinement of prisoners during the sessions," the said council of the borough humbly prayed that her majesty would be graciously pleased to grant that a separate court of quarter sessions of the peace should thenceforth be holden in and for the said borough.

By charter, dated 3d May, 1839, her majesty, in compliance with the said petition, granted to the said borough that a separate court of quarter sessions
*643] of the peace should thenceforward be holden in and for such *borough, according to the provisions of stat. 5 & 6 W. 4, c. 76, ss. 103, 105, and shortly afterwards appointed a recorder of the said borough.

At the time when the said council of Birmingham so presented their said petition, there was not in fact, nor at any time since hath there in fact been, any jail or house of correction in the borough of Birmingham.

Within ten days (b) after the grant of the separate court of quarter sessions, the council of the borough sent a copy of such grant, with and under the seal of the said borough, to the clerk of the peace of the said county: and a separate court of quarter sessions of the peace hath, since the last-mentioned grant, been in fact from time to time regularly and at the accustomed periods holden in and for the said borough before the said recorder: and all such offences and matters as are usually cognisable at courts of quarter sessions of the peace in England have, (when committed and arising within the said borough,) since the granting of such separate court of quarter sessions, been tried and inquired into at such separate court, save and except the offences and matters which in due course ought to have been tried and inquired into at the quarter sessions of the peace holden at Michaelmas, 1840, and Epiphany, 1841, and at the adjourned quarter sessions of the peace holden in March, 1841.

The expenses of prosecutions at the separate courts of quarter sessions for the borough, from the time of the grant thereof until the quarter sessions holden at Michaelmas, 1840, were paid by the treasurer of the borough out
*644] of money advanced by her majesty's *government to the town council, and which still remains due and owing to the government. The expenses of the prosecutions at the several separate courts of quarter sessions for the borough, holden since the said adjourned court in March, 1841, have been paid out of the borough fund of the said borough: but, at the times of the holding of the said three separate courts before mentioned, (viz. at Michaelmas, 1840, Epiphany, 1841, and March, 1841,) the council of the borough had no funds whereout to defray the expenses of the prosecutions. The recorder of the borough consequently declined to try the offenders committed to take their trials at those three courts, and adjourned his court on each occasion, immediately after opening the same: and the prisoners, so

(a) Sect. 35, and schedule (O.) (b) Stat. 5 & 6 W. 4, c. 76, s. 112.

committed as last aforesaid, were on that account, and on those occasions, in fact tried at the quarter sessions for the county of Warwick; and the expenses of those prosecutions were paid out of the county fund.

In consequence of there being no jail or house of correction within the borough, the course has always been, and is, that all prisoners committed to take their trial at the borough sessions by virtue of the said grant, have been and are conveyed to the county jail at Warwick (about twenty miles distant from the said borough) for safe custody, and brought back again to the borough for trial at the separate court of quarter sessions; and prisoners convicted thereat have been, and are, reconveyed to the said county jail, there to undergo, and have in fact there undergone, their sentences: and the expense of such conveyance and reconveyance has always been paid by the treasurer of the borough. No contract has at any time been entered into between the town council and the county justices for or relating to the *maintenance of such prisoners: and the expense of maintaining them [*645 has in fact been always paid out of the county fund; and, in like manner, the costs incurred by the prosecution of offenders committed from the borough and tried at the assizes for the county have also been paid out of the county fund. Several county rates have been made and levied for the county of Warwick since the granting to the said borough of the separate court of quarter sessions of the peace: but the parish of Birmingham has never been included in, or assessed to, any such county rate made since the said grant, until the making of the said rate or assessment on 19th October, 1841.

In June, 1839, the town council of the borough made a borough rate for the borough in the nature of a county rate; in and to which the said parish of Birmingham was assessed by the council at the sum of 8,734*l.* 19*s.* 8*d.*: but the overseers of the poor of the parish, being advised that it was very doubtful whether the council had a right to make that rate, refused to pay the sum assessed on the parish. In February, 1841, the town council made another borough rate in the nature of a county rate, in and to which the parish of Birmingham was assessed at the sum of 5,161*l.* 10*s.* 6*d.*; and the overseers of the parish had in fact paid a considerable part of that assessment, and were in course of paying the residue thereof, at the time of the making of the said county rate on the 19th October, 1841. On the 12th October, in the same year, the council of the borough made a third borough rate, in the nature of a county rate, in and to which the parish of Birmingham was assessed at the sum of 4,479*l.* 6*s.* 7*d.*; and the last mentioned assessment, at the time of the issuing of the writ of *certiorari before mentioned, was in regular course of payment by [*646 the said overseers.

The whole of the parish of Birmingham is situate within the limits of the borough of Birmingham, as settled and described by stat. 2 & 3 W. 4, c. 64, and within the district comprised in the said charter bearing date the 31st October, 1838.

On behalf of the prosecutors of the writ of certiorari, it is contended that, in consequence of such grant of a separate court of quarter sessions of the peace to the said borough, and of a copy of such grant having been so as aforesaid duly sent to the clerk of the peace of the said county, the county justices had no authority to assess the messuages, lands, tenements, or hereditaments, situate in the parish of Birmingham, to the said county rate,(*a*) so as aforesaid made on the 19th October, 1841. The county

(*a*) Stat. 5 & 6 W. 4, c. 76, s. 112.

justices on the other hand insist that, as there was not at the time of the making the said grant, nor at any time since hath been, any jail in the borough of Birmingham, and as the whole expense of maintaining offenders committed for trial at such separate court of quarter sessions for offences within the borough had in consequence thereof fallen on, and been defrayed out of, the general county rates of the county, and as the treasurer of the county had never received any sum in aid or on account of the county rate from the council or treasurer of the borough, and as, in consequence of there being no jail within the said borough, no contract could, as they allege, be entered into with the county justices for the maintenance of the borough prisoners in the county jail and house of correction, *647] *and the above expense is not therefore, as they allege, legally recoverable from the said borough, the county justices had authority to include the borough of Birmingham in the assessment to the county rate made 19th October, 1841. It is moreover contended, in support of the said rate, that the said grant of a separate court of quarter sessions of the peace to the said borough of Birmingham is void on two grounds: First, that her majesty was deceived by the petition before mentioned, and induced to make the said grant by the untrue allegation contained in the said petition, that there was then a commodious jail in the said borough; whereas, in truth, there was not, at the time of the said petition, or of the said grant being made, or at any time since hath there been, any jail whatever within the said borough: Secondly, that the said charter of incorporation of the said borough, dated 31st October, 1838, was, for the reasons hereinafter stated, void; or, if not void, still that the same did not nor could legally vest in the town council of the said borough the right of ordering a borough rate in the nature of a county rate to be made within and for the said borough; nor was it, under such circumstances, competent to her majesty to grant unto the said borough, so incorporated by such charter, that a separate court of quarter sessions of the peace should be holden in and for such borough according to the provisions of stat. 5 & 6 W. 4, c. 76.

The case then stated four objections to the charter of incorporation, of which the first only was insisted upon by the counsel supporting the rate, and which was as follows.

That the charter was not granted, and it is agreed to be admitted on the *648] argument on this case that it was *not in fact granted, on the petition of the whole or a majority, either in number or property, of the inhabitant householders, or of the whole or of a majority, either in number or property, of the male inhabitant householders of the town of Birmingham.

The question for the opinion of the court was, whether the justices of peace of the county of Warwick had authority to assess messuages, lands, tenements, and hereditaments situate within the borough of Birmingham, to the said general county rate or assessment. If the court should be of opinion that the justices of the peace of the county had such authority, then the orders of the said justices, and the said general county rate or assessment so made as aforesaid, were to be affirmed: if the court should be of opinion that the said justices of the peace had not such authority, then so much of the said rate or assessment as purports to assess the parish of Birmingham at the sum of 1599*l.* 6*s.* 8*d.*, and of the order directing the same to be made, and so much of the said order of the said justices to the high constable of the hundred as commands him to collect and

receive the said last-mentioned sum from the overseers of the said parish, are to be quashed.

The case was argued in this vacation.(a)

Whateley for the prosecutors of the certiorari. The order must be quashed. The county sessions, by 5 & 6 W. 4, c. 76, s. 112, had no power to assess the lands, &c., within the borough of Birmingham to the general county rate, unless the grant of a court of quarter sessions be void.

*The objection, that the charter of incorporation was not granted on the petition of the whole or a majority of the inhabitants, must [*649 fail, on the authority of *Rutter* v. *Chapman*, 8 M. & W. 1.

The other objection, that the grant of a court of quarter sessions was void on the ground that the Queen was deceived in her grant, will not be entertained in this proceeding. If the objection be good at all, it can be made available only on a scire facias to repeal the grant. A decision in favour of this rate would not avoid the grant. No person connected with the borough of Birmingham is a party to this application. It is true that there may be found in the books expressions to the effect that grants by patent are, under certain circumstances, void: but the real meaning is that they are voidable by scire facias. In 17 Vin. Abr. 100, tit. *Prerogative of the King*, (O. b,) pl. 1, in marg., it is said, "if the matter which is false in the letters patent be suggested on the part of the grantee, and that to the prejudice of the king, there the king shall be said to be deceived in his grant so as to make it void." But the dictum of EYRE, J., in *Rex* v. *Kemp*, 12 Mod. 77, 78, is cited for this; and there the question was whether the grant could be avoided by scire facias. In 17 Vin. Abr. 117, tit. *Prerogative of the King*, (S. b,) pl. 14, it is said, "Where the king by his letters patent, dated 1st May, grants to me an office or other thing, and after, by other patents dated 2d May, he grants the same thing to a stranger, those second patents are merely void; and yet I shall have scire facias against the second patentee, and avoid those last patents by judgment of *the court:" for which a dictum in *Rex* v. *Savage*, Keilw. 196 b, is cited. And this agrees with the language of Lord COKE, [*650 4 Inst. 88: "This writ of *scire fac'* to repeal letters patents doth lie in this ordinary course of justice in three cases. The first, when the king by his letters patents doth grant by several letters patents one and the self same thing to several persons, the former patentee shall have a *scire fac'* to repeal the second patent. Secondly, when the king granteth any thing that is grantable upon a false suggestion, the king by his prerogative *jure regio* may have a *scire fac'* to repeal his own grant. Thirdly, when the king doth grant any thing, which by law he cannot grant, he *jure regio* (for advancement of justice and right) may have a *scire fac'* to repeal his own letters patents." [Lord DENMAN, C. J. The first and third cases are certainly very strong: but it is not said that the letters are not void without a scire facias.] If they were so, the scire facias would have no object. In 2 Rol. Abr. 191, tit. *Prerogative le Roy*, (S), pl. 1, it is said, "Si le patentee del Roy d'un office commit un forfeiture per condition en fact, ou en ley enfreint, le Roy poet luy ouster devant ascun scire facias graunt, ou office, ou fesance d'ascun novel patent." For this *Sir George Reynel's Case*, 9 Rep. 95 a, is cited; but two placita in 2 Dyer, 198 a, pl. 50, and 211 a, pl. 29, are referred to as contravening the doctrine, which they do. And, even in *Sir George Reynel's Case*, the office was seised after a finding of the forfeiture by a commission under the Great

(a) June 21st. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.

Seal returned into Chancery; so that there was a finding of record, which finding might have been traversed. Accordingly, in Com. Dig. *Officer*, *651] (K. 11), (K. 12), (K. 13), three modes of taking *advantage of a forfeiture are pointed out, where an interest is devested, namely, by scire facias, by inquisition or office, and by information, all matters of record and direct proceedings. It seems, from 17 Vin. Abr. 115, tit. *Prerogative of the King*, (S. b,) pl. 2, that scire facias is not necessary where the letters patent themselves disclose an objection according to the grant: but here the objection arises on extrinsic matter. In the case of letters patent for new inventions a third party may take advantage of the want of novelty of intention: but that is because stat. 21 Ja. 1, c. 3, puts an end absolutely to the monopoly, with an exception, by sect. 6, of patents to the inventor where others have not used the manufacture. But in other cases, as the case of grants of markets or fairs, the courts pay so much respect to the Great Seal as to put a party objecting to his scire facias. [COLERIDGE, J. Suppose a contest between the first and second patentees of the same thing, as a market: must not the court decide upon the right? That would be a noticing of extrinsic matter. So if a stranger disputed the right of the second patentee.] In the case last put, it is not clear that the court would decide without a scire facias. In each case the objection would be that the crown had granted what it had not to grant: here the objection is that the crown did grant what it had power to grant, but was deceived. [COLERIDGE, J. If this grant be good only under stat. 5 & 6 W. 4, c. 76, s. 103, a question may arise whether the circumstances stated respecting a jail do not show that the statutory power had not arisen.] That, at any rate, does not appear on the face of the grant. Besides, sect. 103 directs only that a representation be made as to the state of the *652] jail: that does not necessarily confine the power to the case *where a jail exists. The grant of a court would carry with it the grant of a jail; *Smith* v. *Hellier*, Cro. Eliz. 167; and such appears to have been the opinion of this court in *Regina* v. *The Justices of Lancashire*, 11 A. & E. 144. Besides, the court may be created at common law; Com. Dig. *Prærogative*, (D. 28); though not a new court with a new power; 4 Inst. 200. And none but the crown has a right to complain of the alleged deceit.

Mellor, contrà. The question is, whether the borough of Birmingham, which, it is admitted, has put the county to expense, shall be exempt from contributing to the county rate. The borough is to make out the exemption. No common law prerogative of the crown will be enough for this; since the Queen can have no power to exempt from the county rate. It may be that the Crown could not avoid the grant without scire facias, on the ground of deceit: but a third party has a right to question the power of the Crown, which clearly, unless properly exercised under the Municipal Corporation Act, cannot exempt from the statutory liability to the rate. In Com. Dig. *Patent*, (F. 1,) it is said, "if the patent be void in itself, *non concessit* may be pleaded to it, without a scire facias to repeal it:" and in *Rutter* v. *Chapman*, 8 M. & W. 1, it was taken for granted that the point might be raised between third parties, and the court entertained the question. [Lord DENMAN, C. J. That might be because the coroner had an interest.] Here the county is interested in supporting the rate by impugning the grant. [PATTESON, J. In *Regina* v. *Taylor*, 11 A. *653] & E. 949, this court refused to allow the charter of a borough to *be impugned in a quo warranto against an officer of the borough.

In *Regina* v. *Davis*, note (c) to 11 A. & E. 953, the point seems not to have been brought before the court.] In *Regina* v. *The Justices of Lancashire*, the court decided that a borough, having a grant of quarter sessions, but being without a jail, could not contract with the county for the maintenance of prisoners, under stats. 5 G. 4, c. 85, s. 1, and 5 & 6 W. 4, c. 76, s. 114. If, therefore, this grant be upheld, the county will be without remedy. Sect. 3 of stat. 5 G. 4, c. 85, enacts that, during the existence of such contract, no city, &c., shall be indicted for non-repair of its jail, &c.: but there are no means of compelling a borough which has never had a jail to build one, so as to be capable of contracting. There is therefore a public right to resist the carrying into effect a grant, the consideration for which cannot be fully obtained; and the principle laid down in *Rex* v. *Cumberworth*, 3 B. & Ad. 108, and 4 A. & E. 731;(a) and *Blakemore* v. *The Glamorganshire Canal Navigation*, 1 Mylne & Keen, 154, 162, applies.

Then, the language of stat. 5 & 6 W. 4, c. 76, s. 103, implies that a borough is not to petition for a grant of quarter sessions till it has a jail the state of which may be shown. [COLERIDGE, J. How could a new borough have a jail?] It may be that the enactment is incomplete in not supplying this requisite; or perhaps the new borough ought to build a jail before the application for the grant is made. The Recorder cannot have power to commit to the county jail. [COLERIDGE, J. If you add, in sect. 103, the words "where there is a *jail," the difficulty disappears.] The language of the section is not at all conditional. [Lord DENMAN, C. J. Or rather you would say that the condition comes earlier, and that, when there is a jail, the borough may apply.] That is the effect of the section. [COLERIDGE, J. Yet sect. 103 beyond doubt contemplates that the application may be made by a borough having no quarter sessions.] That argument might have been urged in *Regina* v. *The Justices of Lancashire*, 11 A. & E. 144. [PATTESON, J. The difficulty there arose from the attempt to apply the regulations of an earlier statute to the state of things produced by stat. 5 & 6 W. 4, c. 76.] Yet the legislature has attempted to incorporate the provisions of stat. 5 G. 4, c. 85, in the Municipal Corporation Act. It is argued that the grant of a court is in effect a grant to have a jail. But, even if the Crown could grant the right to have a jail, the construction suggested would be bad, as giving a double intent to the Crown's grants, which cannot be done; 17 Vin. Abr. 142, tit. *Prerogative of the King*, (G. c.) (b) [*654

As to the charter of incorporation, the case differs from *Rutter* v. *Chapman*, 8 M. & W. 1. There the court held that MAULE, B., did rightly in leaving to the jury whether the petition was in fact the petition of the inhabitant householders: but here the finding of fact is express, that there was no petition either of the whole or the majority. The decision of the privy council does not furnish an answer to this objection. [PATTESON, J. But, although that decision be not conclusive, it throws upon you the burden of showing that the proceeding was illegal.] By sect. 141 of stat. 5 & 6 W. 4, c. 76, the Crown may grant *a charter of incorporation on the inhabitant householders' petition: such petition is, in fact, substituted for the common law requisite of acceptance. Something equivalent to a petition must be shown; in *Rutter* v. *Chapman*, 8 A. & E. 1, it was never [*655

(a) See *Rex* v. *Edge Lane*, 4 A. & E. 723; *Regina* v. *The Eastern Counties Railway Company*, 10 A. & E. 531.

(b) See the argument in *Jewison* v. *Dyson*, 9 M. & W. 540, 568.

suggested that there could be such equivalent without the express or implied concurrence of the whole, or majority, of the inhabitant householders.

Whateley, in reply. As to the last point. The case shows no dissent: there is therefore nothing to impeach the decision of the Privy Council. Half the inhabitants may have petitioned, and the remainder have abstained from interfering.

It is not denied that the objection, that the Queen has been deceived, may be raised by a third party: but that must be done by a direct proceeding in which the fact of the deceit may be specifically alleged and traversed: and for this purpose a subject may proceed by scire facias. *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the court.

The question for the opinion of the court in this case is, whether the justices of the peace of the county of Warwick had authority to assess messuages, lands, tenements and hereditaments, situate within the borough of Birmingham, to the general county rate. And that question must depend on this: whether the borough of Birmingham has been in due form of law incorporated by a charter of her majesty granted to the inhabitants of the
*656] said borough in the second year of her reign, *and, moreover, whether the charter of the Queen, of the 3d of May, 1839, granting to the borough a separate court of quarter sessions, be valid.

Primâ facie, the town of Birmingham, having been (before the said charter) situate within and parcel of the said county of Warwick, is liable to be assessed to the said county rate, except the exemption above mentioned be satisfactorily established: and that depends upon the legality of the said last-mentioned charter: because, if that be legal, the borough of Birmingham, by virtue thereof, becomes exempt from the contribution to a county rate.

Several objections to the validity of the said first-mentioned charter were pointed out in the statement of the case for our opinion, for the purpose of showing that there existed no legal borough to which the grant of a separate court of quarter sessions could be made.

The learned counsel, however, who argued in support of the order of sessions, abandoned all except two, as having been disposed of by the decision in the case of *Rutter* v. *Chapman*, 8 M. & W. 1.

As to one of those objections to the first-mentioned charter, however, it was contended that the present case is distinguishable from that referred to in this respect; that, whereas in that case it only appeared *inferentially*, it here is *directly stated*, that the charter was granted upon the petition of a less number than the majority of the inhabitant householders. We are all of opinion, however, that the view taken of this subject in the case of *Rutter* v. *Chapman* is applicable also to this case, and disposes of the objection.

*657] *The other objection, which is to the latter charter, is attended with much more difficulty; and, if we had thought that it came before us *directly* for decision, we should certainly have taken further time for consideration. This objection depends upon the 103d section of the act in question. It is required that "*the state of the jail*" in the borough petitioning for a charter shall be set forth in the petition. From this it is inferred, (and we think that there is great weight in the argument,) that there must in fact be a jail in existence at the time of so petitioning the Queen; and that none such did exist at that time, or at any time since, in the borough of Birmingham. That, if such fact did not exist, the Queen was deceived in her grant, and that such deceit would be a ground for invalidating it altogether. But a doubt has arisen, whether, in the present state of the case, this important question be really raised.

The borough of Birmingham, as duly incorporated, does exist *in fact*. The same observation applies as to the second charter of the Queen, and the holding of courts of quarter sessions thereunder. The validity of the first charter, and of the incorporation by virtue of it, and the legality of the courts of quarter sessions under the second charter, is *incidentally* (and so only) impeached. No person connected with the borough itself complains of that incorporation, or of the holding of the court of quarter sessions being illegal. The illegality of the charter is, for the purpose of assessing the borough, *assumed;* whereas another and more formal method of questioning their legality is open. It is competent, by the writ of scire facias, *directly* to ascertain whether the grant of the Queen of a separate court of quarter *sessions be invalid or not. And, in the absence [*658 of such proceeding, we think that we are not called upon to pronounce any opinion upon the effect of this objection, but that the state of things, *as we find them*, must be sustained, and that the order of sessions, for that reason *only*, cannot be supported. We are strongly impressed with the inconvenience of deciding upon a case of so much importance in this form of proceeding. Whereas by another (to which we have already referred) the question may be raised in such a manner as not only to challenge those immediately interested in the continuance of the charter to maintain its validity, but the decision, whatever it may be, will be directly on the point, and subject to further consideration and review.

Rule absolute.

PEYTON, Clerk, v. WATSON.

Since stat. 5 & 6 W. 4, c. 74, s. 1, debt for treble value for not setting out tithes, under stat. 2 & 3 Ed. 6, c. 13, s. 1, cannot be maintained where the annual value does not exceed 10*l*.

DEBT. The declaration (dated 29th June, 1841) recited that plaintiff, before and at the several times after mentioned, was rector of the parish of Doddington in Cambridgeshire, being proprietor of the tithes of corn, grain, and hay, yearly arising, growing, &c., upon divers, to wit, 200 acres of land, situate, &c., in the parish and county aforesaid, and within the bounds, limits, and titheable places of the parish; and defendant, during all the term aforesaid, was occupier of the land; that all and singular the tithes of corn, grain, and hay, yearly arising, growing, &c., on the said land within forty years before and at the time of the passing of a certain act of parliament passed in the reign of Edward *the Sixth, &c., of [*659 right ought to have been set out and paid in kind to the farmer or proprietor of tithes for the time being: that defendant heretofore, to wit, 1st June, 1835, and on divers other, &c., reaped, mowed, and cut down certain corn, grain, and hay, to wit, 200 acres, &c., then growing upon the said lands, the tithe whereof then belonged to plaintiff, and of right ought to have been set out and paid to him as such proprietor as aforesaid: yet defendant, after the said reaping, &c., and before the commencement of this suit, to wit, on, &c., did take and carry away the said corn, &c., from the land whereon the same had so grown, and been so reaped, &c., and where the same ought to have been tithed, the tenth part of the same respectively, or of any part thereof, not having been separated, divided, or set out from the nine parts, residue thereof, nor any composition or agreement made, &c., contrary to the form of the statute in such case, &c.: that the tenth

part of the said corn, &c., so as aforesaid taken, &c., at the times of the taking, &c., of the same, was reasonably worth a large sum, to wit, the sum of 30*l.*; whereby, and by force of the statute, &c., an action hath accrued to the plaintiff to have and demand the sum of 90*l.*, being treble the value of the said tenth part, &c. Breach, that defendant had not paid the sum demanded.

Plea. Nil debet. Issue thereon.

On the trial, before ALDERSON, B., at the Cambridgeshire Summer assizes, 1841, it was admitted that the plaintiff was rector, the land titheable, and the defendant occupier from April, 1834, to April, 1839; and that he had not set out the tithe: but it appeared also that the tithe was of an annual value under 10*l.* On this ground, the counsel for the defendant con-
*660] tended that the action was barred, *under stat. 5 & 6 W. 4, c. 74. The learned judge directed a verdict for the plaintiff, giving leave to move to enter a nonsuit or a verdict for the defendant.(*a*) In Michaelmas term, 1841, *B. Andrews* obtained a rule accordingly.

Byles now showed cause. Stat. 5 & 6 W. 4, c. 74, s. 1, after referring first to stat. 7 & 8 W. 3, c. 6, and secondly to stat. 53 G. 3, c. 127, and then to some other statutes, enacts that, after the passing of that act, (9th September, 1835,) "no suit or other proceeding shall be had or instituted in any of his majesty's courts in England now having cognisance of such matter for or in respect of any tithes, oblations, or compositions withheld, of or under the yearly value of 10*l.*, (save and except in the cases provided for in the two first-recited acts,) but that all complaints touching the same shall, except in the case of Quakers, be heard and determined only under the powers and provisions contained in the said two first-recited acts of parliament in such and the same manner as if the same were herein set forth and re-enacted;" with a proviso excepting cases where the title or liability is in dispute, or where a suit has been actually instituted before the passing of the act. The enactment relates to suits properly so called, for the recovery of tithes, which are instituted in Chancery, or in the Ecclesiastical Courts. But this is a proceeding for a penalty, under stat. 2 & 3
*661] Ed. 6, c. 13, s. 1, for taking *away the crops without setting out the tithes. Stat. 7 & 8 W. 3, c. 6, gives a remedy for the recovery of small tithes by complaint to two justices: but it leaves the remedy under stat. 2 & 3 Ed. 6, c. 13; and, indeed, it does not do away with a direct proceeding by suit for the tithes, as appears by sect. 14. Stat. 53 G. 3, c. 127, s. 4, extends the remedy of stat. 7 & 8 W. 3, c. 6, to all tithes not exceeding 10*l.* But the penal action is left untouched, except that sect. 5 limits the time for commencing it to six years. Then stat. 5 & 6 W. 4, c. 74, must be construed as leaving the penal action in force, like the two other statutes. The tithes are not recovered at all by the penal action: the judgment is for the forfeiture of treble value, for omitting to set them out.

B. Andrews, contrà, was stopped by the court.

Lord DENMAN, C. J. If the learned judge who tried the cause had expressed a very strong opinion, I might perhaps have wished for longer time to consider the question. But it seems to me quite clear that stat. 5 & 6

(*a*) Two other questions were also made; first, whether the rector was not barred under an enclosure act 32 G. 3, c. 108; and, secondly, whether the proviso in stat. 5 & 6 W. 4, c. 74, s. 1, as to a dispute on title, did not apply. The first point was, however, given up by the plaintiff's counsel; and the court ultimately considered that the second point was not raised by the facts.

W. 4, c. 74, extends to the prohibition of actions of debt for treble value under stat. 2 & 3 Ed. 6, c. 13, s. 1, where the annual value is less than 10*l*. The words "for or in respect of any tithes," and "all complaints touching the same," are obviously sufficient.

WILLIAMS (*a*) and COLERIDGE, Js., concurred.

Rule absolute for a nonsuit.

(*a*) Patteson, J., had left the court.

*MARTINS v. UPCHER and GAY. [*662

A notice of action to a magistrate, under stat. 24 G. 2, c. 44, s. 1, must specify the place at which the act complained of occurred.

It is not enough that it names the day.

The omission is not cured by the magistrate pleading a tender of amends, under sect. 2.

TRESPASS for assault and false imprisonment.

Pleas. 1. Not guilty (by statute). Issue thereon.

2. That defendants were justices of the peace in Norfolk; that the alleged trespasses were committed in execution of their office, after 24th June, 1751; and that, before the commencement of the suit, and within one calendar month after any notice in writing of any suit, &c., defendants offered to plaintiff's attorney a sum of money, to wit, 50*l*., as and for amends, which was sufficient amends, and which the attorney refused to accept. Replication, that the sum mentioned was not sufficient amends. Issue thereon.

On the trial, before ALDERSON, B., at the Norfolk Summer assizes, 1841, it appeared that the act complained of was an imprisonment under a conviction by the defendants in their office of justices. The plaintiff proved service of the following notice upon the defendants, more than one month before action brought.

"To Henry Ramey Upcher, and John Johnson Gay, Esquires, two of her majesty's justices of the peace in and for the county of Norfolk.

"I do hereby, as the attorney of and for Martin Martins of North Walsham in the county of Norfolk, labourer, duly authorized in this behalf, according to the form of the statute in such case made and provided, give you notice that Martin Martins will, at or soon after the expiration of one calendar month from the time of your being served with this notice, cause a writ of *summons to be sued out of her majesty's Court of Queen's Bench at Westminster, against you, at the suit of him, the said Martin Martins, and proceed thereupon according to law. [*663 For that you, on the 5th day of October, A. D. 1840, with force and arms, caused an assault to be made on the said Martin Martins, and then caused him to be apprehended, seized and laid hold of, and to be forced and compelled to go as a prisoner, and in custody, in, through and along divers public highways, to a certain dwelling-house, and there caused him to be imprisoned and detained in prison for a long time, to wit, for twelve hours then next following, at the expiration of which time you again forced and compelled the said Martin Martins to go as a prisoner, and in custody, from and out of the said dwelling-house, into, through and along divers other public highways, to a prison and house of correction, and to be there imprisoned, and kept and detained in prison there for a long time, to wit, for three months then next following; whereby the said Martin Martins suffered great pain and anguish," &c.,

"and was, during all the time aforesaid, prevented from attending to his lawful and necessary affairs," &c., "and was also put to, and necessarily incurred, divers great expenses," &c. "And that you other wrongs to the said Martin Martins then did, against the peace," &c.

"Dated this 9th day of January, A. D. 1841.

"Yours, &c., CHRISTOPHER ROBSON,
of No. 13 Clifford's Inn, Fleet Street, in the city of London, attorney for the said Martin Martins."

*664] The counsel for the defendants objected that this *notice was uncertain, as not specifying the place at which the alleged trespass was committed: and the learned judge, upon this objection, nonsuited the plaintiff.

In Michaelmas term, 1841, *Peacock* obtained a rule nisi for a new trial.

B. Andrews (with whom was *O'Malley*) now showed cause. Stat. 24 G. 2, c. 44, s. 1, requires that in the notice there "shall be clearly and explicitly contained the cause of action." And sect. 5 enacts that no evidence shall be given "of any cause of action, except such as is contained in the notice." Here the cause is not clearly or explicitly described; for there is no statement of the place where the alleged trespass was committed. It would not be possible to apply the limitation of sect. 5 to such a notice: and the magistrates might be surprised by evidence of an imprisonment different from that in respect of which they had tendered amends under sect. 2. *Stringer* v. *Martyr*, 6 Esp. 134, shows how closely plaintiffs are bound down to the terms of their notices. In *Freeman* v. *Line*, 2 Chitt. Rep. 673, a road act (16 G. 3, c. 80) enacted that no action or suit should be commenced for any thing done in pursuance of the act until twenty-one days' notice should be thereof given to the clerk of the trustees. An action was brought for taking toll in respect of things exempted: and the notice stated the intended action to be "for demanding and taking of me toll for and in respect of certain matters and things particularly mentioned, and exempted from the payment of toll, in and by a certain act of parliament, entitled,"
*665] &c.: and this was held too uncertain. Lord ABINGER, C. B., *at Nisi Prius, ruled that a notice under stat. 24 G. 2, c. 44, s. 1, was insufficient unless it specified both time and place; *Bennett* v. *Broughton*.(a) This decision has been twice acted on at Nisi Prius: by PARKE, B., in *Larkins* v. *Yorke*,(b) where the notice was in the same terms as the present; and by TINDAL, C. J., in *Newman* v. *Bendyshe*,(c) though that case afterwards went off on another point. In *Lovelace* v. *Curry*, 7 T. R. 631, it was decided that the intended writ or process must be mentioned in the notice. Here the amount was tendered; but that is no waiver of the objection. (He was then stopped by the court.)

Peacock, contrà. The offence could be committed in no county but that for which the defendants were justices. Therefore the place, so far, is not left uncertain. How much farther particularity is required? Must the parish, and the particular house, be named? In *Gimbert* v. *Coyney*, M'Cel. & Y. 469, the notice was drawn in the form ordinarily used in declarations, and stated the time of the alleged trespass to be on the 16th August, 1824, "and on divers other days and times between that day and the day of the date hereof," (26th November, 1824;) and this was held good: yet the time

(a) Sittings at Westminster, November 27th, 1838. B. Andrews referred to a report of this case in "The Justice of the Peace," vol. ii. No. 48, p. 759

(b) At the Cambridgeshire assizes.

(c) At the Cambridgeshire assizes. B. Andrews stated that this was a different action from *Newman* v. *Bendyshe*, 10 A. & E. 11.

would have comprehended any day within three months. Here the day is fixed by the notice. If there were a latent ambiguity, it would be open to the defendants to show that by *evidence. In *Wood* v. *Folliott*, note (a) to *Osborn* v. *Gough*, 3 B. & P. 552; a notice of action, for [*666 a seizure made by an excise officer, was held sufficient, under stat. 23 G. 3, c. 70, s. 30, though it specified neither time nor place. In *Lovelace* v. *Curry*, no place seems to have been mentioned: yet no objection was made on that ground. In *Bennett* v. *Broughton*, antè, note (*a*), p. 665, no place was mentioned, as here: and, as a verdict was obtained against one defendant, the plaintiff probably did not think it worth while to raise the point in banc. In *Larkins* v. *Yorke*, antè, note (*b*), p. 665, a juror was withdrawn. It is true that PARKE, B., was about to nonsuit: but the counsel for the defendant cannot have relied on the objection; and there was no opportunity of moving. That the decision, as well as *Newman* v. *Bendyshe*, antè, note (*c*), p. 665, proceeded entirely on the authority of the Nisi Prius decision of *Bennett* v. *Broughton*. The courts construe such clauses reasonably. In *Agar* v. *Morgan*, 2 Price 126, separate notices to several defendants were held sufficient for an action against them jointly. In *Robson* v. *Spearman*, 3 B. & Ald. 493, the criterion applied by ABBOTT, C. J., is this: "It was, however, quite sufficient to apprize the magistrate of the nature of the action about to be brought against him, so as to have enabled him, if he had thought proper, to have tendered amends." In *Jones* v. *Bird*, 5 B. & Ald. 837, BAYLEY, J., said: "A notice of this sort does not require the same precision as a declaration. It is quite sufficient if it calls the attention of the defendants to the general nature of the injury." And BEST, J., said: "The only *object of the notice is to give the defendants an opportunity to tender amends, and it ought not to be scanned very [*667 nicely. Its object is at an end the moment the action is brought, and it is only necessary to refer to it, in order to see whether, substantially, the defendant has been informed of the ground of the complaint." When the jury was to come de vicineto, it might have been necessary to specify the place: but now naming the day is enough to give full information. But the defendants have acknowledged that they know what act is complained of, by tendering amends.(*a*) [COLERIDGE, J. You might say that of any plea in justification.] Such a plea would deny that there was any right of action.

Lord DENMAN, C. J. This appears to be the first occasion on which a decision on the point now before us has been called for in Westminster Hall. An inference might be suggested from the point not having been raised in banc before: but that, I think, would not be safe. Indeed it is not certain that the question may not have arisen, but have remained unnoticed in the reports, because the actual decisions have been upon other points. I decide, however, on the language of the act, which requires that the causes of action "shall be clearly and explicitly contained" in the notice. Unless both time and place be inserted, the cause is not clearly and explicitly contained. Lord ABINGER, C. B., in *Bennett* v. *Broughton*, appears to have thought both necessary. I do not go so far as to say that a party will always be *strictly bound to prove the time and place which he names in his notice: but I think the words of the statute require that a time and [*668 place for the occurrence be named. It is satisfactory to find that this was Lord ABINGER's opinion, and that no objection was made in banc to his

(*a*) On the motion for the rule nisi, the court expressed an opinion against this argument. *Coles* v. *The Bank of England*, 10 A. & E. 437, was cited.

ruling. Then great weight must be attached to the opinion entertained both by Lord Chief Justice TINDAL and Mr. Baron PARKE, that the place must be part and parcel of the notice. My view is quite in conformity with theirs: and we should introduce an improper doubt if we did not act upon this principle.

WILLIAMS, J.(a) I am of the same opinion. We must construe the act by looking at the whole, which has been carried into effect with much minuteness. It is not enough for an attorney to describe his abode as in London or Westminster.(b) Now here, as it seems to me, the plaintiff cannot say that the cause of action is explicitly contained in the notice, unless the description of the act complained of include the place where it occurred. And we find this view confirmed by the decisions at Nisi Prius, which have not been complained of in banc.

COLERIDGE, J. I am of the same opinion. The act was passed to protect magistrates in the execution of their duty; and we ought to give such a construction to it as will advance that object. Mr. *Peacock* endeavours
*669] *to limit the effect by assuming that the intention was merely to enable the magistrates to tender amends. And the expression of BEST, J.,(c) as to notice has been referred to, that "its object is at an end the moment the action is brought." But look at sect. 5. The evidence is to be limited to what is contained in the notice: that surely makes the place a part of the description required: and it is not to be supposed that no action will be brought except where the complaint is true. The words in sect. 1 are, "the cause of action which such party hath or claimeth to have." Suppose the charge to be false, how material it is to the magistrate to know the time and place to which the plaintiff's evidence will refer. Therefore, I should have held that the place is an essential ingredient in the notice, even without the authority of the three cases at Nisi Prius.

Rule discharged.

(a) Patteson, J., had left the court.
(b) See the decisions on the Uniformity of Process Act, stat. 2 W. 4, c. 39, s. 12, and sched. No. 1, cited in the argument in *Tadman* v. *Wood*, 4 A. & E. 1011, 1012, 1013.
(c) In *Jones* v. *Bird*, 5 B. & Ald. 846.

DOE on the several demises of HARRIET PARSLEY, and of SAMUEL and HARRIET PARSLEY, *v.* GEORGE DAY.

Reported 2 Q. B. 147.

*670] *The QUEEN *v.* The Commissioners of Sewers for the TOWER HAMLETS, excluding ST. KATHERINE'S and BLACKWALL MARSH.

The Commissioners of Sewers (under stats. 23 H. 8, c. 5, and 2 W. & M. sess. 2, c. 8,) made a rate upon a level formed by uniting two levels, S. and N., which had formerly been distinct. Certain rate payers of N. objected, on the ground that the level of N. would be rated more highly; and gave the commissioners notice that they intended to remove the proceedings by certiorari. For this purpose, they applied to the commissioners for inspection of their proceedings. The commissioners allowed inspection of all proceedings relating to the union of the levels and to the rate in question, but not of any other documents.

This court refused to order the commissioners, by mandamus, to produce "all commissions, plans, rates, presentments, decrees, accounts, books, proceedings and minutes of proceedings, relating to the district" comprising the two levels, for inspection by the said rate payers. Though the commissioners had given the rate payers notice of their intention to enforce the rate.

Erle, in last Hilary term, obtained a rule calling upon the above-named commissioners to show cause why a mandamus should not issue, commanding them to produce all commissions, plans, rates, presentments, decrees, accounts, books, proceedings and minutes of proceedings, relating to the district of the Tower Hamlets, or any parts thereof, for inspection by the solicitors of the St. Katherine Dock Company. The facts shown on affidavit, so far as material to the decision of the court, were as follows.

The commissioners act under stats. 23 H. 8, c. 5, and 2 W. & M. sess. 2, c. 8. Before 1836, the district was divided into several levels, for each of which separate and distinct presentments were made, and separate and distinct accounts kept. One of them was the Spital Fields and Wapping Level,(a) and another the Nightingale Lane Level. In 1836 the commissioners, by order, directed works, which were executed accordingly, uniting the two into one drainage. In 1838, a jury presented *the owners and occupiers of "The Spital Fields, Wapping and Nightingale Lane Level." [*671 This presentment not having been traversed, the commissioners, on 20th July, 1838, decreed a rate of 9*d.* in the pound upon the level so presented. The St. Katherine Dock Company(b) possessed large property within the level of Nightingale Lane. They conceived themselves to be aggrieved by the joint rate, and the order uniting the levels, as subjecting them to a higher rate than that to which they were liable before the union: they therefore gave notice to the commissioners of their intention to bring the proceedings of the commissioners before this court by certiorari; and, as a preparatory step, applied by letter to the commissioners for "copies of some of the proceedings of the commissioners," for the purpose, as stated in the application, of preparing affidavits for the certiorari. The commissioners granted an inspection of all proceedings and documents relating to the union of the levels, and to the rate in question; and the solicitor for the company inspected such proceedings accordingly, taking copies of what he considered material. The commissioners, however, refused to permit the inspection of any other documents: and they informed the company of their intention to enforce the rate.

In last term,(c)

Sir *W. W. Follett*, Solicitor General, *Kelly*, and *Willes* showed cause. This inspection cannot be granted. The applicants have no interest in any documents *besides those which they have already inspected: and, further, there are no legal proceedings as yet instituted in the matter. [*672 It certainly was held, in *Rex* v. *The Justices of Leicester*, 4 B. & C. 891, that the rate payers to a borough rate in the nature of a county rate were entitled to inspection of copies of the last two rates, and all orders made for the expenditure of the same, and the orders of sessions made thereon, and other proceedings and documents relating thereto. But the present application is unlimited, both as to time and as to the nature of the accounts. And *Rex* v. *The Justices of Leicester* was questioned in *Rex* v. *The Vestrymen of St. Mary-le-Bone*, 5 A. & E. 268, 275, and expressly overruled in *Rex* v. *The Justices of Staffordshire*, 6 A. & E. 84, on the ground of the want of interest in the rate payers. In *Rex* v. *Allgood*, 7 T. R. 746, this court refused to compel the lord of a manor to allow an inspection of the court rolls to a freehold tenant, who did not show that he had "some cause depending."

(a) This level was itself made up of two, the Spital Fields level, and the Wapping level, which the commissioners had united.

(b) Established by stat. 6 G. 4, c. cv. (local and personal, public,) and later acts.

(c) June 13th, 1842. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.

In *Rex* v. *The Mayor of Maidstone*, 6 D. & R. 334, a mandamus to allow inspection of the records of a court leet was refused to a party who assigned no reason for the inspection except a supposed general right.

Erle, *Platt*, and *Ogle*, contrà. The applicants state their object, which is, to try the question whether the union of those levels is not contrary to the principle of *Rex* v. *Commissioners of Sewers for the Tower Hamlets*, 9 B. & C. 517. They have a direct interest in the question. It is true that no motion has yet been made for a certiorari: but the object is to obtain the necessary
*673] materials for such a *motion, which indeed cannot be rightly made without such materials. That intention is, in principle, as sufficient a reason for inspection as an actual cause depending. It is necessary to know the previous divisions and other circumstances of the levels, that the parties may be properly brought before the court.(*a*) Here a distress is actually threatened. In *Rex* v. *Tower*, 4 M. & S. 162, a mandamus went to compel the lord of a manor to allow the inspection of the court rolls, so far as regarded the cutting of underwood, to a tenant who claimed the right to cut, which the lord denied: and the argument, that no suit was depending, was there unsuccessfully urged. *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the court.

This was an application, by the St. Katherine Dock Company, for a mandamus to compel the inspection of the rate books and other books of the commissioners of sewers. It seems that the commissioners have made some alteration in the mode of rating the different levels within their jurisdiction; by which it is alleged that the applicants are improperly united with a very expensive district, and burdened with a much heavier rate than they ought to be: and they are desirous of inspecting the books, in order to ascertain whether it has been the practice of the commissioners to make such alterations in former times.

*674] *The law on the subject of rating different levels is laid down in *Rex* v. *Commissioners of Sewers for the Tower Hamlets*, 9 B. & C. 517: but it is said that the present dispute may be materially affected by the practice which has prevailed. Now this is not a question of custom, nor one which depends upon the continued exercise of any right claimed: nor is it made at all clear to us how the inhabitants of the parish in which the St. Katherine Docks are situated can be affected by alterations made as to other parishes, or how they are interested in any proceedings which have been adopted by the commissioners in regard to any other places, and to which they have not been parties.

As to all entries of rates and other matters relating to their parish, they may have the right of inspection: but to that extent we understand that it has been given to them. And none of the cases on this subject warrant us in compelling the inspection of any other documents.

Rule discharged.(*b*)

(*a*) The counsel in support of the rule referred to a case of *Birkett* v. *Crozier*, in which this court in Trinity term, 1827, ordered such an inspection as that now applied for. The counsel opposing the rule stated that the order appeared to have been made by consent. The cause was afterwards tried, December 11th, 1827; *Birkett* v. *Crozier*, Moo & M. 119.

(*b*) See *Rex* v. *The Merchant Tailors' Company*, 2 B. & Ad. 115; *Burrell* v. *Nicholson*, 3 B. & Ad. 649; *Birmingham, Bristol, and Thames Junction Railway Company* v. *White*, 1 Q. B. 282.

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

The QUEEN, on the Prosecution of ARMSTRONG and FRANCIS, v. FALL and Others.

Reported, 1 Q. B. 653.

*IN THE EXCHEQUER CHAMBER. [*675

(Error from the Queen's Bench.)

ROBINSON and Another, OVERSEERS of the Poor of the townships of TODMORDEN and WALSDEN, LANCASHIRE, v. The Guardians of the Poor of the TODMORDEN Union, in the Counties of LANCASTER and YORK.

Under stat. 4 & 5 W. 4, c. 76, ss. 26, 38, the Poor Law Commissioners formed a union of six townships, comprehending T. and L., and ordered that there should be eighteen guardians of the union, two of whom were to be elected by L., and the other sixteen by the other townships, in specified proportions, there not being less than two for any one township. The first and two subsequent annual elections took place, at each of which more than six guardians were elected for the union; but L. elected none on any occasion.

Held, by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that the board of guardians elected on the third election, though not eighteen in number, might, under sect. 38, make an order on the overseers of T. for payment of money conformably to the regulations issued for the union by the commissioners: and that the overseers were compellable by mandamus to pay.

THE material parts of the record in the court below,(a) the arguments and the judgments there delivered, are stated in 1 Q. B. pp. 185—197.

The Court of Queen's Bench having awarded a peremptory mandamus, with 12d. damages, and costs, the overseers of Todmorden and Walsden brought error in the Exchequer Chamber, assigning error in the common form, and on special grounds which are not material. The point stated in the margin of the writ of error was that the true construction of the words in stat. 4 & 5 W. 4, c. 76, s. 38, "provided always, that one or more guardians shall be elected for each parish included in such union," is, that one guardian at least ought to be elected for each parish contained in the Todmorden union. Joinder in error.

*The writ of error was argued in this vacation.(b) [*676

Kelly, for the plaintiffs in error, stated, as a preliminary objection, that the mandamus did not anywhere expressly state that the defendants below were overseers at the time when the guardians made orders which had been disobeyed. And he cited *Rex* v. *The Margate Pier Company*, 3 B. & Ald. 220. But

The Court overruled the objection, saying that the mandamus, which bore date January 22d, 1839, recited the orders as made in the preceding half year, and stated that "you the said overseers" were required to pay, &c. that the annual appointment of overseers was fixed by stat. 54 G. 3, c. 91,

(a) At p. 189, line 19, after the word "after" read "the 25th day of."

(b) June 20th. Before Tindal, C. J., Coltman, Maule, and Cresswell, Js., Parke, Alderson, and Rolfe, Bs.

to the 25th of March, or fourteen days next after; and therefore that the overseers appointed within that space of time in 1838 must have been in office when the orders were made and when the mandamus issued, unless a death had intervened, which the court would not presume; and that the overseers making the return (on 15th April, 1839) were identified with those named in the mandamus by the language of the return itself, which began, "We William Robinson and William Crossley, the overseers of the poor of the township," &c., "in the within writ mentioned, do hereby humbly certify and return," &c., and, in the subsequent part, admitted that they "the said W. R. and W. C., the said overseers," were required by the said orders to pay, and refused: and further that, at all events, succeeding overseers would be bound to obey a mandamus directed to their predecessors.

*677] *Kelly then argued the principal points of the case, repeating in substance the arguments used on behalf of the defendants in the court below, and pointing out that, by sect. 38, until the board of guardians should be duly elected and constituted as before mentioned in that section, the orders of the commissioners were to be carried into effect by the justices in each parish, as magistrates, and not as ex officio guardians. And that stat. 2 & 3 Vict. c. 84, s. 1, gave another remedy than mandamus, for recovery of the rates. [ALDERSON, B. That statute was passed after the granting of this mandamus.] It prevents the prosecutors from contending that if the mandamus proves ineffectual there will be a failure of justice.

Tomlinson, contrà, was not heard, the court saying that he would be called upon if, on consideration, they should deem it necessary.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court.

The question in this case turned on the construction of stat. 4 & 5 W. 4, c. 76, s. 38; and it was contended, on behalf of the defendants, that the proviso requiring one or more guardians to be elected for each parish included in every union imported a condition, and implied that, without such election for each parish, a board of guardians could never be legally constituted. But the words of the proviso appear to us to be no more than directory. We think they do not call for the strict interpretation which has been insisted upon. But, supposing that they do imply a condition, we *678] think that *the words which follow get rid of the suggested difficulty. The clause empowering justices of the peace to carry into effect the rules, orders, and regulations of the commissioners "until such board of guardians shall be duly elected and constituted as aforesaid, and also, in case of any irregularity or delay in any subsequent election of guardians," applies, we think, to a defective appointment as to number on the first election only; and to the case of irregularity or delay on a second or subsequent election. We have no doubt that the omission to appoint the proper number of guardians on a second or subsequent election is provided for by another part of the same section, which enacts that, "in case the full number of guardians shall not be duly elected at such subsequent election of guardians for the time being, the other or remaining members of the said board shall continue to act until the next election, or until the completion of the said board, as if no such vacancy had occurred, and as if the number of such board were complete." The objection, therefore, applies to the first election only, and not to a second or subsequent election de facto.

The point raised as to the identity of the overseers was disposed of in the course of the argument.

My brother CRESSWELL points out that the difficulty first referred to is met by the concluding proviso of sect. 38, which enacts that nothing in that section contained shall prevent the rate payers "from electing as a guardian any person who may already have been chosen as a guardian of any other parish." This shows clearly that it was not considered necessary that there should be actually a guardian for each parish. The non-electing parish must be taken to assent to the elections already made by the others.

*The judgment of the Queen's Bench will therefore be affirmed. [*679

Judgment affirmed.

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

NEWLANDS v. HOLMES.

Trespass quare clausum fregit. Declaration, August, 1838, laying trespasses on June 27th, 1838.

Plea, that W., being seised in fee of the close, before the time, &c., to wit, June 23d, 1791, demised it to J. H. for ninety years, by virtue of which demise, J. H. afterwards, to wit, on the same day, entered and was possessed; that after the demise, and during the term, J. H., being so possessed, to wit, on November 21st, 1812, made his will, and thereby bequeathed the close to W. H. for all his the testator's estate therein: that afterwards, to wit, on January 17th, 1820, J. H. died so possessed of the said close for the remainder of the said term, after whose death, to wit, on 21st February, 1820, the executors assented to the bequest, whereby W. H. then became and was possessed for the remainder of the term: And, he being so possessed, plaintiff, under colour of a pretended demise to him for his life by W. before the demise by W. to J. H., entered, to wit, on the day and year mentioned in the declaration, and was possessed: And thereupon defendant, at the time when, &c., as the servant of W. H., entered upon plaintiff, &c.

Replication: That the trespasses were committed after 31st December, 1833, mentioned in stat. 3 & 4 W. 4, c. 27, s. 2: that the entry was for the purpose of recovering the said close: that the supposed right of entry did not first accrue within twenty years next before such entry; and that by reason thereof the said right had become extinguished at the time when, &c.

Rejoinder: That no acknowledgment of title had been given, pursuant to stat. 3 & 4 W. 4, c. 27, ss. 14, 15, before the passing of the act: that W. H. at the time of the passing of the act, claimed to be and was entitled to the close as in the plea mentioned: that the close was not then possessed adversely to the right of W. H.: and that the entry was made, as in the plea mentioned, within five years next after the passing of the act.

Surrejoinder: That the close, at the time of the passing of the act, was possessed, to wit, by one S., adversely to the alleged right of W. H. Issue thereon; and verdict for plaintiff.

***Held*, that the replication did not admit a possession in J. H. or W. H. within twenty years; and that therefore, the rejoinder alleging only new matter which was negatived by the finding in favour of the surrejoinder, the plaintiff was entitled to judgment. And this, although S., mentioned in the surrejoinder, did not appear to be otherwise than a stranger, through whom neither party made title.**

By the Court of Exchequer Chamber, affirming the judgment of the Court of Q. B.

DECLARATION, August 3d, 1838, for breaking and entering plaintiff's close, in the parish of St. George the Martyr, Southwark, on June 27th, 1838.

Plea, that Jane West, before the time when, &c., to wit, on 23d June, 1791, was seised in her demesne as of freehold, for the term of her natural life, of and in the *close in which, &c. And that Temple West, [*680 before the said time when, &c., to wit, on the said 23d June, 1791,

was seised as of fee of and in the reversion of the said close in which, &c., immediately expectant on the death of the said Jane West; and that, being so seised, afterwards and before the said time when, &c., to wit, on the day and year last aforesaid, by indenture then made between the said Jane West of the first part, the said Temple West of the second part, Thomas Kendal of the third part, and James Hedger and Thomas Griffiths of the fourth part, (profert of the indenture, dated as last aforesaid, and sealed with the seals of Jane West and Temple West,) the said Jane West and Temple West did demise, lease, &c., to the said James Hedger and T. Griffiths, their executors, &c., the said close in which, &c., habendum to James Hedger and T. Griffiths, their executors, administrators, and assigns, from the feast day of the Annunciation then last past, for and during, and to the full end and term of, ninety years and a half from thence next ensuing. By virtue of which demise, James Hedger and T. Griffiths afterwards, to wit, on the said 23d June, 1791, entered, &c., and became and were possessed, &c., for the said term so to them thereof granted. That, after the making of the indenture, and during the term, James Hedger and T. Griffiths being so possessed, &c., to wit, on 12th July, 1812, T. Griffiths died, and the said James Hedger survived him, whereupon and whereby James Hedger became solely possessed of the close in which, &c., for the remainder of the term then to come, &c.: that James Hedger being so possessed, afterwards and during the term, to wit, on November 21st, 1812, made and published his will,
*681] bearing date the day and year last aforesaid; and *thereby gave and bequeathed the close in which, &c., to William Hedger, habendum to him, his executors, administrators, and assigns, for all James Hedger's said estate, term, and interest therein: that afterwards, to wit, on 17th January, 1820, James Hedger died so possessed of the said close in which, &c., for the remainder of the said term; after whose death, to wit, on 21st February, 1820, the executors appointed in the will proved the same, and took upon themselves execution, and assented to the said bequest; whereby William Hedger then became and was possessed for the remainder of the said term: and that, William Hedger being so possessed, the plaintiff, claiming title under colour of a charter of demise, pretended to be thereof made to him by the said Jane West and Temple West for plaintiff's natural life before the demise by them to James Hedger and T. Griffiths, whereas nothing of or in the said close in which, &c., ever passed, &c., afterwards and before the said time, when, &c., and during the continuance of the term granted to James Hedger and T. Griffiths as aforesaid, to wit, on the day and year mentioned in the declaration, entered into and upon the said close in which, &c., and was thereof possessed: and thereupon defendant, at the said time when, &c., as the servant of William Hedger, and by his command, entered into and upon the said close in which, &c., and upon plaintiff's possession thereof, as being the close of the said William Hedger, and committed the trespasses, &c. Verification.

Replication. That defendant entered, &c., and committed the trespasses, &c., as in the plea above acknowledged, after the passing of a certain act of parliament, &c., (stat. 3 & 4 W. 4, c. 27,) and also after the 31st
*682] *December, 1833, in the said act mentioned, to wit, at the said time when, &c., in the declaration mentioned: That such entry was so made in manner aforesaid for the purpose of recovering the said close in which, &c.; and the said William Hedger, by the defendant his servant in that behalf, by means of the premises in the said declaration mentioned, did then enter upon and obtain possession of the said close in which, &c., as a

the declaration also alleged, and as in the plea also mentioned: That the supposed right to make such entry as aforesaid did not first accrue to the said William Hedger, or to defendant as his servant, or to any person through whom the said William Hedger or defendant claims the estate and interest in the said close in which, &c., within the true intent and meaning of the said act, at any time within twenty years next before the making of such entry as aforesaid; and that by reason thereof, and of the said period of twenty years next before the making of such entry having fully expired and determined before the making of the same without such right of entry having first accrued as aforesaid at any time during the said last-mentioned period, the said supposed right of the said William Hedger, and of defendant as such servant as aforesaid, to make such entry, had been and was extinguished according to the force, form, and effect of the said act of parliament, and the true intent and meaning thereof, before and at the said time when, &c., in the declaration mentioned. Verification.

Rejoinder. That no acknowledgment of the title of the person entitled to the said close in which, &c., according to the said act of parliament, was given to the person entitled to the said close, or his agent, at any time before the passing of the said act; and that the *said William Hedger, at the time of the passing of the said act, claimed to be and was entitled [*683 to the said close in which, &c., as in the said plea mentioned; and that the possession of the said close in which, &c., was not, at the time of the passing of the said act of parliament, adverse, nor was the said close in which, &c., then possessed by the plaintiff or any other person adversely, to the right or title of the said William Hedger, or any person through whom he claims; and that the said entry was made, and the said supposed trespasses committed, in manner and form as in the said plea is alleged, and for the reasons and causes therein mentioned, within five years next after the passing of the said act of parliament. Verification.

Surrejoinder. That the possession of the said close in which, &c., at the time of the passing of the said act, was adverse, and the same was then possessed, to wit, by one William Shickle, adversely, to the said alleged right and title of the said William Hedger. Conclusion to the country. Issue thereon.

On the trial, before Lord DENMAN, C. J., at the Summer assizes for Surrey, 1839, a verdict was found for the plaintiff.

In Michaelmas term, 1839, a motion was made in the Court of Queen's Bench for a new trial, or for arresting the judgment: but that court, after time taken for consideration, refused the rule. *Holmes* v. *Newlands*, 11 A. & E. 44.

The defendant below brought error in the Exchequer Chamber: and the case was now argued before TINDAL, C. J., COLTMAN, MAULE, and CRESSWELL, Js., and PARKE and ROLFE, Bs.

**The plaintiff in error*, (the defendant below,) in person, insisted that the plaintiff below had, on the record, admitted the possession [*684 of William Hedger within twenty years of the action brought, so that sect. 2 of stat. 3 & 4 W. 4, c. 27, was inapplicable: and that, as to sect. 15, the possession set up by the surrejoinder was no answer, as neither party claimed through William Shickle.

Martin, contrà, was stopped by the court.

TINDAL, C. J. The argument for the plaintiff in error is founded on the erroneous assumption that the dates, as set forth in the plea, are material.

They are clearly not so. The plaintiff below brings an action of trespass. It is admitted that he is in possession: but the defendant sets up an answer, that certain persons named West, having the full title, demised the premises to Hedger and Griffiths for a term not yet expired: that Hedger and Griffiths became possessed: that Hedger survived, made his will, and died on a day which is mentioned under a *videlicet*, and also that the will was proved on a day mentioned under a *videlicet:* whereupon, by the assent of the executors to the will, William Hedger, the legatee of the term under the said will, became possessed: and express colour is then given to the plaintiff's entry, under which he is said to be possessed: and then the defendant justifies his entry upon the plaintiff in the right of William Hedger. Then the replication states that this entry of the defendant was made after the passing of stat. 3 & 4 W. 4, c. 27, and after 31st December, 1833, for the purpose of recovering the close for William Hedger; and that William Hedger's right
*685] did not first accrue within twenty years next before *the defendant's said entry. Now, if the dates in the plea were correct, this allegation was contrary to the fact: and, then, why should not the defendant at once have taken issue on the allegation, and have rejoined that William Hedger's right did accrue within the twenty years next before the entry of the defendant. But the defendant, in the rejoinder, passes by this allegation, which is distinct: the right of William Hedger therefore is, so far as that goes, barred under sect. 2. Then, by way of answer, the defendant rejoins matter of which he proposes to avail himself under sect. 15: he says that William Hedger had five years from the passing of the act for enforcing his right, because there was no adverse possession at the time of the act: but, on the surrejoinder denying this, the fact is found for the plaintiff below, that there was such an adverse possession. Sect. 15 is therefore out of the question: and sect. 2 takes effect. I cannot see how the defendant below can complain, having chosen not to deny the facts which bring the case within the second section. The operation of that section is suspended till after the 31st of December, 1833: and, by sect. 15, the situation of claimants is further tendered, and five years are given to them, unless there has been an adverse possession at the time of passing the act. The defendant below is thus barred by his admission of facts which bring the case within the second section, and by his allegation, which is made for the purpose of bringing it within the fifteenth section, being unfounded in fact.

The defendant, in his argument as plaintiff in error, insists upon the hardship of his losing the benefit of the fifteenth section in consequence of
*686] the adverse possession of a third person through whom neither party *claims; and upon the inconsistency of the plaintiff's case, who brings an action upon his own possession, but supports his claim by showing the possession of a stranger. But the stranger's possession, at the time of the statute passing, is insisted upon by the plaintiff below only as an answer to the case set up under sect. 15: the plaintiff may possibly have had no title; but his possession at the time of the action commenced is admitted. It is therefore the case of a party (with or without title) in possession, resisting a party whose entry is barred.

On this ground, and on those upon which the judgment below was founded, I think the judgment of the Queen's Bench must be affirmed.

The rest of the court concurred.

Judgment affirmed.

MEMORANDUM.

In this vacation, *Herbert George Jones*, of Lincoln's Inn, Esquire, was called to the degree of Serjeant at Law, and gave rings with the motto "*Bene volens.*"

END OF TRINITY VACATION.

CASES

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

Michaelmas Term and Vacation.

VI. VICTORIA.

The judges who usually sat in banc in this term and vacation were,
Lord DENMAN, C. J. COLERIDGE, J.
WILLIAMS, J. WIGHTMAN, J.

DOE on the demise of FRYER *v.* COOMBS.

The onus of showing that a deed, otherwise regular, has not been duly stamped lies on the party impeaching it. And, if a deed be produced, purporting to have been sealed and delivered, "being first duly stamped," but the stamp has been obliterated, and it only appears by marks on the deed that some stamp was once impressed on it, the judge may decide whether or not the fact of stamping is sufficiently proved, and, if satisfied of it, receive the instrument as evidence.

EJECTMENT by reversioner against lessee for lives. On the trial, before WIGHTMAN, J., at the last Dorchester assizes, the lessor of the plaintiff (who relied upon a forfeture) produced in proof of his title, deeds of lease and release executed in 1806. The deed of release had no ad valorem stamp but appeared, by marks remaining upon it, to have been stamped. The stamp itself was obliterated. No evidence was given to account for the state of the deed. It was thereupon *contended by the defendant's counsel that the deed was inadmissible. WIGHTMAN, J., received the evidence; and the plaintiff had a verdict. [*688

Erle, now moved for a new trial. The instrument had no stamp, and therefore, according to the express language of the Stamp Act, (*a*) could not be used as evidence. It was impossible, on looking at this deed, to say that it was, or had been, stamped as the act requires. [WIGHTMAN, J. I think there was enough left on the parchment to show that there had been a stamp. Lord DENMAN, C. J. Was not it for the judge to say whether, in his opinion, the instrument had been stamped. Primâ facie it will be supposed that the deed was executed by parties who knew what they were about. WIGHTMAN, J. I think the attestation clause had the words "being first duly stamped." Lord DENMAN, C. J. A person might destroy the stamp after it had been improperly imposed.] If evidence like this were receivable, an improper stamp might be made available by obliterating it. [COLERIDGE, J. Suppose the seal of an old deed is rubbed off by accident.] Formerly that would have been held to avoid the deed, Com.

(*a*) See stat. 37, G. 3, c. 19, s. 3.

Dig. Fait (F 2,) though the same doctrine would prevail now.(a) But the party setting up a deed which is said to have become imperfect by accident should at least give some evidence to account for its condition. The onus of proof here did not rest on the defendant.

Lord DENMAN, C. J. The onus lies upon the party attacking a deed which appears to have been properly *executed. The Stamp Acts superadd the necessity of something beyond execution; but the party impeaching the deed ought to show the want of that requisite. And, if the appearance of the deed, combined with the probability that parties would take care of their own interest, gave reason to infer that a stamp had been affixed, the judge was entitled to say that the instrument had been properly completed, and to receive it in evidence. [*689

WILLAMS, J. concurred.

COLERIDGE, J. The only question here raised is, whether the deed was admissible in evidence; and there was abundant ground for holding it to be so.

WIGHTMAN, J. concurred. Rule refused.(b)

(a) Shepp. Touch. 69, and Mr. Preston's comment. (7th ed.) Also *Davidson* v. *Cooper* (second argument,) 11 M. & W. 778, 788, et seq.

(b) See Chitt. Stamp Laws, p. 71, sect. 12 (2d ed.;) citing *Crisp* v. *Anderson* 1 Stark. N. P. C. 35, and *Pooley* v. *Goodwin*, 4 A. & E. 94.

*MILBANKE v. GRANT. [*690

In an action of debt for attendance and medicines by a person claiming to practise as an apothecary without certificate, under stat. 6 G. 4, c. 133, s. 4, on the ground that, before that act passed, he was in practice "as holding a commission or warrant as surgeon or assistant surgeon" in the army, it is not necessary for the plaintiff to produce such warrant or commission.

And, where the plaintiff omitted to produce such document, or account for its absence, but proved, by an army paymaster, that, twenty-seven years before, in (July, 1815,) the plaintiff acted as assistant surgeon of a regiment, that the witness paid him his salary, and that he would not have done so unless he had seen the warrant: *Held* that the evidence was sufficient.

Admitted that, where a party was qualified, under stat. 6 G. 4, c. 133, s. 4, to practice without certificate while that act was in force, the qualification did not cease when the act expired.

DEBT for work and attendance by plaintiff as a surgeon and apothecary, and for medicines, &c. Plea. Never indebted. Issue thereon.

On the trial, before Lord DENMAN, C. J., at the sittings in Middlesex after last Trinity term, it appeared that the plaintiff was not a certificated apothecary under stat. 55 G. 3, c. 194, s, 14; and although an endeavour was made to prove that he had been in practice on the 1st of August, 1815, mentioned in the same section, the evidence was objected to as insufficient, on the authority of *Apothecaries' Company* v. *Roby*, 5 B. & Ald. 949. The plaintiff's counsel, however, contended that he was at all events entitled to practise without certificate, by stat. 6 G. 4, c. 133, s. 4,(a) having, before that act passed, held a *commission or warrant as an assistant surgeon in the army: and that although that statute expired in 1826, the privilege it conferred did not expire with it; *Steavenson* v. *Oliver*, 8 M. & W. 234. [*691

(a) Stat. 6 G. 4, c. 133, s. 4, enacts, "That every person who heretofore has held, or who now holds, or hereafter shall hold a commission or warrant as surgeon or assistant surgeon in his majesty's navy, or as surgeon or assistant surgeon or apothecary in his majesty's army, or as surgeon or assistant surgeon in the service of the honourable the East India Company, shall be entitled to practice as an apothecary in any part of England or Wales, without having

The evidence in support of this alleged privilege of the plaintiff was as follows. Captain John Garratt, of the Tipperary militia, stated that he was formerly paymaster of the force in which the plaintiff held a commission as assistant surgeon and acted in that capacity; that the witness used to pay plaintiff his salary from 1809 to July, 1815, when plaintiff quitted the regiment; that plaintiff was reappointed in 1818, and was acting as assistant surgeon when the evidence was given. The defendant's counsel objected that the warrant or commission ought to be produced, or its absence accounted for. The witness was then further examined by the lord chief justice, and stated that the plaintiff had acted as medical officer, and had had 250 men under his care: that the witness did not know what plaintiff did with the warrant after he received it, but that witness must have seen the warrant; and he added "I should not have paid the salary without." The lord chief justice refused to nonsuit, but gave leave to move that a nonsuit might be entered. The case went to the jury upon other facts, and the plaintiff had a verdict.

Crowder now moved for a rule to show cause why a nonsuit should not
*692] be entered. The authority of **Steavenson* v. *Oliver*, 8 M. & W. 234, is not disputed: but there was no sufficient evidence here that the plaintiff ever did hold a commission or warrant as assistant surgeon in the army. Captain Garratt's evidence amounted only to opinion. [COLERIDGE, J. If an officer had been seen commanding a troop, would not that be some proof of his having held a commission? Lord DENMAN, C. J. Captain Garratt said, that he should not have paid the salary without production of the warrant. And the period referred to was twenty-seven years ago.] The warrant, like any other document, if not produced, should have been accounted for. Suppose a certificate under stat. 55 G. 3, c. 194, had been in question, could it have been proved by such evidence as was given here? [COLERIDGE, J. If stat. 6 G. 4, c. 133, s. 4, had used the words "every person who has been a surgeon or assistant surgeon," your difficulty would not have arisen. You rely on the words "hold a commission or warrant."] They make the difference. But for them, proof of acting might have been sufficient. (*Crowder* also moved for a new trial on affidavits.)

Lord DENMAN, C. J. I thought at the trial that, after twenty-seven years, if a public officer said, "I paid the salary, and should not have done so unless there had been a warrant," that was sufficient evidence to support the privilege.

WILLIAMS, J. The language of stat. 6 G. 4, c. 133, s. 4, does not impose the necessity of actually producing a warrant. The words are, that
*693] "no such person shall *be obliged," for the recovery of charges as an apothecary, "to prove that he was in practice" on the 1st August, 1815, "otherwise than as holding a commission or warrant as surgeon or assistant surgeon." It does not follow that there can be no other proof of such practice than the production of a warrant. And here the other proof was sufficient.

undergone any such examination, or received any such certificate" as is directed by stat. 55 G. 3, c. 194, "and without being liable to any penalty," &c.; "and no such person shall be obliged, in order recover in a court of law any charges claimed by him as an apothecary, to prove that he was in practice as an apothecary on the said 1st day of August, 1815, otherwise than as holding a commission or warrant as surgeon or assistant surgeon in his majesty navy,' or "army," or the service of "the East India Company; anything in the said recited act' (55 G. 3, c. 194) "contained to the contrary thereof in any wise notwithstanding." By sect. 11, the act is to continue in force till August 1st, 1829.

COLERIDGE, J. I am of the same opinion. The only proof which the words of the statute point to is (as my brother WIGHTMAN suggests) that the party was in practice "as holding" a commission or warrant as surgeon or assistant surgeon. The evidence in this case was surely sufficient to prove that the plaintiff practised as holding the warrant of an assistant surgeon.

WIGHTMAN, J., concurred.

Rule to enter a nonsuit refused.(a)

(a) The rule nisi for a new trial was granted, and was made absolute November 25th, 1842.

CHARLETON and WATSON v. SPENCER.

An agreement of reference recited that C. claimed a balance of 201*l.* to be due to him from S.; and it was covenanted, between C. and S., that all disputes and differences which existed between them should be referred to the arbitration of B., to determine the account between the parties, and the true balance.

Held, that C. was entitled to the decision of the arbitrator upon all matters in dispute up to the time of the agreement, though independent of, and arising subsequently to, the matters upon which the balance of 201*l.* was claimed.

COVENANT. The declaration stated that heretofore, to wit, 14th March, 1842, by articles of agreement between plaintiffs on the one side and defendant on the other, sealed, &c., (profert,) dated, &c., *"after reciting that the plaintiffs claimed a balance of 201*l.* 9*s.* 10*d.* to be due to them from the defendant, and that they, the plaintiffs, also claimed interest on the said balance from the time of the respective payments, it was witnessed that it was thereby covenanted and agreed by and between the said parties thereto, to wit, the plaintiffs and the defendant, that all disputes and differences which existed between the said parties respectively should be referred to the arbitration of one George Bates, of," &c., "to determine the account between the said parties, and the true balance, and to appoint how and in what proportions such balance should be paid, and by and to whom; and that the award of the said G. Bates, made in writing, &c., ready to be delivered, &c., on or before, &c., should be binding and conclusive on all the said parties, and their heirs, executors and administrators." (Then followed provisions for making the reference or submission a rule of court, and other terms not material to the point afterwards discussed.) "As by the said articles," &c. That Bates made and published his award in writing, &c., and did thereby award and determine that the true balance justly due and owing from the defendant to the plaintiffs was the sum of 190*l.* 8*s.* 2*d.*: and he did thereby award and appoint that the defendant, his executors or administrators, should pay the said sum of 190*l.* 8*s.* 2*d.* to the plaintiffs, their executors or administrators, on, &c. (Further award as to arbitrator's costs and costs of the reference, which were to be borne by the defendant.) Of which award defendant, to wit, on, &c., had notice. Averments as to amount of costs. Breach, nonpayment of the 190*l.* 8*s.* 2*d.* balance, and 11*l.* 2*s.* 6d., and 23*l.* 11*s.* 10*d.*, costs. [*694

*Pleas: 1. That the said articles of agreement were not the deed of plaintiff in manner, &c. Issue thereon. 2. That Bates did not make the award in manner, &c. Issue thereon. 3. That, after the making of the said articles of agreement, and before the making of the said award, to wit on, &c., plaintiffs claimed of defendant the payment of, and alleged that he was liable to pay them, a certain debt or sum of money amounting [*695

(to wit) to 120*l.*, for and in respect of the plaintiffs having before them taken up and paid a certain bill of exchange, dated 17th January, 1840, drawn by A. L. upon, and accepted by, plaintiffs, for the payment of 120*l.*, to R. W. & Co. two months after date thereof. That the said claim of plaintiffs was another and different claim to the said claims, or either of them, in the articles of agreement mentioned, and did not constitute or form any part thereof, or of the account in the said articles mentioned: and that no dispute or difference in respect of the same, or any part thereof, existed between plaintiffs and defendant at the time of the making of the said articles; and the said claim, or defendant's liability to pay plaintiffs the said debt or sum of 120*l.*, was not, nor was any part thereof, by the said articles referred to the arbitration of Bates. That the said award was made by Bates as aforesaid of and concerning other matters, disputes and differences than such as were by the said articles of agreement referred to him as aforesaid, and of and concerning a dispute and difference between plaintiffs and defendant which did not exist at the time of the making of the said articles of agreement, to wit, of and concerning the said claim so made
*696] by the plaintiffs of defendant in respect of the *said debt or sum of 120*l.*, and of and concerning defendant's liability to pay the plaintiffs the same. That Bates, in awarding and determining that the balance due from defendant to plaintiffs was the sum of 190*l.* 8*s.* 2*d.*, without the consent and against the will of defendant, awarded and determined of and concerning the said claim, and as to defendant's liability to pay the said debt or sum of 120*l.*, to plaintiffs; and that the said award was and is void in law. Verification.

Replication. That the claim of plaintiffs to the said debt in respect of plaintiffs having taken up and paid the said bill of exchange in the last plea mentioned did constitute and form part of the said claims in the said articles of agreement mentioned, and of the said account in the said articles mentioned; and the said claim, and the defendant's liability to pay the plaintiffs the said debt, was by the said articles referred to the arbitration of Bates. Conclusion to the country. Issue thereon.

On the trial, before Lord ABINGER, C. B., at the last Surrey assizes, it appeared, according to the view contended for by the defendant's counsel, that the defendant had been a member of a partnership carrying on a colliery in Northumberland: that the partnership was in the habit of consigning cargoes of coal to the plaintiffs, who were coal factors in London, and drawing bills against the consignments: that, early in 1840, the defendant ceased to be a member of the partnership: that the alleged balance of 201*l.* 9*s.* 10*d.*, recited in the agreement of reference, and claimed against him by the plaintiffs, arose upon bills drawn by the partnership before the defendant quitted it: that this was reduced, at the arbitration, by a set-off allowed by
*697] *the plaintiffs in respect of cargoes consigned to them before the dissolution of the partnership, to 123*l.* 18*s.* 9*d.*: and the sum of 47*l.* 10*s.* 10*d.*, which, with interest on the sums, made up the 190*l.* 8*s.* 2*d.*, named in the award, arose (after some deductions) upon a bill for 120*l.*, drawn in favour of the partnership, after defendant had quitted it, upon, and accepted and paid by the plaintiffs, on an account independent of the balance of 201*l.* 9*s.* 10*d.*, and for which the members remaining in the partnership after the defendant had quitted it were alone liable. The lord chief baron decided that the parties were bound by the operative part of the agreement of reference: and, it appearing that this bill had become due, and been taken up before the making of the agreement, and that a claim in respect of it was made

before the arbitrator, his lordship directed a verdict for the whole sum awarded. Leave was given to move to enter a verdict for the defendant on the third issue.

Thesiger now(*a*) moved to enter such verdict for the defendant, or for a new trial. The defendant was entitled to show that the bill for 120*l.*, made no part of the subject matter of reference. The account between the parties, and the true balance, are indeed referred generally: but, by the recital it appears that such account and balance relate merely to the 201*l.* 9*s.* 10*d.* When, therefore, it was shown that the bill was not comprehended in claim for the 201*l.* 9*s.* 10*d.*, it followed that such bill formed no part of the matters referred. The operative words of deeds are frequently controlled by the *intention of the parties as appearing from the recital. *Upton* v. *Upton*, 1 Doul. P. C. 400; *Payler* v. *Homersham*, 4 M. & S. 423; *Simons* v. *Johnson*, 3 B. & Ad. 175, are instances. [*698

Cur. adv. vult.

Lord DENMAN, C. J., afterwards, in this term, (November 11th,) delivered the judgment of the court.

In this case, the lord chief baron ruled that the parties to the agreement of reference were bound by the terms of the agreement, which submitted to the arbitrator, in effect, the account between the parties, and the true balance, and all matters in dispute, as they existed at the time of making the agreement. It was contended that this was controlled by the recital, which states that the plaintiffs claimed a balance of 201*l.* 9*s.* 10*d.*: and it was sought, on the authority of *Payler* v. *Homersham*, 4 M. & S. 423, to limit the arbitrator's power to the matters included in the balance so claimed. But we think that the agreement, though it recites the fact of such a claim having been made, afterwards refers every matter existing up to the date of the agreement. The recital merely indicates the motive of the submission; it does not limit the arbitrator's power: and there is nothing unreasonable in referring claims other than that which formed the original inducement to refer.

Rule refused.

(*a*) Before Lord Denman, C. J., Williams, Coleridge, and Wightman, Js.

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*RUSHWORTH v. TAYLOR. [*699

Bailee of a gun overcharged and burst it. The owner required him forthwith to deliver it back in the same good plight in which he received it. Bailee refused to do the repair, and, the gun not having been returned, the owner brought trover.

Held, that the refusal to comply with a demand of redelivery, qualified as above, was not of itself evidence of a conversion.

TROVER for a gun. Plea, Not guilty. There were also a special count in case, and pleadings on it, which it is unnecessary to notice further. On the trial, before Lord DENMAN, C. J., at the last Summer assizes at York, it appeared that the plaintiff, in July or August, 1839, put the gun into the possession of one Cross, to be sold. Cross, with the view of obtaining a purchaser, lent it to one Todd; and Todd lent it to the defendant to try. Defendant overcharged the gun, and burst it. Plaintiff afterwards wrote to defendant as follows.

"Mr. George Taylor,

I hereby give you notice that the double-barrelled gun you received from Robert Todd, which he received from Thomas Cross, who had previously received the same from me for the purpose of making sale thereof, is my property; and I hereby demand the same of you, and require you

forthwith to deliver the same to me in the same good plight and condition as the said gun was in at the time you received the same from the hands of the said Todd. Dated this 11th day of March, 1840.

JOHN RUSHWORTH."

Defendant said that he would not pay for the repair of the gun. He afterwards redelivered it to Todd, for the purpose, as was said, of his taking it to a gunmaker's; and it was then taken (but by whom did not
*700] *distinctly appear) to a gunsmith at Hull, and remained in the possession of the gunsmith or of the defendant, never having been restored to the plaintiff, when this action was brought. The lord chief justice thought it difficult to say that the qualified demand contained in the letter (that the gun should be delivered up "in the same good plight," &c.,) and the refusal which followed, were, of themselves, proof of a conversion; and he directed the jury to find for the defendant on the first count, if in their opinion there had been no denial of the plaintiff's right. Verdict for defendant on all the issues.

W. H. Watson now moved for a new trial on the ground of misdirection, and contended that the demand and refusal, if not of themselves evidence of a conversion, fully proved it when coupled with the other facts of the case, to which the jury's attention had not been sufficiently directed in the summing up. [Lord DENMAN, C. J. The claim in trover was founded on a demand and refusal: and the demand was that the gun should be delivered in the same good plight as when the defendant received it. Refusal of such a demand is different from refusing altogether to restore.]

WILLIAMS, J. The case was properly put to the jury as to the demand and refusal. A demand of the article in statu quo was not a demand on which, in case of refusal, a charge of conversion could be founded. The rest of the evidence did not bear out the declaration.

COLERIDGE, J. I am of the same opinion. The qualified demand could
*701] not be complied with; and the *rest of the evidence was not clear enough to entitle the plaintiff to recover.

Lord DENMAN, C. J., and WIGHTMAN, J., concurred.

Rule refused.

HARTLEY *v.* MOXHAM.

Defendant, claiming a sum of money as due to him from plaintiff, his lodger, locked up plaintiff's goods in a room which he held of defendant, and in which plaintiff had put them, kept the key, and refused plaintiff access to them, saying that nothing should be removed till defendant's bill was paid.

***Held*, not such a taking of the goods as would sustain an action of trespass.**

TRESPASS for seizing, taking, carrying away and converting articles of furriery, and other goods and chattels of the plaintiff. Pleas, Not guilty, and a justification (on which nothing ultimately turned) alleging that defendant, as an inkeeper, detained the goods as a pledge for money due in respect of lodging, &c. On the trial, before CRESSWELL, J., at the last Summer assizes for Somersetshire, the following facts appeared. The plaintiff had lodged in the house of the defendant, who was a poulterer, and kept a beer shop at Clevedon. In September, 1841, plaintiff was packing up some goods for the purpose of taking them to Gloucester for sale, when defendant said that nothing should be removed till plaintiff had paid defendant his bill. A dispute arose: and the bill was not paid. Plaintiff put the goods under the charge of his own servant, in his bedroom: and

defendant then locked them up in that room, kept the key, and detained the goods till plaintiff was prevented from going his intended journey. It was objected that trespass would not lie, inasmuch as no act of taking appeared, but, at most, only a wrongful detention, the defendant never having touched the goods; and CRESSWELL, J., being of opinion that no taking was proved which would support an action of trespass, directed a nonsuit.

**Erle* now moved for a new trial. If the goods were not, in the literal sense, taken away, they were separated from the owner by locking the door upon them. A constructive taking was recognised in *Swann* v. *The Earl of Falmouth*, 8 B. & C. 456, where the circumstances were not so strong in favour of the plaintiff as here. [Lord DENMAN, C.J. The defendant's own declaration there concluded him; and it was not held that trespass would lie.] In *Etherton* v. *Popplewell*, 1 East, 139, where the plaintiff succeeded in an action of trespass, the goods were not removed, but only locked up. In *Blades* v. *Arundale*, 1 M. & S. 711, the sheriff was considered to have seized goods, though the officer merely laid his hand on a table, saying "I take this table," locked up the warrant in the table drawer, took the key, and went away, without leaving any person in possession. The defendant here had acquired such a possession of the goods that he might have maintained trespass against a third person for taking them away. [*702

Lord DENMAN, C. J. There is no ground for this motion. Cases like the present must often have occurred; yet there is no authority for an action of trespass under the circumstances. The case differs from that of a distress, where the landlord asserts that he takes the goods, and thereby acquires an authority and power of control over them. And, even in such a case of taking, it has never been held that trespass would lie if the act was wrongful.

WILLIAMS, COLERIDGE, and WIGHTMAN, Js., concurred.

Rule refused.

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*EDWARD WALTON CHAPMAN v. BECKINTON. [*703

A bond of guarantee, reciting that W. and E. had entered into copartnership in a certain business, and had, on the treaty for such copartnership, agreed that P. should be the acting partner in the said business, stated, as the condition, that P. should keep all the covenants in a certain indenture of copartnership between him and W. and E. and also should, during such time as he should continue the acting partner in the said business of the said copartnership, truly account for all monies which should come to his hands as such partner as aforesaid to the said W. and E.

By the indenture referred to, after reciting that W. and E. had carried on the trade or business, &c., and had agreed to admit P. a partner therein, W., E. and P. covenanted to each other to become partners in the trade or business, &c. from the day of the date of that deed of copartnership, for a term of years: P. to superintend the business, perform the duties of an acting partner during the said copartnership, and have the care and custody of the account books during the continuance of that copartnership: that W., E. and P. should meet yearly during that copartnership, cast up the accounts, and value the stock, &c. Proviso, that, if any of the parties, their executors, &c. should desire to withdraw from that copartnership at the end of the seventh year, and should give notice, &c., that indenture of copartnership should, on the expiration of such notice, determine as to such party. Agreement, that any one of the partners in the said joint trade might transfer his share therein during his lifetime to his son, being of age, or might bequeath the same to any person by will, and that such son or other person, &c., or, in case of the death of any partner without having made such transfer or disposition, the executors or administrators of such partner, should be deemed a partner or partners in the said joint concern during the then residue thereof in respect of such share, &c., in the place of such partner, &c., and should hold such share during the remainder of the said copartnership, subject to the provisions of that indenture.

After the making of the bond and indenture, W died; and, after his death, P. as managing partner, rendered false accounts; whereupon E. declared against P.'s surety in debt upon the bond. Plea, performance of the condition. Replication, after setting forth the indenture, that P., while he continued such partner in the trade and business of the said copartnership as aforesaid, and after the decease of W., did not duly account, &c., but delivered false accounts. Rejoinder, that P. did not deliver false accounts in manner, &c. Issue thereon. Verdict for plaintiff.

***Held*, on the construction of the above deeds, that the copartnership referred to in the condition of the bond was determined by W.'s death, and the surety, therefore, not liable for P.'s default happening after that event.**

That the defendant, however, having accepted an issue on the above rejoinder, could not claim a nonsuit.

But, although the court, on motion for a nonsuit, and rule nisi granted, discharged the rule, they arrested the judgment.

DEBT on defendant's bond, made January 2d, 1830, to plaintiff and William Chapman since deceased.

Plea. Condition set out on oyer, as follows. "Whereas the said William Chapman, Edward Walton Chapman and Washington Potts have lately entered into copartnership in the trade or business of ropemakers, to be carried on by them at Willington Ropery, in the county of Northumber-
*704] land, and, upon the treaty for the said *copartnership, it was amongst various other things agreed that the said W. Potts should be the acting partner in the said trade and business, and that, in consideration of the trust and confidence thereby reposed in him by the said W. Chapman and E. W. Chapman, he the above bounden W. Potts, and also the above bounden John Beckinton" (defendant) "as his surety, should, by writing obligatory under their respective hands and seals, become jointly and severally bound unto the said W. C. and E. W. C. in the sum of 1000*l*., subject to such condition for making void the same bond as hereinafter is mentioned; and, in pursuance of such agreement, the said W. Potts and the said J. Beckinton have executed the above written bond: Now the condition of the above written obligation is such, that, if the said W. Potts shall well and truly observe, perform and keep all and every the covenants, provisoes, clauses and agreements on his part to be observed and performed, contained in a certain indenture or deed of copartnership bearing date the 1st day of January instant, and made between the said W. C. of the first part, the said E. W. C. of the second part, and the said W. Potts of the third part; and also, if he the said W. Potts, during such time as he shall continue the acting partner in the said trade or business of the said copartnership, shall and do well and truly and faithfully make, deliver or transmit a just and true account in writing of all sum and sums of money, cash, notes, bills and other partnership effects, which shall come to the hands of the said W. Potts, or which he shall be entrusted with, by or on account of the said copartnership, and also make good answer for and pay the mo-
*705] nies due on the balance of such account, and *also of all and every other sum and sums of money, cash, notes and bills, which may by possibility come to the hands of the said W. Potts as such partner as aforesaid, to the said W. C. and E. W. C.: and if the above bounden," &c., (further condition, if W. Potts and defendant should indemnify, &c., the said W. Chapman and E. W. Chapman, their executors, &c., from and against all losses, &c., for or by reason of any act, &c., to be done or committed by him the said W. Potts as such acting partner as aforesaid, or in any manner relating thereto;) then this obligation to be void, &c., otherwise, &c. Averment that the said W. Potts hath always since the making of the said writing obligatory until the time of the commencement of this suit well and truly observed, performed and kept all and every the cove-

nants, &c., on his part, &c., (following the words of the condition,) and hath always, during all the time he continued to be the acting partner in the said trade, &c., well and truly, &c., (averment of W. Potts having accounted, &c., in the words of the condition,) and also during all the time aforesaid made good answer for, and paid, the monies due, &c., and also all and every other sum, &c., which during the time aforesaid came to the hands of the said W. Potts, as such partner as aforesaid, to the said W. Chapman, and E. W. Chapman in the lifetime of the said W. Chapman, and to the plaintiff since the decease of the said W. C.; and that W. Potts and defendant have always, since the making, &c., well and sufficiently saved, &c., and indemnified the said W. Chapman and plaintiff in the lifetime of W. C., and plaintiff since W. C.'s decease, from and against all losses, &c., for or by reason of any act, &c., (as above.) Verification.

*The replication set forth the indenture, whereby, after reciting [*706] that the said W. Chapman and plaintiff had for some years then last past, and up to the day of the date thereof, carried on the trade or business of ropemakers at Willington, in and upon certain premises demised to and owned by them as was therein stated, and were owners of certain machinery, &c., there erected and being; and reciting also that it had been agreed between the parties to that indenture that the said W. Potts should be admitted a partner with the said W. Chapman, deceased, and plaintiff in the said trade or business, from the day of the date thereof during the time, upon the terms and conditions, and subject to the several provisions, stipulations, &c., thereinafter contained; in pursuance of the said agreement, and in consideration of a certain capital advanced and brought into the joint trade by W. Potts, and of the special trust, &c., of the parties in each other, the said W. Chapman, deceased, plaintiff and W. Potts did, in and by the said indenture, jointly and severally covenant, promise and agree to and with each other that they, the said parties thereto, should and would, at and from the day of the date of the said indenture or deed of copartnership, and up to the 1st day of July which would be A. D. 1841, be and become partners and joint traders in the art, trade or business of patent and common ropemakers, under the firm of Chapmans and Potts: the premises, machinery, stock, profits, &c., to be, during the copartnership, considered as partnership property, and to belong to the said parties, their executors, &c., in the shares and proportions of one third part to each; proviso, that, "at the end or other *sooner determination of the said copartnership," W. Chapman [*607] and plaintiff (and one John Anderson) should be exclusively entitled to certain machinery which was scheduled; also for an allowance to W. C. and plaintiff for the use of a half part of the machinery in which they had a distinct interest: agreement that the trade, &c., should be carried on in the joint names, &c., and for the joint benefit of the said partners: and that W. Potts should attend and reside at the ropery, and have the general superintendance of the said trade or business during the said copartnership: covenant by W. Potts to and with W. Chapman and the plaintiff, their executors, &c., that he would, during all the term of that copartnership, devote the whole of his time, skill and most assiduous attention and diligence, with such assistance of the plaintiff as should be deemed necessary by the said parties thereto, in and towards the affairs and business of the said ropery, and in the improvement and management and extension thereof, to the best advantage of all the said parties thereto, and should not absent himself therefrom nor neglect the same, but that he would in every respect faithfully and diligently perform

the duties incumbent upon an acting partner. Agreement, that W. Chapman and plaintiff should not be under obligation to attend to the business, but that plaintiff should be allowed certain annual compensation if he did so: that certain annual compensation should be allowed to W. Potts for his trouble in the superintendance: that W. Potts should, during the continuance of that copartnership, have the care and custody of all the books *708] of account relating to the joint stock and trade, they, the said *W. Chapman deceased and plaintiff, having access thereto at all times whenever they should think fit; and that W. Potts, his executors, &c., should make good to the joint stock all money wasted or lost during the time in which he should have the care and custody or receiving thereof as aforesaid (with certain exceptions.) Agreements for the defraying of certain expenses, and providing for losses, &c., out of the joint stock, and according to the respective shares; for continuing the capital and profits in the joint trade during the said copartnership, &c.; and for regulating the management of the concern, and conduct of the partners, in other respects: and, further, that the said parties should meet at the said ropery on 1st March, 1831, and so in future yearly and every year during that copartnership, and make, cast up and fairly state between and amongst them a true and perfect account in writing, touching and concerning the said joint stock, and all monies, debts and effects thereon due and owing to or from the said copartnership, and of and concerning all matters relating thereto, &c., and should thereupon enter the true particulars of every such yearly account, and the rest or balance thereof, in three several books to be provided as aforesaid; and, on allowance of the account, should subscribe the books, and each party should take one of the books into his own custody, and the account should be conclusive, except in certain specified cases; and that the net profits should be divided, &c. Provided always that, in case any of the parties, their executors, &c., should be desirous to withdraw from that copartnership at the end of the seventh year of the said copartnership, and should give to the others of the said part- *709] ners twelve calendar months' previous notice, &c., *then that present indenture of copartnership, and every covenant, &c., therein contained, should, on the day of the expiration of such notice, cease, determine and be absolutely void as to the party or parties so giving the same, except so far as regarded the valuation of the share of such party or parties, which valuation, and payment of the value, were then provided for. And it was further declared and agreed that any of the partners in the said joint trade should be at liberty to transfer, in his or their lifetime, his or their respective shares therein, or any part or parts thereof, to any one or more of their respective sons, being of the age of twenty-one years or upwards, and not to any other persons, except under the regulations thereinafter mentioned(a) and contained in that behalf; and also to dispose of and bequeath his or their respective shares, or any part or parts thereof, by will, to any person or persons whomsoever; and that the son or sons, or other person or persons, to whom any such transfer or disposition should be made as aforesaid, or, in case of the death of any partner without having made any such transfer or disposition as aforesaid, then that the executors or administrators of every such partner so dying, should be deemed and considered as a partner or partners in the said joint concern during the then residue thereof, in respect of such share or shares, or any part or parts of a share or shares, so transferred or bequeathed, or which should

(a) No provision on this subject appeared in the replication.

become vested in them respectively as executors or administrators of any such deceased partner or partners as aforesaid, in the stead and place of the partner or partners from whom they should respectively *have derived such share or shares, or part or parts of a share or shares, [*710 of and in the said joint trade or business, and should hold such share or shares, or part or parts of a share or shares, for all the then residue and remainder of the said copartnership, subject to and under the several stipulations, provisoes, conditions and agreements contained in those presents. And, lastly, it was covenanted, declared and agreed that, if any difference should arise between the parties, or either of them, or the survivors and the executors, &c., of a deceased partner, touching the said joint trade, &c., or any other matter or thing concerning the said copartnership, or any thing in those presents contained, all such differences, &c., should be from time to time referred, &c., (then followed provisions for arbitration.) The replication proceeded to aver that defendant, at the time of making his said writing obligatory, had notice of the indenture, and of the covenants, agreements, &c., therein contained: and that W. Potts was and continued the acting partner of the said copartnership for a long time, to wit, from the making, &c., until and after the happening of the breaches in the replication set forth. Several breaches were then stated, of which the following only (the seventh) is material.

"That, after the making," &c., "and whilst the said W. Potts continued such partner in the trade and business of the said copartnership as aforesaid, and after the decease of the said W. Chapman, he the said W. Potts did not nor would well, truly and faithfully make, deliver or transmit a just and true account in writing of all sum and sums of money, cash, notes, bills and other partnership effects which came to the hands of the said W. Potts, or which he was intrusted with by *or on account of the copartnership, but on the contrary thereof, although there came into [*711 the hands of the said W. Potts whilst he was such acting partner as aforesaid, and after the making," &c., "and after the decease of the said W. Chapman, to wit, on," &c., "and on divers other days," &c., "and he the said W. Potts was then intrusted with divers sums of money, cash, notes, bills and other partnership effects, of great value, amounting to a certain large sum, to wit, the sum of 50,000*l.*, he the said W. Potts did, to wit, at the close of each of the said several years, during the period last aforesaid, make, transmit, and deliver, to wit, to the said plaintiff, false, fictitious and fraudulent accounts in writing, falsely purporting to be accounts of the said sums of money, cash, notes, bills and other partnership effects, and, although he was then, to wit, at the close of each of the said years respectively, requested so to do, did not nor would make, deliver or transmit any just or true account whatsoever of the said sums of money, cash, notes, bills and other partnership effects to the said plaintiff, contrary to the said condition," &c. Verification.

Rejoinder. As to the seventh breach, that the said W. Potts did not make, transmit or deliver to the plaintiff, false, fictitious or fraudulent accounts, in manner, &c. Conclusion to the country. Issue thereon.(*a*)

On the trial, before ROLFE, B., at the Northumberland Summer assizes. 1840, it appeared that W. Chapman died in May, 1832; that after his death the business was carried on by the other partners; and that W. Potts, after the death of W. Chapman, and during the subsequent copartnership,

(*a*) There was also an issue upon a plea of set-off, on which the defendant had a verdict.

*712] was guilty of defaults *complained of in the seventh breach. The defendant's counsel claimed a nonsuit on the ground that the conditions of the bond applied only to accounts which should be rendered to W. Chapman and E. W. Chapman, and therefore that the defendant could not be liable for defaults after W. Chapman's death. The learned judge gave leave to move for a nonsuit; and the plaintiff had a verdict as to the seventh breach. A rule nisi for entering a nonsuit was obtained in the following term. In Michaelmas vacation, 1841,(*a*)

W. H. Watson and *Warren* showed cause, and contended, first, that, at any rate, a nonsuit could not be entered. (The argument on this point is fully stated in the judgment of the court.) As to the general question on the record. The rule undoubtedly is, as laid down in Gow on Partnership, 123, (3d ed.) c. 3, s. 1, that the prospective operation of a guarantee given to a partnership ceases on the death or retirement of one of the partners, or the addition of a new one, "unless the guarantee itself contain some provision contemplating such change, and continuing its operation to the succeeding partnership." Here the language and provisions of the partnership deed, and the terms of the condition, show that the obligors were responsible to the partnership, not only as it originally stood, but as it might be continued according to the indenture. (The argument on the words of the bond and partnership deed will appear sufficiently in the judgment.) The intention to carry on the liability may be collected from the stipulations here as it was in *Metcalf* v. *Bruin*, 12 East, 400; W. Chap-
*713] man *and E. W. Chapman, here, standing in the same situation as the trustees in that case. In *Strange* v. *Lee*, 3 East, 484, a contrary intention was inferred; LAWRENCE, J., however, observing, "A bond may be drawn with the condition now insisted on in argument by the plaintiff's counsel, for the obligor to be answerable not only to the present but to all future partners in the house; but that has not been done here." In the present case the bond is, in effect, so drawn. *Pemberton* v. *Oakes*, 4 Russ. 154, was cited in moving for this rule; but there the guarantee was confined by express terms to sums which should be due to H. O. and W., the then partners, or to the survivors or survivor of them, or to the executors, &c., of such survivor; and, when the alleged liability accrued, H. had died, and the business was carried on by the survivors and H.'s representatives. That was a new partnership, clearly not within the terms of the deed. *University of Cambridge* v. *Baldwin*, 5 M. & W. 580, also cited in moving, was a similar case, decided on the strict letter of the particular guarantee, and not applicable here. The same remark applies to *Weston* v. *Barton*, 4 Taunt. 673; and MANSFIELD, C. J., said there: "I believe the general understanding is, that these securities are given to the banking house, and not the particular individuals who compose it; and we should readily so construe the bond if the words would permit." *Barclay* v. *Lucas*, 1 T. R. 291, note (a), S. C. 3 Doug. 321, is an instance of such a construction. Here the guarantee was to the house of business: it secured, not the discharge of certain duties towards individuals, but the observance, generally, of the terms of the partnership deed. In *Dry* v.
*714] *Davy*, 10 A. & E. 30, which may be cited *on the other side, it might be presumed that the guarantee was meant for a firm composed of particular individuals. The argument, that a surety engages himself because persons known to him are in the firm, and does not mean to

(*a*) November 26th. Before Lord Denman, C. J., Williams, Coleridge, and Wightman, Js.

remain liable when they leave it, can have no weight where the party for whom the guarantee is given is himself the managing partner. Potts himself would be liable on this deed; and the surety must be so likewise.

Cresswell, contrà. First as to the bond itself: the condition for accounting contemplates an accounting for monies of the "said copartnership;" and the whole language of the deed shows this to mean the copartnership between W. Chapman, E. W. Chapman and Potts: whenever that ceased, the undertaking to account no longer applied. *Pemberton* v. *Oakes*, 4 Russ. 154, is a direct authority on this point. A condition for rendering an account to a trader and his executors does not make the obligor liable in respect of monies received after the trader's death: *Barker* v. *Parker*, 1 T. R. 287. Lord ELLENBOROUGH, in *Strange* v. *Lee*, 3 East, 484, thought there were expressions in *Barclay* v. *Lucas*, 1 T. R. 291, note (a), S. C. 3 Doug. 321, inconsistent with the other authorities. Then, if the bond alone does not keep up the liability after an alteration in the firm, can that effect be given to it by reference to the indenture? (He then went through the deed of partnership, arguing that its language and provisions were not such as to render the guarantee binding after the original partnership had terminated. [WIGHTMAN, J. In an action upon the indenture, would Potts have been liable on the breach here stated?] There is no covenant in the indenture *for rendering accounts; and it is not the general duty of a managing partner to do so. The liability in this respect must depend on the condition of the bond. [*715] The provisions of the indenture, down to the clause for accounting and taking stock, refer wholly to the original partnership. The stipulations that follow provide for changes in the firm, but leave the accounting clause independent of such changes. Taking the indenture and condition together, the reasonings in *Pemberton* v. *Oakes*, 4 Russ. 154; *Barker* v. *Parker*, 1 T. R. 287, and *Strange* v. *Lee*, 3 East, 484, apply. In *University of Cambridge* v. *Baldwin*, 5 M. & W. 580, the bond was conditioned for an account by B. C., and J., "and the survivors and survivor of them;" and yet the condition was held not available prospectively after a partner had retired.

Cur. adv. vult.

Lord DENMAN, C. J., in the vacation following this term, (December 3d,) delivered the judgment of the court.

This was an action brought by the surviving obligee of a bond: and, the condition being set out on oyer in the plea, it appeared that the plaintiff and the deceased William Chapman had entered into partnership by deed with one Potts; that Potts was to be acting partner; and that in consideration of this trust, he and the defendant bound themselves to the plaintiff and William Chapman for the observance by Potts of the covenants in the partnership deed, and also that Potts, during such time as he should continue the acting partner in the said trade of the said copartnership, should *faithfully make and deliver a true account in writing of all sums of money, notes, bills and other partnership effects which should [*716] come to his hands, or which he should be intrusted with, by or on account of the said copartnership, and also make good answer for and pay over the monies due on the balance to the said plaintiff and W. Chapman. The plea then averred performance in the words of the condition, as well to the said plaintiff and W. Chapman in the lifetime of the said W. Chapman as to the said plaintiff since his decease. The replication set out the partnership deed at length, and then assigned several breaches, on the seventh of which alone a verdict has passed for the plaintiff; and a rule has been ob-

tained for entering a nonsuit. This breach is in terms framed on that part of the condition of the bond which requires Potts to make and deliver a just account; and alleges that, although there came into his hands while such acting partner, and *after the death of the said* W. Chapman, and he was *then* intrusted with divers sums of money and other partnership effects, he did, at the close of each of several years named, make and deliver a false account thereof *to the said plaintiff.* The ground alleged for the nonsuit is that, by the condition of the bond, the account is to be delivered to the plaintiff and W. Chapman; that, upon the decease of W. Chapman, the bond in this respect was discharged; and that breach is assigned for a matter happening after that event.

Two questions were made on the argument; the first, whether the defendant's construction of the condition were corect; and, secondly, assuming that it were so, whether he could be entitled to a nonsuit: and this
*717] last, *as being the shortest, it may be convenient to dispose of first.

The plaintiff's counsel naturally objected that, issue having been taken on the breach, and the breach having been proved, no nonsuit could be entered, and that the fault, if any, was on the record,(*a*) the breach being badly assigned. In answer to this it was ingeniously contended that, the plea to the declaration being of a general performance, the real and only question for the jury was, whether that was true: that, in order to go to them at all, the plaintiff was bound to offer evidence of some breach within the terms of the condition; any breach beyond those terms was wholly immaterial; and therefore, on the assumption that his main objection was well founded, a nonsuit might properly be entered. This argument rests on the particular frame of the record, in which the substantial grounds on which the action rests are postponed in statement till the replication: but the fallacy of it consists in confounding the province of the Court of Nisi Prius with that of the Court in Banc. In the former the issues are assumed to be well raised, and no judgment is passed on them: they are all to be tried; and the verdict on each must be according to the evidence; the only question is, are they proved? There can therefore be no nonsuit in this case.

But we are bound to look to the whole record, and give judgment notwithstanding the verdict, or arrest it, according as the breaches are well or
*718] ill assigned: and *the first or main objection must therefore be considered. As both the condition and the deed to which it refers are set out, we have all the necessary materials before us.

It has been stated above that the condition is twofold; first, generally, for the keeping the covenants in the partnership deed; and, secondly, for that on which the breach in question is assigned, the transmitting a true account. If we are to determine the question upon the true construction of this latter part, taken by itself, it seems clear that the objection of the defendant is well founded. The condition recites the formation of a copartnership in a certain trade between the plaintiff, W. Chapman and Potts, in which Potts was to be the acting partner, and then stipulates that Potts, so long as he shall continue the acting partner "in the said trade" "of the said copartnership," shall make a true account and pay the balance due to the plaintiff and W. Chapman. The defendant, therefore, has bound

(*a*) Creswell suggested in argument that the objection not did necessarily arise on the record as it did not appear by the seventh breach that the sums unaccounted for might not have been due before the death of W. Chapman.

himself for the duration of the copartnership in the said trade. If the partners had wholly changed the nature of their business, it could hardly have been contended that the defendant's liability would have continued; and it can be with as little reason contended that it will continue beyond the duration of that copartnership: but *the* copartnership, in the ordinary sense of the term, was dissolved by the death of W. Chapman. For the first of these points the case of *Lord Arlington* v. *Merricke*, 2 Saund. 403, is, in principle, a direct authority: for the latter, if any be needed, *Vulliamy* v. *Noble*, 3 Meriv. 593, 614, and *Gillespie, Executor of Crawford*, v. *Hamilton*, 3 Madd. 251, are in point.

[*719] *But it was said that, this being a question of construction, the whole condition must be looked to, and the copartnership deed therein referred to, in order to ascertain the meaning of this or any other part of it: and it was urged that from such an examination it would clearly appear that the word "copartnership" must be understood in a sense wider than ordinary, in order to effectuate the clear intention, that the defendant's liability should extend as widely at least as assumed in the breach. The deed shows that the partnership was to endure for twenty-one years;(a) and it is provided that, if either of the partners be desirous to withdraw at the end of the seventh year, and should give twelve calendar months' notice, the covenants should absolutely determine as to him, except as to the valuation of stock and compensation for his share; and, further, that any one of the partners should be at liberty to transfer his share, or any part or parts thereof, to any one or more of his sons, and also to dispose of it by will to any person or persons; and, in case of death without such disposition, that it should pass to the executor or administrator, and such son, legatee or representative should be deemed a partner in the concern for all the residue of the said copartnership, subject to the stipulations and covenants in the deed. These provisions, it is said, make it clear that the word "copartnership" is used in the deed and condition to signify, not merely the joint carrying on of the trade by the three parties to the deed, but extends to a carrying it on by any two of them, with or without the assignee or representatives of the third, during the term of years specified in the deed. It is material, however, to observe that the deed contains *no [*720] such covenant as the stipulation in that part of the condition on which the breach is assigned, and that the covenants which it does contain as to keeping books and accounting precede these provisions respecting the withdrawal of old or introduction of new partners: and those provisions are only in terms made binding on the parties to the deed.

We are now, then, to apply these particulars in the deed on the one side, and the other to the construction of this branch of the condition. And, seeing that this branch follows one requiring a general observance of the covenants in the deed, and is clearly an additional stipulation for something not contained in the deed, and that in terms it is to be performed to W. Chapman and the plaintiff with no mention of the survivor, assignee or any other person, we think the more probable and the safer construction will be to give to the word "copartnership" its ordinary legal meaning, limiting it, that is, in duration, to the period during which the same trade was jointly carried on by the same three original parties to the union. Full effect will be given to the intention of the parties to the deed if we construe these stipulations in it as providing, under the circumstances stated, for the introduction of new partners, and the carrying on of the same trade

(a) By the dates given on the record it appears to have been eleven years.

by the new firm, under the same conditions inter se as governed the old. All this may well have been without adverting to or intending to alter the legal consequences of such change in the members of the firm: and we ought to be slow in extending by implication the meaning of words beyond that which they ordinarily bear in legal construction, in order to extend the liability of a surety.

*721] We are strengthened in this opinion by the authority *of a case cited by the counsel for the defendant, which it is difficult to distinguish in principle from the present, that of *Pemberton* v. *Oakes*, 4 Russ. 154. There a banking partnership was formed for fifteen years between Harding, Oakes and Willington: it was stipulated that, if Oakes or Willington should die during the term, the concern should be continued by the survivors or survivor, the deceased's share to be paid to his executor up to the death; but, if Harding should die, he might dispose of his share to his wife and children: and there was a provision for his appointing persons who should carry it on, as if he were living, during the minority of his children; and the business was, in that event, to be carried on by the surviving partners and the appointee, in the manner and on the terms and conditions directed by the partnership articles, as if he had not died. Harding made his will in favour of his children as to this share, and appointed persons to carry on the concern with his partners; and, he dying, this was carried into effect. The question was, whether a surety for a customer of the original firm, who had executed a deed to the members of that firm to secure them for sums already due or which should become due *to them for advances to be made thenceforward to the end of the fifteen years*, was liable for any advance made after the death of Harding. And the present lord chancellor held clearly that he was not liable for advances by a new firm, although he had stipulated to secure advances made during the whole fifteen years; and that the death of Harding, with the substitution of the appointees, though contemplated by the original articles, made a new firm. In this case, it is true, no new partner has been admitted; but that *is immaterial if the death of one of the old ones

*722] works a dissolution. And it is true, also, that in this case the defendant (the surety) is averred to have had full notice of the covenants in the partnership deed, a circumstance which did not exist in the case cited: but this also is immaterial, the question turning on the written language of the instruments.

Many cases were cited to show that, where the surety had covenanted with the house and not the members of the firm, or had stipulated that his liability should not be affected by a change of the members, he would remain liable to the new firm. These cases we do not in the least question, our judgment proceeding on the language of this condition, making all due allowance for the effect which the language of the deed ought to have on its construction.

On these grounds we think the judgment for the plaintiff ought to be arrested.

Rule for a nonsuit discharged.
Judgment arrested.

ROBSON *v.* CURLEWIS.

Reported, 2 Q. B. 421.

*CHAPMAN v. BEECHAM. [*723

B., the owner of land, agreed with C., for the sale of it to him: and C. not paying the purchase money, and being also indebted to B. in a further sum, B., by indenture to which B. and C. were parties, settled the land to the use of himself in fee, with proviso that, if C. should pay B. the debt with interest, on a day named, B. should convey to C. in fee: C. covenanted to pay the principal and interest on the day, and that, if default were made therein, B. might enter; but it was agreed that, till default made, C. should hold and enjoy the land: and C. covenanted that, as often as it should happen that the interest was in arrear, it should be lawful for B. to enter and distrain for the arrear, and dispose of the distress as landlords may do in respect to distresses for arrears of rent on leases for years.

C. having entered into possession, B. distrained for interest accruing after the day named for payment of the principal. B. replieved; and C. avowed, under the indenture, the taking, as for and in the name of a distress.

Held, that C., whether he had or had not the legal estate, might create the power of distress, and that the avowry was good on general demurrer, even supposing it to set up only a leave and license.

REPLEVIN, for taking, on 25th November, 1839, in the parish of Hawkhurst, Kent, in a certain dwelling house, shop, warehouse, yard and bakehouse there in the possession and occupation of plaintiff, the goods, chattels, effects and cattle, to wit, &c., of the plaintiff, and unjustly detaining, &c.

Avowry. That, long before and at the said time when, &c., plaintiff was indebted to defendant in a sum of money, to wit, 800*l.*, and that afterwards, and before the said time when, &c., to wit 29th August, 1832, by a certain indenture then between defendant of the one part, (profert of the indenture, sealed with the seal of the plaintiff,) the plaintiff did covenant, promise and agree with the defendant that he, plaintiff, would pay or cause to be paid unto defendant the said sum of 800*l.*, with interest for the same at and after the rate of 5 per centum per annum, free from taxes and without any deduction except as in the said indenture is excepted, on the 29th day of February next ensuing the day of the date of the said indenture; and for better securing the payment of the interest of the said principal sum of 800*l.*, the *plaintiff did, in and by the said indenture, grant unto the defendant that, as often as it should happen that the interest [*724 of the principal sum of 800*l.*, should be in arrear, in the whole or part, for the space of twenty-one days after any of the times in and by the said indenture appointed for payment of the same,(*a*) it should be lawful for the defendant into and upon the said plot of land, messuage or tenement, buildings or hereditaments, and premises, in the said indenture mentioned, being the said dwelling house, shop, warehouse, yard and bakehouse, in the said declaration mentioned, in which, &c., or into or upon any part of the same in the name of the whole, to enter, and distrain for the same interest and the arrears thereof, and the distress and the distresses then there found to impound and in pound to detain, and in due time to appraise and dispose of the same according to the due course of law, in the same manner in all respects as landlords are by act of parliament or otherwise authorized to do in respect to distresses for arrears of rent upon leases for years; to the intent that the defendant should by the same distress or distresses, be paid and satisfied all arrears of the

(*a*) No time appeared (from either the avowry or the indenture as after set out) to be appointed for the payment, except the above 29th February: but it appears to have been assumed in the arguments and judgments that interest at the same rate continued to accrue after the failure to pay the principal upon the appointed day.

said interest, and all costs occasioned by the nonpayment thereof: as by the said indenture, &c. That, after the making of the indenture, and before the time when, &c., to wit, 29th February, 1836, being the 29th day of February next ensuing the date of the indenture, and the day thereby appointed for payment thereof, the principal sum of 800*l*.,
*725] and another large, &c., to wit, *the sum of 60*l*., for interest thereon, at 5 per cent. per annum, for one year and a half of another year, ending 29th February, 1836, became due and payable from plaintiff to defendant, according to the tenor, &c., of the indenture: that plaintiff did not pay the 800*l*., or the 60*l*., or any part thereof, on or before the 29th of February, 1836, and that the same continued due and unpaid for more than twenty-one days next following, to wit, from thenceforward continually until and upon and at and after the time when, &c.; whereby another large, &c., to wit, the sum of 140*l*., for interest upon the principal of 800*l*., at the rate of 5 per cent. per annum, for a long period, to wit, for the period of three years and a half, commencing on a certain day, to wit, 29th February, 1836, became and ending on a certain other day, to wit, 29th August, 1839, became and was due and payable from plaintiff to defendant under the indenture, and, at the time when, &c., was, thenceforth hath been, and still is, due, &c., from plaintiff, to defendant: by reason whereof defendant says that there was, at the time when, &c., due from plaintiff to defendant a large, &c., to wit, the sum of 200*l*., for interest on the principal sum of 800*l*., at 5 per cent. per annum, under the indenture, and according to the tenor, &c.: and, because the said sum of 60*l*., was so due and owing and in arrear and unpaid from plaintiff to defendant for more than twenty-one days after the 29th of February next ensuing the date of the indenture, and at the time when, &c., was still in arrear and unpaid, together with the other large, &c., to wit, the said sum of 140*l*., for such interest, &c., making together 200*l*., defendant, under and by virtue of the power and authority
*726] to him the defendant for that purpose granted by the plaintiff *by the said indenture, the plaintiff long before and at the said time when, &c., being in possession of the said dwelling house, shop, warehouse, yard and bakehouse in which, &c., well avows the taking of the said cattle, goods, chattels and effects, in the said dwelling house, shop, warehouse, yard and bakehouse, in which, &c., and justly, &c., as for and in the name of a distress under the said power and authority so to him for that purpose granted as aforesaid, for the said sum of 200*l*., so due and owing from the plaintiff to the defendant for such interest as aforesaid, and which still remains due and unpaid: and this he the defendant is ready to verify: wherefore he prays judgment and a return, &c.

The plaintiff set out on oyer the indenture, which was dated 29th August, 1832, and whereby, after reciting a conveyance of land to such uses as the defendant should appoint, and, in default thereof and subject thereto, to the use of defendant for life, remainder during defendant's life to a trustee and his heirs in trust for defendant, remainder to the heirs of defendant, and that defendant had agreed with plaintiff for the sale to him of the land in fee for 183*l*. 6*s*. 8*d*.; that since the agreement, plaintiff had erected a messuage or tenement, bakehouse, stable and other buildings, on part of the land; that the purchase money still remained due, and defendant had advanced to plaintiff, for the purpose of erecting the buildings, 616*l*. 13*s*. 4*d*.; and that it had been agreed that the two sums, making together 800*l*., should be secured with interest thereon to defendant in manner thereinafter contained; it was witnessed that,

in pursuance of the agreement, and in consideration of the premises, and of 10s., paid by plaintiff to defendant, defendant did appoint the land to him, *the defendant, in fee, subject to the proviso thereinafter contained, that is to say, that, if plaintiff, his heirs, executors, administrators [*727 or assigns, should pay to defendant, his executors, administrators or assigns, the 800l., with interest at 5 per cent. per annum, "on the 29th day of February now next ensuing," the defendant, his heirs or assigns, should and would, at the request, costs and charges of plaintiff, his heirs or assigns, reconvey or reassure the land to the use of plaintiff, his heirs or assigns, in such manner as he or they should direct. Then followed several provisos, covenants, &c.; among which were covenants by defendant for title, and for further assurance; and a covenant by plaintiff to pay the 800l. with interest at the day and time before appointed, and that, after default made therein, it should be lawful for defendant, his heirs and assigns, to enter upon and enjoy the land, and that plaintiff and his heirs should, at the request of defendant, his heirs, executors, administrators or assigns, but at the expense of plaintiff, his heirs, executors, administrators and assigns, execute conveyances, &c.; and an agreement and declaration that, until default made in payment of the 800l. or interest, it should be lawful for plaintiff, his heirs and assigns, to hold and enjoy the land, buildings, &c., and receive the rents and profits for his and their own use and profit, without eviction or interruption by defendant, his heirs, &c., or any one claiming through them; and a covenant and grant corresponding with those set out in the avowry. The plaintiff then pleaded three pleas in bar; of which two only are material here.

1. That plaintiff, at the time of the making of the said indenture, had not, nor at any time since had he, *any estate whatsoever in the said dwelling house, shop, warehouse, yard and bakehouse, or [*728 either of them, or any part thereof, whereby he could make the said grant to the defendant, or give to him the said power and authority of distress in the said indenture in that behalf contained, and in the said avowry in that behalf above mentioned. Verification.

2. That defendant, at the time of the making of the supposed grant of the supposed power and authority of distress in the avowry mentioned, and from thence until and at the time of the making of the said distress in the declaration mentioned, continually, was seised in his demesne as of fee of and in the said dwelling house, shop, warehouse, yard and bakehouse, in the declaration mentioned, and every of them, and had not at any time, during the period aforesaid, demised, or in any manner parted with, any legal interest of and in the same, or any part thereof, to any person or persons whomsoever: by reason of which premises the said supposed power and authority became, and at the said time when, &c., were, wholly merged and extinct.

Special demurrer to both the pleas, for causes which were afterwards stated in the argument.

Joinder in demurrer.

W. H. Watson for the defendant in replevin. The facts stated in the pleas constitute no answer to the avowry: if they did, the plaintiff would be estopped from setting them up. It is not necessary, to justify the taking under the clause set out in the avowry, that the plaintiff should have a legal estate in the land. The clause may be construed as a license to take in the event of non-payment. Such a license may be pleaded in

*729] replevin *as well as in an ordinary action of trespass. But, further, if a legal interest in the plaintiff were essential to the defendant's right of distress, then the defendant, by making the grant under seal, is estopped from denying that essential fact. It is laid down by Littleton and Lord Coke that, if debt be brought for rent on a lease, the lessee may plead that the lessor had nothing in the tenements at the time of the lease, except the lease be made by deed indented, for "then are both parties concluded;" Litt. B. 1, c. 7, s. 58, Co. Lit. 47, b. So, if a disseisor lease to the disseisee, this works a remitter unless the lease be by deed indented: but, if it be, the lease works no remitter, and a reservation of rent in such lease shall be good against the disseisee; and this estoppel would be good, even if the deed were a feoffment in fee reserving a rent or condition, and there were livery of seisin; Co. Lit. 363, b. In *Heath* v. *Vermeden*, 3 Lev. 146, it was decided that a lessee by lease indented could not plead *nil habuit in tenementis* to debt for rent. The same doctrine is recognised in *Treviban* v. *Lawrence*, 2 Ld. Raym. 1036, 1048, 1051, S. C. 6 Mod. 256, 258. In *Dancer* v. *Hastings*, 4 Bing. 2, the plaintiff in replevin was held to be concluded, on an issue upon *non tenuit*, pleaded to a cognisance made under a receiver in chancery who had demised to the plaintiff. The exception to the rule that a party is estopped by his own deed is where persons are acting as trustees for the public, or where the point arises upon an act of parliament of which the court must take notice, *Fairtitle dem. Mytton* v. *Gilbert*, 2 T. R. 169. But, further, it appears from *Wilkinson* v. *Hall*, 3 New Ca. 508, that the effect of this indenture
*730] is as if the defendant had *demised to the plaintiff till failure in the payment of interest. [Lord DENMAN, C. J. The decision in *Wilkinson* v. *Hall*, was questioned in *Doe dem. Parsley* v. *Day*, 2 Q. B. 147, 153, on the authority of a passage in Shepp. Touchst. 272, which was not brought to the attention of the Court of Common Pleas.] *Alexander* v *Bonnin*, 4 New Ca. 799, is an authority for the defendant on this point. [COLERIDGE, J. Did that case decide more than that the landlord, having parted with the soil, could not maintain trespass for the interruption of a right of way reserved to him?] It is, however, for the reasons before given, unnecessary to contend that the plaintiff had a legal estate. *Hope* v. *Booth*, 1 B. & Ad. 498, may be cited on the other side: but there the question arose in an action of covenant, on the application of stat. 6 G. 4, c. 16, s. 75, the defence being bankruptcy and certificate. Lord Tenterden considered that there was a power of distress, and would therefore, in replevin, have upheld the estoppel. An annuitant may distrain for arrears, though a term for years be vested in himself; and may treat the occupier as his undertenant; *Fairfax* v. *Gray*, 2 W. Bl. 1326.

Platt, contrà. The avowry is bad, taken together with the indenture; the two showing that there is not that relation between the parties which authorizes a distress. A man cannot distrain on his own lands. This was no demise; and at any rate after default in payment the legal interest of the plaintiff expired, and the rent merged in the estate of the defendant. It is said that this is a mere license: but the avowry claims a right to
*731] "enter, and *distrain," and justifies the taking "as for and in the name of a distress." Indeed it may be contended that the clause in question is nugatory: for the "February next ensuing the day of the date" of the indenture was February, 1833. The allegation therefore of the interest becoming due on February 29th, 1836, as the 29th February next after the date of the indenture, is bad. But at any rate this is not

rent reserved; for there is no demise: and, as a grant of a rent charge, the deed is void. It is said, in Shep. Touchst. 243: "If a man grant or charge that which is none of his, and that wherein he hath no property, it being in the grantee, or a stranger; the grant is void." "And albeit the grantor doth afterwards purchase the manor, or the land, yet this will not make the grant good."(a) In such a case, the grant might have been treated as a license as well as here. In *Doe dem. Barber* v. *Lawrence*, 4 Taunt. 23, it was held that a right of entry cannot be reserved to a stranger to the estate. Then there is no estoppel, because the objection appears on the face of the indenture. "Where the verity is apparent in the same record, there the adverse party shall not be estopped to take advantage of the truth; for he cannot be estopped to allege the truth, when the truth appeareth of record;" Co. Lit. 352, b, cited, Com. Dig. Estoppel, (E. 2,) [WIGHTMAN, J. Why do you call this a rent charge at all? The parties agree that the interest shall be levied by distress.] A charge which is to come out *of the land is a rent charge. Therefore, if this distress [*732 be maintainable, the goods of a stranger might have been seised; *Saffery* v. *Elgood*, 1 A. & E. 191: and then the result would be that the owner of land may have granted to him a charge on his own land, for which he may seize any man's goods being on that land.

W. H. Watson in reply. The authorities cited on the other side tend only to show that in this case there is no valid rent charge. But there is a license. The goods of a stranger could not be seised, because this is not a rent charge: in *Saffery* v. *Elgood*, 1 A. & E. 191, the grant was of a rent charge in terms and effect. A party may grant a right of seising by way of a distress, just as a party may, if he please, create a lien in cases where the law would not raise it, and may modify its conditions, as was held in *Hawthorn* v. *Newcastle, &c. Railway Company*.(b) *Crowfoot* v. *The London Dock Company*, 2 Cr. & M. 637, S. C. 4 Tyrwh. 967, is a similar case. [*Platt*. In *Rogers* v. *Birkmire*, 2 Str. 1040, it was held that a single distress cannot even be levied on two pieces of land let separately; but that there must be several distresses for each.] As to the objection, that the allegation of the principal and interest becoming due on the 29th of February, 1836, as being the 29th of February next following the date of the indenture, is inconsistent with the terms of the deed, it is clear that the day meant in the deed was the next 29th of February, which would be in 1836: and, even if that were not so, and it were necessary to abandon so much of the plea, it would still appear that 140*l*. was due, and the *defendant must have a return; *Howell* v. *Samback*, Hob. 133, (5th ed.); *Dent* v. *Parsons*, Cro. Jac. 473; *Forty* [*733 v. *Imber*, 6 East, 434.

Lord DENMAN, C. J. I cannot understand why the plaintiff should not have the power of granting the right of distress, his possession of the land being undisputed. Perhaps the avowry would have been more correct if it had justified in terms by way of leave and license: the deed would support such an avowry. The objection therefore comes only to this, that the plea is not sufficiently distinct as to claiming by leave and license. The

(a) Sheppard adds: "But if the grant be by way of fine, or by indenture, there in some cases it shall be good by way of estoppel. And in this case, albeit the party recite that it is his own, yet this will not mend the case. And therefore if a man recite that he hath a rent of ten pounds a year, and then grant five pounds a year parcel of it; in this case if he have no such rent the grant is void."

(b) See note at the end of this case.

objection on the words "next ensuing" cannot prevail: we cannot refer the words to the last antecedent, February, when by so doing we turn the whole into nonsense:(a) we must refer them to "the twenty-ninth day."

WILLIAMS, J. The objection turns on the words of the justification, "as for, and in the name of a distress." Mr. *Platt* assumes that this creates a difficulty: but, if the words were totally omitted, the avowry would be equally available. The meaning was that, in the event of the money not being paid, the defendant might satisfy himself by seising goods on the premises.

COLERIDGE, J. The whole stands on the agreement of the parties. The title is immaterial. The party in possession says the other may distrain, eo nomine. You may call that what you please: the words can make no difference.

*734] *WIGHTMAN, J. The objection is put as if this were a rent charge issuing out of land. But the plea merely shows that the plaintiff, having possession, is distrained on by virtue of an agreement that, if the interest be not paid, the defendant may distrain for it on these particular lands. As to the other objection, it could at the utmost show only that too much is distrained for: the avowry separates the interest claimed as due on February 29th, 1836, from that due after. If the interest be due only in respect of the time after February, 1836, the defendant has distrained for too much; but he is still entitled to a return.

Judgment for defendant.(b)

(a) See *Rex* v. *Wright*, A. & E. 434, 445.

(b) The following is the case alluded to in the argument, at p. 732.

HAWTHORN and Others, Assignees of ROBSON and Another *v.* The NEWCASTLE UPON TYNE and NORTH SHIELDS Railway Company.

A railway company contracted with R. that R. should build a bridge for the company on their railway; R. was to provide implements and materials; and, if the company's architect considered that R. did not proceed with proper expedition, the company, on seven days' notice, might employ other or additional workmen, and in that case, might use the implements and materials of R. which, for the time being, should be used by R. in or about the works; and R. was to repay all additional expenses. The company were to have a lien on the implements and materials which for the time being should be upon the ground whereon the bridge was to be built, as a security for the completion of the works, R. undertaking to execute such deeds as counsel for the company should advise for confirming the lien and security.

A fiat of bankruptcy issued against R. on the 31st July, on which day the company took possession of implements and materials used by R. in building the bridge. On 1st August the company gave notice, as provided in the contract: on 2d August they commenced completing the bridge, and in so doing used some of the materials, and detained the rest.

1. *Held*, that the agreement was lawful, not being made in contemplation of bankruptcy.
2. That the company were not entitled to use the implements and materials till the expiration of the seven days' notice, and that the previous use was a conversion.
3. That they were entitled after the seven days, to use all implements and materials used by the contractor on any part of the works for constructing the bridge.
4. That they were entitled to a lien upon all such implements and materials, so used, as were upon any land, possessed by the company, on which the building of the bridge was, in a popular sense, being carried on. But not to a lien upon the materials of a temporary railway constructed for bringing articles to the bridge from an adjoining river, nor to a crane at the end of such temporary railway, not being on the company's land.
5. But that these last materials were liable to be used by the company, as above.
6. That these rights of the company were not invalidated by the possession of the bankrupt, under stat. 6 G. 4, c. 16, s. 72, he being the true owner.
7. Nor by other implements and materials, so used, having been removed without any objection from the company's authority, the lien being a shifting one, and attaching to such articles as were brought from time to time, and ceasing as to such only as were removed.
8. Nor by the implements and materials not being scheduled.

9. The assignees of R. having brought trover against the company for all the implements and materials above mentioned, the defendants pleaded the contract specially, and alleged that the implements and materials were brought, and used for the bridge, and were on the ground whereon the bridge was to be built; and that defendants had possession by R.'s permission, and continued to possess under the lien. On replication de injuria: *Held*, that defendants were entitled to judgment, although the facts did not bring all the articles to which the declaration applied within the lien, the plaintiffs not having new assigned.

10, The rules, as to new assignments apply to trover as well as trespass.

TROVER. The defendants (who were incorporated under stat. 6 & 7 W. 4, c. lxxvi., local and personal, public) pleaded several pleas, leading to issues of fact. On the trial, before COLERIDGE, J., at the Spring Assizes for Northumberland, 1838, a verdict was found for the plaintiffs *for 1387*l.*, subject to be reduced, or a verdict entered for the defendants, upon a case. [*735

The case was stated accordingly; and in Easter term, 1840, (May 1st, before Lord DENMAN, C. J., LITTLEDALE, PATTESON, and COLERIDGE, Js.,) *Alexander* was heard for the plaintiffs and *W. H. Watson* for the defendants. The following authorities were referred to. *Wilson* v. *Greenwood*, 1 Swanst. 471, and note (a) ib. b. 481; *Tripp* v. *Armitage*, 4 M. & W. 687; *Crowfoot* v. *The London Dock Company*, 2 Cr. & M. 637, S. C. 4 Tyrwh. 967; *Rouch* v. *The Great Western Railway Company*, (then standing for judgment, since decided 1 Q. B. 51;) *Manton* v. *Moore*, 7 T. R. 67; *Collins* v. *Forbes*, 3 T. R. 316, note (6) to *Greene* v. *Jones*, 1 Wms. Saund. 300 b.; *Freeman* v. *Crofts*, 4 M. & W. 4; *Routledge* v. *Abbott*, 8 A. & E. 592; *Alston* v *Mills*, 9 A. & E. 248; *Gordon* v. *The East India Company*, 7 T. R. 228. *Cur. adv. vult.*

Lord DENMAN, C. J., in Trinity vacation, (June 24th, 1840,) delivered the judgment of the court.

The main question in this case arises upon the proper construction to be given to certain clauses in an agreement between the defendants and the bankrupts, and upon their validity in the event, which has arisen, of the bankruptcy of the parties on the one part of the agreement. Several points have been discussed in the argument, it being submitted to us to decide, not only the verdict, but the amount of damages. And the most orderly method of disposing of them will be, first, to consider the agreement itself; secondly, the circumstances to which it is to be applied, and, lastly, what the conclusion from both will be in reference to the pleadings in the cause.

The defendants in the construction of their railway, having to throw a bridge over Willington Dean, entered into a contract with the bankrupts, who were builders, for that purpose. These last were to provide, at their own expense, all necessary implements and materials for completing the work; large powers were given to the architect of the company in the rejection of improper materials, and the determination whether the work, as it proceeded, was properly done; " and, if, in his opinion, the bankrupts should not proceed with sufficient expedition in the performance *of the works as directed, it was to be lawful for the company, or their surveyor, to employ other or additional workmen to complete the works, on giving [*736 seven days' notice of his or their intention so to do: and then, in such case, it should be lawful for the said company to use and employ the cranes or other machines, implements and materials, which for the time being should be used by the said bankrupts in or about the said works; and whatever extra expense might thereby be incurred by the said company, in completing the works in a proper manner and with proper expedition, should be defrayed by the said bankrupts and their sureties: and, further, that the said company should have a lien upon such machines, implements and materials as should for the time being be in or upon the lands or grounds whereon the said bridge was to be built, as a security for the completion of the works, the said bankrupts thereby agreeing to execute, at their expense, all such deeds and instruments as the counsel of the said company should advise for completing and confirming such lien and security." We think it cannot be contended that this agreement, whether entered into by one subject to the bankrupt laws or not, bears any thing unlawful upon its face. It has no professed or necessary reference to the event of bankruptcy: and, assuming the solvency of the contractors, that bankrupcy was not in contemplation, and that they were the owners of the chattels to be affected by the deed, they might certainly stipulate with regard to them as the contractors have by this instrument.

Neither can there be any question as to the extent of its operation in the first branch. Supposing the contingency should arise, and the seven days' notice be given, the company would clearly be at liberty to make use of all implements and materials then in use by the contractors in and about the works, whether they happened to be on this or that precise spot. The wording of the latter part, which gives the lien, is more limited: the lien is to attach on such machines, implements and materials as for the time being might be in or upon the lands or grounds whereon the bridge was to be built. It would be in the nature of a shifting lien: as materials were brought on the ground, it would attach to them; as they were worked up and became part of the bridge, it would cease and merge in actual property; and if they or any of the machines, &c., were removed elsewhere, not wrongfully, it would be lost; but the loss

of the lien on articles so removed would not affect it as to what remained, or what from time to time should be afresh brought on. Possession of course would be indispensable to the continuance of the lien: but, as it was a lien created by agreement, it would admit of modifications, as to the nature of that possession, and in other respects necessarily to be implied from the subject matter of the agreement. As to the place where the lien would attach, that also must receive a reasonable interpretation: it would defeat the plain intention of the parties to limit it literally to the spot on which the bridge would be built; comparatively very few of the
*737] materials *would be on that spot, until worked up into the bridge itself. The expression "lands or grounds," as well as the reason of the thing, shows that the lien would extend into all places in which the building of the bridge was, in a popular sense, being carried on, if such places were in the possession of the company, so that they might be considered as having a possession of the articles there placed.

Such being our view of the validity and import of the agreement, we may at once dismiss two points made for the assignees; the removal of machinery from the works from time to time to be used elsewhere without the leave, but without the objection, of the architect; and the fact that no schedule was made of the goods and chattels from time to time brought upon the ground. The circumstances which must be taken to have been in the contemplation of the parties fully account for both these facts, and strip them of all importance.

We come then to the other facts of the case. Acts of bankruptcy were committed on the 26th July; a fiat issued on the 31st. On the same day the company took formal possession of the articles for which the action is brought, and put a special agent in charge of them. On the first of August they gave the notice required by the former part of the agreement above stated, and on the second took on themselves the completion of the bridge, and, in building it, have used part of the said articles, and have ever since retained possession of the residue.

Here again we may dismiss some points made in argument. There is no apparent ownership; for down to the date of the bankruptcy, the bankrupts who had a possession were the true owners of the property in question. On the other hand, the company had no right to begin to use the articles on the 2d, or at any time before the seven days' notice had expired: and the user for that time was a conversion. At the end of the seven days, however, their right would begin, and the subsequent user would be lawful. No point was made, and very properly, of the former possession taken by the company on the 31st, which was certainly consistent with their previously having such a possession as would suffice for the lien.

We come now to the articles which have been so used. And the case divides them into four parts. The first division in value, amounting to 612*l.*, 13*s.* 6*d.*, were actually upon the line of the railway, on land the absolute property of, and in the possession of, the company. Upon these it was hardly contested that the lien would attach, if it attached at all. The second, of the value of 634*l.* 13*s.* 9*d.*, were upon land adjoining the line, and in possession of the company: these also, in our opinion, fall under the lien, giving to the expressions which limit its range the reasonable interpretation which we think we are bound to do. The third class, of the value of 7*l.* 16*s.* 9*d.*, were one temporary railway constructed for the purpose of bringing materials from the Tyne to the bridge, and the materials of the temporary railway itself of the value of
*738] 131*l.* 15*s.* 4*d.* And the fourth was a crane, of the value of 50*l.*, erected at the water's edge at the end of the temporary railway. We think that the lien did not attach upon these. We doubt whether the first two were ever in the possession of the company: the last clearly was not: and neither were within the prescribed local limits. But, although not subject to the lien, they were both within the former clause of the agreement, and, at the expiration of the notice, might lawfully be retained, used and employed by the company in and about the work.

It only remains to refer to the pleadings and, applying these facts to them, to draw the right conclusion as to the verdict to be entered. The declaration is in trover, containing the two usual counts. The pleas (after the first of Not guilty, on which nothing turns) are in sets, the second and fourth traversing the possession of the bankrupts, and the assignees, respectively; the third and fifth setting out the special agreement. It will be sufficient to consider the effect of the second and third. With regard to the first of these, if it stood alone, some questions of nicety might arise, its applicability to the defence contemplated, and its sufficiency to furnish any answer with regard to the third and fourth class of articles above enumerated. But it seems that the third plea is a sufficient defence for the company.

It must be remembered that no question arises upon the goodness of the plea; we are only to consider its extent, and whether it has been proved. It commences with stating the possession by the bankrupts of all the goods and chattels mentioned in the first count; then sets out the agreement with both the clauses stated above; then avers that, before the bankruptcy, and after the making of the indenture, they brought the goods and chattels to and upon the lands and grounds whereon the bridge was to be built, for the purpose of constructing it, which lands and grounds were in the possession of the company; and that afterwards, and before the bankruptcy, the company had possession of them by the consent and delivery of the bankrupts, and still have possession of them, and exercise the lien upon them in the indenture mentioned,

and had and received them for that purpose; and they conclude, averring a continuance of the possession in the same right, and for the same purpose, the bridge being still incomplete. To this plea, the replication, admitting the indenture, is de injuriâ as to the residue.

We have stated already that this defence does not cover the whole grievance proveable under the declaration; but we think this objection received the proper answer at the bar. The plea professes to cover every thing in the declaration; it places all the goods and chattels within the prescribed limits; it avers a possession taken and retained only by virtue of the lien granted by the deed. If the plaintiffs intended to rely on the use of any of the articles too soon, or on a possession of articles not within the local limits, which made them subject to the lien, they should have newly assigned; and, not having done so, these matters cannot be *taken [*739 into consideration. It is true that a new assignment is a novelty in trover, as in assumpsit; but that must be attributed to the practice before the new rules of giving nearly every matter in evidence under the general issue. Now that these forms of action are made subject to the same rules of special pleading as trespass, the consequences will follow in every stage. And, as a new assignment would certainly have been necessary if the declaration had been in trespass, it will be equally so now.

We are of opinion therefore that a verdict ought to be entered, on the third and fifth issues for the defendants.

The QUEEN v. The Inhabitants of HENDON.

Reported, 2 Q. B. 455.

The QUEEN v. The Inhabitants of SILKSTONE.

Reported, 2 Q. B. 520.

The QUEEN v. The Inhabitants of STOWFORD.

Reported, 2 Q. B. 526.

*BEVAN v. GETHING. [*740

In an action upon a promissory note, to which the Statute of Limitations was pleaded, plaintiff gave evidence that defendant had paid *5s.* on account of the note. He then offered to prove that defendant, on a subsequent occasion, admitted orally that he had made such payment on the above account.

***Held*, that the latter evidence was not excluded by stat. 9 G. 4, c. 14, s. 1.**

DEBT on a promissory note, and on an account stated. Plea (among others) the Statute of Limitations. On the trial, before COLTMAN, J., at the Monmouth Summer Assizes, 1841, the plaintiff, to take the case out of the operation of the statute, proved that the defendant had, in September, 1835, paid 5*s.* to the plaintiff's son, (who was called as a witness,) acknowledging that it was on account of the note in question. The plaintiff then called his attorney, who stated that the defendant had, since this action was commenced, admitted having paid the 5*s.* to plaintiff's son on account of the note. The evidence was objected to, but received; and the plaintiff had a verdict. *Talbot*, in the ensuing term, obtained a rule nisi for a new trial.

Godson now showed cause. Stat. 9 G. 4, c. 14, s. 1, enacts that, in actions of debt on simple contract, "no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation" of the Statute of Limitations, "or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some

writing," &c. The effect of payments is preserved by a proviso in that section: though it is true that an oral acknowledgment of having paid money on account within six years was held insufficient in *Willis* v. *Newham*, 3 Y. & J. 518: and *Bayley* v. *Ashton*, 12 A. & E. 493, supports this
*741] *decision. But in *Waters* v. *Tompkins*, 2 Cro. M. & R. 723, S. C. Tyrwh. & G. 137,(a) part payment having been proved otherwise than by admissions, it was held that oral declarations were receivable to show that the payment, when made, had been appropriated to the debt in question. *Moore* v. *Strong*, 1 New Ca. 441, and *Trentham* v. *Deverill*, 3 New Ca. 397, also show how far evidence of this kind is admissible to support or explain other proof of a payment. In the subsequent case of *Maghee* v. *O'Neil*, 7 M. & W. 531, where the decision in *Willis* v. *Newham*, 3 Y. & J. 518, S. C. Tyrwh. & G. 137, was adhered to, Lord ABINGER, C. B., said: "If this question were res integra, I should certainly say that the mode of payment of principal or interest was left by Lord TENTERDEN's Act to be proved as at common law. But we are not sitting here as a Court of Error." "My impression however, is, that the act of parliament has been pressed beyond its intention." And PARKE, B., referring to *Willis* v. *Newham*, 3 Y. & J. 518, S. C. Tyrwh. & G. 137, and *Bayley* v. *Ashton*, 12 A. & E. 493, said: "My feeling certainly is, that those decisions have gone too far; but sitting as we do, with a co-ordinate jurisdiction only, we cannot overrule the judgment of the Court of Queen's Bench." He intimated, however, that the plaintiff might, in a fresh action, bring error: and he added: "If it comes before us in that shape, I shall then hold myself fully at liberty to consider it independently of the cases." The present objection would go even farther than those which were held good in the cases thus commented upon in the Court of Exchequer.

*742] * *Whateley*, contrà. The question is, not whether the effect of this piece of evidence was more or less important in the particular case, but whether or not it would have been admissible if it had stood alone: if it would not, the fact that other evidence of payment was given cannot render this more legitimate. *Willis* v. *Newham*, 3 Y. & J. 518, (expressly recognised as a binding authority in *Bayley* v. *Ashton*, 12 A. & E. 493, and *Maghee* v. *O'Neil*, 7 M. & W. 531,) decides the present case. The distinction introduced by *Waters* v. *Tompkins*, 2 Cro. M. & R. 723, S. C. Tyrwh. & G. 137, is perhaps too refined; but at all events the case does not apply, as the real question here is not of appropriation but of the payment itself. To hold this evidence admissible would let in all the mischief which the clause of stat. 9 G. 4, c. 14, requiring a written acknowledgment, was intended to prevent.

Lord DENMAN, C. J. I think the statute does not apply to this case. The fact of payment was proved. The acknowledgment was put in only to show the probability that it was correctly proved. Stat. 9 G. 4 c. 14, s. 1, says that "no acknowledgement or promise by words only shall be deemed sufficient evidence." Here proof is given by words, but by other evidence also.

WILLIAMS, J. Sect. 1 has a proviso "that nothing herein contained shall alter or take away or lesson the effect of any payment of any principal or interest." The present case turns upon that clause. Here, some proof of a payment was given. Nothing in the statute prevents the adducing of evidence to sustain that fact.

(a) See, as to this and the last cited case, *Edan* v. *Dudfield*, 1 Q. B. 302, 307.

*COLERIDGE, J. I felt pressed by the argument for the defendant: but I cannot distinguish this case from *Waters* v. *Tompkins*, 2 Cro. M. & R. 723, S. C. Tyrwh. & G. 137: and I rely rather on that authority than on principle. [*743

WIGHTMAN, J. *Waters* v. *Tompkins*, 2 Cro. M. & R. 723, S. C. Tyrwh. & G. 137, decides the precise point now before us. Evidence of oral declarations is not sufficient to prove a payment, but may be received to corroborate other proof of that fact. Rule discharged.(a)

(a) See *Haydon* v. *Williams*, 7 Bing. 163; *Eastwood* v. *Saville*, 9 M. & W. 615.

*WALKER v. The LONDON and BLACKWALL Railway Company. [*744

The Blackwall railway act, 6 & 7 W. 4, c. cxxiii., enabled the company to make the railway in a certain line, and to purchase lands, and required them to make compensation for damage; the purchase money and compensation to be assessed, in case of disagreement, by a jury, who should be summoned on the company's warrant to the sheriff. By sect. 50, if any person should be applied to by the company to sell part of a house, &c. in his actual occupation, and should offer to treat with them for the whole, and they should refuse, such person was not to be compellable to sell less than the whole. By sect. 51, if any dwelling house, &c. situate within fifty feet of the railway, should be deteriorated by it, and the owner should require the company to purchase the same, they were required to treat for the purchase, compensation, &c; the amount, in case of disagreement, to be settled by a jury, as in other cases: proviso that in no case should the company be compellable to purchase any portion of any dwelling house, &c. which portion was situate at a greater distance than fifty feet from the railway; further proviso that the company, whenever called upon to take part of such dwelling houses, &c. might at their option take the whole, subject to payment of compensation, &c. Stat. 2 & 3 Vict. c. xcv. provided that, if the company should not, on request, issue their warrant for a jury within twenty-one days, the party claiming compensation might send a precept in writting to the sheriff, who should thereupon summon a jury &c.

The company were required to purchase a public house, forty-four feet in depth, the greater part of which was within fifty feet of the railway, but a portion, comprising the bar, and varying in depth from thirteen to sixteen feet, was more than fifty feet from the railway; and it was alleged that the premises were deteriorated by the railway, and that, if the former portion only were purchased, the residue would be useless to the owner. *Held* that compensation was claimable for the whole.

The owner gave notice to the company to purchase the whole premises, stating them to be situate within fifty feet of the railway; and to make compensation for goodwill, &c. This not being done, he required them to summon a jury who should determine whether he was entitled to have the said premises purchased and compensation made as before demanded, and should assess the sums payable. No answer being given, he sent a precept to the sheriff, stating the premises to be within fifty feet of the railway, and deteriorated by it, reciting the previous notices, and requiring the sheriff to summon a jury to inquire whether the property in respect of which his claims had been made, was deteriorated by the railway, and whether he was entitled under the statutes to have the said property purchased and compensation made as claimed, and, if so, to assess, &c. The sheriff, on the inquiry, finding that part of the dwelling house was more than fifty feet from the railway, refused to hear further evidence, and directed the jury to find that the claimant was not entitled to have his property purchased by the company, part of it not being within fifty feet, &c. On motion for a mandamus to the sheriff to execute the precept,

Held that the requisition, though it did not properly follow the original demand, nor state rightly the purpose for which the jury should be summoned, was sufficiently correct to have been acted upon by the sheriff. Mandamus granted.

A RULE nisi was obtained in last Michaelmas term, for a mandamus calling upon the sheriff of Middlesex to proceed to execute a precept signed by Samuel Walker, requiring the said sheriff to impannel, *summon and return a jury for the purpose of determining certain matters in dispute between Walker and the above named company. [*745

Stat. 6 & 7 W. 4, c. cxxiii., local and personal, public, "for making a

railway from the Minories to Blackwall," &c., incorporates the company, empowers them to make the railway in a certain line, to take lands, and to treat for the purchase, &c., and requires them to make satisfaction for damage, &c.: sects. 1, 6, 9, 11. Sect. 22 provides for summoning a jury (on warrant from the company to the sheriff) to assess purchase money for lands and compensation for good will, &c., or for damage in case of disagreement or disability, &c. Sect. 28 contains provisions as to notice, which are sufficiently stated in the judgment of the court, p. 754, post.

Sect. 50 enacts: "That if any person or corporation, by this act authorized to sell and convey any lands, shall be applied to by or on behalf of the said company, to treat for, sell, dispose of or convey any part of any house, garden, yard, warehouse, building or manufactory, in the actual occupation of one person or several persons jointly, and shall by notice," &c., "signify his inclination or desire to treat for, sell, dispose of, and convey the whole of such house, garden," &c.; "and if it shall happen that the said company shall not think proper or be willing to purchase the whole of such house, garden," &c., "then and in every such case, nothing in this act contained shall extend or be construed to extend, to compel such person or corporation interested therein, to treat for, sell, dispose of, or convey, or to authorize the said company to take or use part only or less than the whole of such
*746] house, garden," *&c., "any thing herein contained to the contrary thereof in anywise notwithstanding."

Sect. 51 as follows: "And whereas the said railway is intended to pass through or along divers streets, lanes," &c., "in the parishes," &c., "and the hamlet," &c., "and also close to or adjoining divers dwelling houses or shops in the said parishes and hamlet, and it may happen by reason of the construction thereof, that the said dwelling houses or shops may be greatly deteriorated in value: be it therefore further enacted, that in case any such dwelling houses or shops which shall be situated within fifty feet from the said railway, shall be deteriorated in value, and the owner or owners, lessee or lessees of any such dwelling houses or shops within the said parishes or hamlet or either of them, shall, by notice in writing to be left at the office of the said company require the said company to purchase the same, it shall be lawful for the said company, and they are hereby required within thirty days after the service of such notice to treat for the purchase of the dwelling houses or shops mentioned in such notice, and for the compensation recompense or satisfaction to be made to him or them for any loss, damage or injury in respect of any good will, tenant's fixtures, improvements or otherwise occasioned by the taking thereof; and in case the party so giving such notice, and the said company shall not agree as to value of such dwelling houses or shops or as to the amount or value of the satisfaction, recompense or compensation to be paid for such good will, improvements, tenant's fixtures or otherwise, than the amount of such satisfaction, recompense or compensation shall be ascertained and settled by the verdict
*747] of a jury in the manner *hereinbefore described, for ascertaining and settling the value or recompense for other lands, tenements, hereditaments and premises to be taken or purchased for the purposes of this act: Provided always, that no party shall be entitled to receive any compensation under the above enactment unless the jury to whom it shall be referred to ascertain the amount thereof, shall, by their verdict, determine that the property in respect of which the same is claimed, has been deteriorated in value by the construction of the said railway: Provided also, that" no party shall be entitled to such compensation, nor the company be compellable to

purchase such property after twelve months from the opening of the railway: "Provided always, that *in no case shall the said company be compellable to purchase any portion of any dwelling house or shop, which portion is situate at a greater distance than fifty feet from the said railway*: Provided always, that the said company whenever called on to take part of such dwelling houses or shops as aforesaid, *may at the option take the whole* subject to payment of the compensation herein-before mentioned."

Stat. 2 & 3 Vict. c. xcv., local and personal, public, (for extending the line of the said railway, and amending the acts relating thereto,) enacts, sect. 22, that in cases of dispute between the company and parties claiming compensation, where the company do not, on request, issue their warrant for a jury within twenty-one days, the claimant may send a request to the sheriff, who shall summon and impannel a jury, &c.

Samuel Walker was the owner and occupier of a tavern and dwelling house in the parish of St. George in the East, Middlesex, which (by his affidavit in *support of the present application) he alleged to be situ- [*748
ated within fifty feet of the railway, and to have been deteriorated in value by the railway being constructed so near it. He applied to the company to purchase the whole of the premises,(a) making compensation for good will, &c., which application was not noticed. He then gave them notice to issue their warrant within twenty-one days for the purpose of causing a jury to be summoned, to determine whether he was entitled according to the statutes to have the said dwelling house or public house purchased and compensation made as before demanded, and to assess the the sums payable; and he annexed particulars of his claim. This notice being disregarded, Walker served the sheriff with a precept reciting as follows: "Whereas I am the owner and lessee for a term of thirty-one years from," &c., "of the dwelling house now used and occupied by me as a public house, and called," &c, "which said dwelling house or public house is situate in the road called," &c., "in the parish," &c., "within fifty feet of the London and Blackwall Railway, and has been and is deteriorated in value by reason of the construction of the said railway: and whereas," &c., setting out the previous notices: the precept then required the sheriff to impannel, summon and return a jury to inquire "whether the said property in respect of which the said claims have been so made by me upon the said company as aforesaid has been and is deteriorated in value by reason of the construction of the said railway, *and whether I am entitled [*749
according to the form of the statutes in such case made and provided to have the said property purchased of me by the said company, and to have such compensation made to me in respect thereof as aforesaid, according to my said claims in that behalf: and, if the said jury shall so find, then they shall by their verdict determine and declare that the said property has been deteriorated in value by reason of the construction of the said railway, and shall also by their said verdict assess and determine" the amount of purchase money and compensation, &c.

Walker's affidavit then stated that a jury was accordingly impannelled, &c., and viewed the premises; and that, after the complainant's counsel had opened his case, John Bax Shepherd, a surveyor, was called, and stated "that the entirety of the said dwelling house was not situated within fifty

(a) "All that leasehold estate and premises situate," &c., "known by the name or sign of the 'Duke of Cumberland's Head,' public house," &c., "*held* for a term," &c., "at the rent," &c. "And further take notice that the premises before mentioned are situated within fifty feet of the said railway, and that I require the sum," &c.: 4000*l.* for lease and goodwill, and 500*l.* for loss by removal, &c.

feet of the said railway, but that a small portion of the said dwelling house, abutting upon the high road, was beyond the said fifty feet, but that such portion beyond and out of the said fifty feet did not exceed thirteen feet:" "that the said dwelling house and premises could not be severed or divided, and that a perpendicular line drawn at right angles to the high road would leave only the front of the said dwelling house beyond the said fifty feet, and the remaining chief part of the said dwelling house and premises within fifty feet of the said railway." The counsel for the company then objected to the reception of any evidence to show the value of the premises, or their deterioration, contending that, because the entirety was not within fifty feet, the court had no jurisdiction to assess the value, or to proceed with the inquiry: and the
*750] undersheriff, who presided, refused *to hear any evidence and to allow the inquiry to proceed, and told the jury that the claimant was not entitled under the act to have the premises purchased. The surveyor also made affidavit that the extent of the premises from back to front was forty-four feet eight inches, of which thirteen feet only, on the west side, and sixteen feet on the east side, were more than fifty feet distant from the railway; and that, if the company purchased only that portion which was within the fifty feet, the remainder would be valueless and of no use to the complainant, and the dwelling house would be destroyed and unfit for use or habitation.

The affidavits in opposition to the rule stated that the portion of the complainant's public house nearest to the railway was eighteen feet from it; that the part occupied as the bar and chief place of business was more than fifty feet from the railway; and that the public house was not deteriorated in value by the construction of the railway, unless any injury had arisen from the removal of houses and consequent loss of custom. They stated also that, after argument on the objection, before the undersheriff, the claimant's counsel tendered evidence of the deterioration in value, but the undersheriff rejected it on the ground that the whole premises were not within the fifty feet, and directed the jury to find in the words following: "That the claimant is not entitled to have his property purchased by the London and Blackwall Railway Company, a portion thereof not being within fifty feet of the said railway:" and the jury found accordingly. In last Trinity term,(a)

*751] *Sir *W. W. Follett*, Solicitor General, showed cause. The undersheriff acted rightly. Stat. 6 & 7 W. 4, c. cxxiii. s. 51, differs from stat. 3 & 4, W. 4, c. xlvi. (local and personal, public) s. 46, which was under the consideration of the court in *Regina* v. *London and Greenwich Railway Company*.(b) Here the enactment is (s. 51) that the company shall not be compellable to purchase any portion of a dwelling house which portion is situate more than fifty feet from the railway; and that, when called upon to take part of such dwelling house, they may, at their option, take the whole. The demand was that the whole of the premises should be taken; and the precept was for summoning a jury to assess compensation in respect of the entire property. When it appeared that part of the property (it is immaterial how much) was not within fifty feet of the railway, the undersheriff was bound to stop the inquiry. It is not clear that the company were bound to take even the portion which was within fifty feet; but at all events the requisition to them should have been to purchase that portion, or to act upon the option, given them by the statute, of taking the whole.

(a) June 9th. Before Lord Denman, C. J., Patteson, Williams and Coleridge, Js.
(b) Anté, p. 166.

Having made an erroneous demand, the claimant was not entitled, on its being disregarded, to proceed upon stat. 2 & 3 Vict. c. xcv. 22.

Sir *F. Pollock*, Attorney General contrà. The language of stat. 6 & 7 W. 4, c. cxxiii. s. 51, shows that the company are at least bound to take the portion which is within fifty feet. It was not necessary for the claimant, in his notice, to state that so much of the property was within fifty feet and so much was farther *off. It would be for the jury to ascertain how much was or was not within the distance, and assess accordingly; [*752 and the notice, comprehending the whole property, would be good for each part. [COLERIDGE, J. If you had not required them to take the whole they might have agreed as to part without a jury.] If nearly the whole is to be sold, a small part beyond the fifty feet, remaining useless, ought not to be severed in the compensation. [COLERIDGE, J. You had no right to go before a jury till the company were in default. PATTESON, J. Your original demand should have been that they should take so much as was within fifty feet. They might have agreed to that.] If the complainant fails here, a claim might be defeated in the same manner if one inch were beyond the fifty feet. [PATTESON, J. And, according to your argument, the company must take the whole if one inch were within the fifty feet.] It might be left to the jury to say how much was within, and how much without. [PATTESON, J. They are summoned to assess compensation for the whole.] Practically, the whole house here is within fifty feet; and probably a jury would have so found. The proviso which exempts the company from purchasing where a portion comes within fifty feet of the railway is introduced for their exclusive benefit, and must be construed rigidly as against them, but favourably to the public.

Cur. adv. vult.

Lord DENMAN, C. J., in this term, (November 25th,) delivered the judgment of the court. After stating the nature of the application, his lordship proceeded:

The fact is that the sheriff has summoned a jury, but was of opinion, when the precept was openly read, that *it did not authorize him to take their verdict on the amount of compensation claimed in respect [*753 of the public house, the intended subject of the inquiry. The claimant in effect appeals to us against the decision; and if it has been erroneous he has been deprived of the right conferred upon him by law, and may now compel the execution of the precept.

The claim is preferred under the fifty-first section of the act for constituting this company, 6 & 7 W. 4, c. cxxiii. (local and personal, public.) (His lordship then read sect. 51,(*a*) as far as the words "purposes of this act.") Four provisoes are added, one imposing a limitation of time, the other three connected, perhaps, in some measure, with the present argument, and therefore fit to be stated and considered here. The first is that no party shall be entitled to receive compensation unless the jury shall by their verdict determine that the property has been deteriorated in value by the construction of the railway. The second, that the company shall in no case be compellable to purchase any portion of any dwelling house or shop which portion is situate at a greater distance than fifty feet from the railway. The third, that the company, whenever called on to take a part of such dwelling or shop, may at their option take the whole, subject to payment of the compensation hereinbefore mentioned. The same remedy is therefore given to the owner of a house situate within fifty feet of the rail-

(*a*) Antè, p. 746, 747.

way as to the owner of lands or tenements taken and purchased by the company. That remedy, afforded by sect. 22, is for the company to issue their warrant to the sheriff for summoning a jury, *who are to assess
*754] and give the purchase money, and also the sum to be paid for satisfaction, recompense, or compensation, for good will, &c., and for all damage sustained or to be sustained from the company's acts. The twenty-eighth section also provides that notice of the nature, extent and particulars of the loss or injury, and of the compensation claimed, shall be given ten days before the summoning of the jury, and within six months after the injury done. There is also a provision (sect. 50) that, if any owner shall be applied to to sell a part of any house, &c., and shall express a desire to sell the whole, the company shall not compel him to sell such part, but shall be bound to purchase the whole.

Let us now see the position of the claimant, and consider the steps taken by him. He is the owner of the lease of a public house which, as he says, is situate within fifty feet of the railway. After submitting his claim to the company, who paid no attention to it, he required them to issue their warrant to the sheriff in order to inquire whether the said property has been and is deteriorated in value by reason of the construction of the said railway, and "whether I am entitled" "to have the said property purchased of me by the said company," and have such compensation as therein mentioned: and, if I am found so entitled, to assess the compensation money. On the jury being assembled, the company's learned counsel objected to all evidence of the value or deterioration of the premises, on the ground that the entirety of them was not within fifty feet, it appearing that the greater part of the house was within that distance. The undersheriff allowed this objection; and nothing was done.

*755] We are now to consider whether the objection was *well founded. We are of opinion that any house, of which a very large proportion is within fifty feet, ought to be called a house within fifty feet. This would be so held by a jury, if called to pronounce a verdict on such an issue. In the absence of any appropriate jurisdiction for deciding it, there is strong reason for holding the company to the rule of construing the words of parties most against themselves. The proceedings of the company may, according to the admission of their own act, be so injurious to houses so described as to call for the remedy which it provides; and, though the description is not perfect, there are pretty clear indications of the intention of the legislature; the compensation must be attained through the medium of a verdict, and must be ascertained and settled as in purchases; and we have just seen that no owner of a house purchased is bound to part with a portion of it only. If they will take any part of a house, they are compellable to purchase the whole of it. If then they come within fifty feet of a house, and thereby deteriorate that house in value, the compensation must be settled in the same manner, that is for the whole house at the owner's option. The company have also an option. They are in no case compellable to purchase any portion of a house, which portion is more than fifty feet from their railway; and, whenever called to take a part, they may have the whole if they prefer it, subject to compensation. From these words an argument is deduced that the company, though free to take the whole, is not compellable to do so. But we do not think the inference just. The proviso seems indeed to be framed on the erroneous supposition that the act had given power to the owner to compel the purchase of

a part *of a house, and had then cut down that power, giving the company the option: but from such a mistake we cannot reasonably infer that the company were intended to be free to buy the whole or a part as they thought proper, when it is plain that the purchase of a part might be ruinous to the whole, and when, in the analogous case of taking and purchasing, the option of parting with the whole is given to the owner if a part only should be required by the company. The claimant's requisition to the company appears to have put forward his claim correctly. After giving them information of his term and interest in the premises, stating them to be situate within fifty feet of the railway, it requires a certain sum as the price of the house, &c., and another for compensation in respect of loss and damage. The precept is different; for, though it describes the house as standing within fifty feet, it refers that question to the opinion of the jury, who possess no jurisdiction if it be not in fact and in law within that distance, but who are bound by the act to declare whether the property is deteriorated, and what ought to be paid if it is within that distance. But, though this point may have been improperly raised by the claimant's precept, there is no reason for barring him of the compensation which he claimed correctly for the value of the house, if that house stands at such a distance as to found the right to compensation. [*756

We think, for these reasons, that the sheriff was wrong: and the rule must be absolute.

Rule absolute.

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*DOE on the demise of WATTON v. PENFOLD. [*757
DOE on the demise of LEVY v. HORNE.

Trustees of a turnpike road, under the authority of a local act and of stat. 3 G. 4, c. 126, borrowed money on mortgages of the tolls and toll houses to several parties, each mortgage respectively purporting to convey such proportion of the tolls and houses as the sum secured bore or should bear to the whole sum charged or to be charged on the credit of the tolls.

Held, under stat. 3 G. 4, c. 126, s. 49, that the interest vested in a first mortgage by such conveyance did not prevent a second mortgagee from bringing ejectment for the tolls and toll houses, on his own single demise; but that he might recover in such action, holding all that he recovered, after satisfaction of his own claim, in trust for the other mortgagees.

A bridge act (9 G. 4, c. c.,) authorised commissioners to borrow money by way of mortgage of the bridge and the tolls thereof; and enacted that the several mortgagees should be entitled in proportion to their interest, and without preference by reason of priority.

The commissioners executed two mortgages, one later in date than the other. The later mortagee having brought ejectment against the commissioners; *Held*, that the commissioners were estopped from setting up the fact of an earlier mortgage to defeat the legal estate of the lessor of the plaintiff.

In the first of these cases the action was ejectment for toll gates and toll houses.

On the trial, before Tindal, C. J., at the Croydon summer assizes, 1841, it appeared that the lessor of the plaintiff claimed by virtue of a mortgage from the trustees under stat. 47 G. 3, sess. 1, c. xxv., (local and personal, public,) "for making and maintaining a road from Foxley Hatch, in the parish of Croydon, into the town of Reigate, in the county of Surrey."(a) The mortgage was in the following form, prescribed by the local act, sect. 27.

"No. 46.

"By virtue of an act made," &c. "We, whose names are hereunto

(a) Repealed and further provisions made, and further securities kept in force, 7 & 8 G. 4, c. xiii. (local and personal, public.)

subscribed and seals affixed, being trustees acting in execution of the said act, in consideration of the sum of 100*l.* to the treasurer of the said road in *758] hand paid by Beeston Long, of," &c., "Esquire, do *hereby grant, bargain, sell and demise unto the said B. L., his executors, administrators and assigns, such proportion of the tolls arising by virtue of the said act, and also of the turnpikes and toll houses for collecting the same, as the said sum of 100*l.* doth or shall bear to the whole sum charged and advanced, or to be charged or advanced, on the credit of the said tolls: to be had and holden from the 1st day of June, A. D. 1808, for and during the continuance of the said act, unless the said sum of 100*l.*, with interest after the rate of 5 per cent. per annum, shall be sooner repaid and satisfied. Given under our hands and seals this 1st day of June, A. D. 1808." (Signed and sealed by five trustees.)

The plaintiff's case having been proved, the defendant (the clerk to the trustees) put in a mortgage, in the same form, to another party, prior in date to that relied upon for the plaintiff, and still in force. The plaintiff's counsel contended that this was no answer to the action: and the lord chief justice directed a verdict for the plaintiff, giving leave to move to enter a nonsuit.(*a*) *D. Pollock*, in the ensuing term, obtained a rule nisi accordingly.

Platt and *Chambers* now showed cause. The General Turnpike Act, 3 G. 4, c. 126, s. 49, provides "that if any mortgagee or mortgagees of any tolls, toll gates," &c., "on any turnpike road, shall seek to obtain possession of the said toll gates," &c., "in order to pay himself, herself or themselves the principal money and interest, or any part thereof, due to *759] him, her or them, it *shall be competent for him, her or them, as lessor or lessors of the plaintiff, and upon his, her or their demise only, and without uniting in such demise the other mortgagees of the said tolls and premises, to obtain such possession; but such person or persons who shall obtain the possession thereof, shall not apply the tolls which may consequently be received by him, her or them, to his, her or their own exclusive use and benefit, but to and for the use and benefit of all the mortgagees of the said premises, *pari passu*, and in proportion to the several sums which may be due to them as such mortgagees." That clause empowers "any" mortgagee, and not the first only, to recover in ejectment, subject to the trust pointed out; thus introducing, in these cases, a different law from that which ordinarily prevails as to mortgages. *Doe dem. Banks* v. *Booth*, 2 B. & P. 219, and *Doe dem. Thompson* v. *Lediard*, 4 B. & Ad. 137, do not substantially differ from this case. And, further, the trustees are estopped from setting up their own mortgage to defeat an interest which they have themselves created by their deed.

D. Pollock, contrà. The precise point made here has never arisen before. In *Doe dem. Thompson* v. *Lediard*, 4 B. & Ad. 137, the mortgage put in force was on toll houses and gates erected upon a branch road; and, though persons holding prior mortgages on the gates and toll houses of the original road had a priority of charge affecting the property on both roads, it did not appear that the premises to which that action related was subject to any mortgage prior to that of the lessor of the plaintiff. In *Doe dem.* *760] *Banks* v. *Booth*, 2 B. & P. 219, it does not *appear whether the other mortgages were prior to that of the lessor of the plaintiff or not: the only question was, whether one of several persons to whom, re-

(*a*) *Doe dem Levy* v. *Horne*, p. 760, post, had been previously tried at the same assizes.

pectively, portions of the tolls were mortgaged, could bring ejectment for the toll houses. At common law the first mortgagee would have the legal estate vested in him, so that no other could bring an ejectment: the turnpike acts do not alter that state of things. No case ascribes that effect to them. The mortgagors are not seeking to defeat their own deed. The question is what right it confers. If the mortgagee does not take under it such legal estate as entitles him to bring ejectment, the mortgagees may show that. "Any mortgagee," in sect. 49, does not mean any without regard to priority: the clause merely directs how far any mortgagee, entitled to bring ejectment, shall avail himself of that remedy.

The court then desired to hear cause shown in

DOE dem. LEVY v. HORNE.

This was also an action of ejectment for toll gates and toll houses, tried before TINDAL, C. J., at the Croydon Summer Assizes, 1841. The lessor of the plaintiff claimed as assignee of two mortgages, both of the same date, made by the commissioners under stat. 9 G. 4, c. c., local and personal, public, ("for building a bridge over the river Thames at Staines in the county of Middlesex," &c.,) to Sir Edward Banks. The defendant was the clerk to the commissioners. The mortgage was in the following form, prescribed by sect. 76 of the local act.

*"Number 120. *[761

"By virtue of an act passed in the ninth year" &c., "we, five of the commissioners appointed for carrying the said act into execution, in consideration of the sum of 500*l.*, to us advanced by Sir Edward Banks of the Adelphi in the county of Middlesex, do grant and convey unto the said Sir Edward Banks, his successors, executors, administrators and assigns, the said bridge, and the toll house and toll houses thereunto belonging, and all and singular the tolls arising by virtue of the said act, and all our right, title and interest of, in and to the same, to hold unto the said Sir Edward Banks, his successors, executors, administrators and assigns, until the said sum of 500*l.*, with interest for the same after the rate of 4*l.* 10*s.* per cent. per annum, shall be fully paid and satisfied. Given under our hands and seals, this 14th day of February, in the year of our Lord 1831."

(Signed and sealed by the five commissioners.)

This instrument being proved, the defendant, in answer, produced a mortgage in the same form and still in force, of November 26th, 1828, whereby the commissoners granted the bridge, toll houses and tolls to another party to secure payment of 250*l.* By this instrument, as was alleged on the defendant's part, the legal interest was vested in the prior mortgagee, so that the lessor of the plaintiff could have no title on which the present action could be supported. TINDAL, C. J., reserved leave to move to enter a nonsuit: and the plaintiff had a verdict. *Thesiger*, in the ensuing term, obtained a rule to show cause why a nonsuit should not be entered.

**Platt* and *Chambers* now showed cause. Stat. 9 G. 4, c. c. s. 75, [*762 empowers the commissoners to borrow money "by way of mortgage of the said bridge and the tolls thereof," or by way of annuity, and "to grant or assign over the said bridge and the tolls thereof as a security for any sum" to be borrowed, &c. Sect. 81 enacts "that the several persons to whom any such mortgages, or any such grants of such annuities shall have been made as aforesaid, shall be severally entitled, in proportion to the annual amount of the interest of the monies borrowed on mortgage, and

the annual amount of the said annuities, to the tolls and revenues of the said commissioners, without any preference by reason of the priority of date of any such security or any other account whatever." Assuming, then, that the prior mortgagee, if he had thought proper, might have brought ejectment as having the legal interest in himself, yet, he not having done so, and the statute taking away all "preference by reason of the priority" of date, the subsequent mortgagee may sue as if there had been no conveyance earlier than his own. And, further, the commissioners, who are virtually the defendants, cannot set up their own deed to defeat a conveyance executed by themselves: *Lindsey* v. *Lindsey*, cited, Bull. N. P. 110, *Doe dem. Ogle* v. *Vickers*, 4 A. & E. 782; *Doe dem. Hurst* v. *Clifton*, 4 A. & E. 809, 813.

Thesiger and *Cleasby*, contrà. Stat. 9 G. 4, c. c., being a public act, operates as notice to all the world of the nature of the powers possessed by the commissioners. Sect. 81 contemplates successive mortgages. *Fairtitle dem. Mytton* v. *Gilbert*, 2 T. R. 169, shows that the commissioners,
*763] *acting in a public trust, are not estopped from contending that any act which they have done is beyond their powers. Besides, estoppels are to be taken strictly; here the record does not show that the defendant is sued as clerk to the commissioners. [Lord DENMAN, C. J. But that appears clearly enough, if the ground of estoppel be good.] The mortgages must have the ordinary legal effect of such instruments: each professes to convey all the property. The legal estate is therefore in the first mortgagee. An inference to the same effect may be drawn from stat. 3 G. 4, c. 126, where the legislature has protected the subsequent mortgagee by an express clause, sect. 49; which shows that the ordinary consequences of such instruments would prevail in default of express provision. In *Doe dem. Banks* v. *Booth*, 2 B. & P. 219, it was held that the legal consequences of a mortgage must attach to a conveyance of this kind. So in *Doe dem. Thompson* v. *Lediard*, 4 B. & Ad. 137, it was held that one of such mortgagees acquired a legal estate on which ejectment might be maintained. [Lord DENMAN, C. J. One difficulty there was to make a legal estate of so fluctuating an interest: we thought, however, that the act of parliament enabled us to do so.] Further, the later mortgagee has either no estate, or one which is subsequent to that of the earlier mortgagee. In either case, the earlier mortgage must take effect. Even if the two interests were equal, why should the later mortgagee defeat the right of the earlier?

The court, at the close of the argument, gave permission to *Cleasby* to hand in a list of authorities on the doctrine of estoppel, as applicable to
*764] the present case: and, *on a subsequent day, *Cleasby* delivered to the court a list containing references to the following authorities. Co. Lit. 352, b. *Tappenden* v. *Burgess*, 4 East, 230; *Right dem. Jeffreys* v. *Bucknell*, 2 B. & Ad. 278; *The Stratford and Moreton Railway Company* v. *Stratton*, 2 B. & Ad. 518; *Hill* v. *The Manchester and Salford Water Works Company*, 2 B. & Ad. 544; *Doe dem. Preece* v. *Howells*, 2 B. & Ad. 744; *Doe dem. Baggaley* v. *Hares*, 4 B. & Ad. 435, 436, 440; *Doe dem. Chandler* v. *Ford*, 3 A. & E. 649, 654.

Lord DENMAN, C. J. As to the case of *Doe dem. Watton* v. *Penfold*, I see no doubt. The defendant cannot get over the 49th section of stat. 3 G. 4, c. 126, and the cases, *Doe dem. Banks* v. *Booth*, and *Doe dem. Thompson* v. *Lediard*, are quite conclusive. Each mortgagee is entitled, if not paid, to possess himself of the mortgaged premises: and the act,

while it provides that, in such a case, prior mortgages shall not be set up, directs that the party recovering shall hold for the benefit of all the mortgagees, according to their respective interests. The rule must, therefore, be discharged. There is a clear distinction between this case and *Doe dem. Levy* v. *Horne*, as to which case we will take time for consideration.

WILLIAMS, J. concurred.

COLERIDGE, J. The question turns on stat. 3 G. 4, c. 126, s. 49. That statute allows the granting of several mortgages on the same property, and says to each mortgagee, "You shall not be prevented from bringing *ejectment because an earlier mortgagee does not choose to proceed. [*765] You may recover without joining any other morgagee in the action: but this shall not give you a substantial advantage which would be unfair to other parties. All that you recover beyond the amount which satifies your own claim you will hold as trustee for them." On this short ground I think the rule in *Doe dem. Watton* v. *Penfold*, ought to be discharged.

WIGHTMAN, J. Without considering whether or not the question of estoppel arises in this case, it is sufficient to observe that the objection taken is founded on a fallacy, namely, the supposition that the first mortgage passed the whole legal estate. But, on looking at the form, it appears that the mortgage conveys only "such proportion of the tolls arising by virtue of the said act, and also of the turnpikes and toll houses," as the sum lent on that security bears "to the whole sum charged and advanced, or to be charged or advanced, on the credit of the said tolls." And the effect of the general Turnpike Act, sect. 49, is that all the mortgages make up one entire title. But, to avoid the inconvenience which would arise if it were necessary that all the mortgagees should join in an ejectment, the act enables one to sue, laying the demise in his own name, and to recover what is due to himself, accounting to the other mortgagees for the residue. The objection, therefore, fails, inasmuch as the whole legal estate did not pass by the former mortgage.

In *Doe dem. Watton* v. *Penfold*,

Rule discharged.

In *Doe dem. Levy* v. *Horne*,

Cur. adv. vult.

*Lord DENMAN, C. J., in the ensuing vacation, (December 3d,) [*766] delivered the judgment of the court in *Doe dem. Levy* v. *Horne*.

This was an ejectment by a mortgagee of tolls of Staines Bridge, against the commissioners, sued by their clerk. The plaintiff was not the first mortgagee, and was not empowered, as the second and other mortgagees are by the turnpike acts, to recover as a trustee for all. But the plaintiff relied on the ordinary principle that a lessor, or any grantor, cannot dispute with his lessee or grantee his own title to what he has assumed to convey. The application of this principle was denied in the present case, on account of the public character of the defendant, whose counsel referred particularly to a dictum of ASHHURST, J., in a case of *Fairtitle dem. Mytton* v. *Gilbert*, 2 T. R. 171. His lordship concluded his judgment for the defendants, after holding them entitled on other grounds, in the following words: "Besides, there is a still further ground why the trustees should not be estopped; for this is a public act of parliament, and the court are bound to take notice that the trustees under this act had no power to mortgage the toll-houses. This deed therefore cannot operate in direct opposition to an act of parliament, which negatives the estoppel.

But that observation proceeded on the contents of the act, presumed to be known to both the contracting parties, and to qualify any contract into which they might enter in execution of its powers. No such presumption can be made as to any party's knowledge of the fact that a previous mortgage had been made: and there is no authority for holding that trus-
*767] tees for a public *purpose are in any peculiar state of protection on such a point.

The dictum of ASHHURST, J. is not adopted by either of the two judges sitting with him, whose concurrence with the general result might be wholly independent of this doctrine.

The learned counsel for the defendant thought he could furnish the court with some authorities, which, if produced, might have made further discussion proper. But the cases which he has since handed to the court all appear to us to fall short of the object, and to be distinguishable from this case on obvious grounds, except one dictum of LITTLEDALE, J., in a case reported in 4 Barnewall & Adolphus,(a) which, upon reference, does not appear to raise this point.

We think, therefore, that the plaintiff is entitled to recover: and the rule will be discharged.

Rule discharged.

(a) *Doe dem. Baggaley* v. *Hares*, 4 B. & Ad. 440.

*768] *RENNO *v.* BENNETT.

Plaintiff, a seaman, declared against a ship owner on an agreement (under stat. 5 & 6 W. 4, c. 19, ss. 2, 3,) to employ plaintiff as carpenter's mate of a vessel during a South Sea voyage, and to pay him by way of wages, on discharge and sale of the cargo, a stated proportion of the net proceeds; breach, that defendant wrongfully discharged plaintiff before the end of the voyage, whereby his wages were lost. Plea, that it was by the agreement stipulated that plaintiff should not cause disobedience of orders or mutiny on board the ship, and that the wages should not be due unless plaintiff should have well and truly performed the voyage according to the agreement; that during the voyage, the master died, whereupon S., the first mate, became and was and exercised the duties of master till the completion of the voyage; and that plaintiff, afterwards and during the voyage, refused to perform his duty as carpenter's mate, though commanded by S. so to do, and mutinously refused to proceed on the voyage, and tried to excite mutiny and disobedience; wherefore defendant discharged plaintiff. Replication, that, although S. became and was and exercised the duties of master on board the ship, in manner, &c., nevertheless, &c., de injuriâ suâ absque residuo causæ. Issue thereon.

On the trial it appeared that S. was a foreigner, disqualified to command the vessel by stat. 3 & 4 W. 1, c. 54, s. 16: that S. after taking the command, required the crew to sign a fresh agreement with himself: and that plaintiff and others refused, and refused also to do duty on board the ship unless in taking her to an English port.

Held, that plaintiff, having admitted, by his replication, that S. was master, could not under such allegation de injuriâ, &c., offer evidence of his disqualification; and that the refusal to navigate the ship unless to an English port was mutiny against the master de facto, and bore out the justification.

ASSUMPSIT. The first count of the declaration stated that defendant, before and at the time of making the promise, &c., was the owner of a ship called the Surprise, lying at London, and bound on a voyage to the Southern Ocean; that defendant, in consideration that plaintiff, at the request, &c., would enter and serve on board the said ship as carpenter's mate, and faithfully perform his duty in that behalf, promised plaintiff to permit him so to do; and, provided he should, until the completion of the voyage, personally act and serve in his proper capacity on board the said ship or on shore, &c., to pay him, at the expiration of the voyage, and after the arrival of the ship at London, and after her cargo should have been

there discharged and sold and the money for the same actually received, the value of a certain part or share, to wit, of a 165th part or share, of the net proceeds of the cargo which should have been obtained during the said voyage, as and by way of *compensation or wages. Averment that plaintiff, confiding, &c., entered on board the said ship, and went part of the voyage as carpenter's mate therein, and faithfully performed his duty, &c., and personally served, &c., and was ready and willing to go and proceed on the remainder of the voyage, and to continue performing his duty, &c. Breach, that defendant would not permit plaintiff to go the remainder of the voyage, but refused so to do; and, while the vessel was proceeding on the said voyage to the Southern Ocean, to wit, on, &c., at, &c., wrongfully and against the will of plaintiff, compelled him to cease from the performance of such duty, and to go out of the said ship, unto and on shore of the island of Java, otherwise than for the purposes of the said voyage, and there wrongfully left him, and thereby prevented him from going the remainder of the voyage. Averment of damage by loss of profits and wages, &c. Counts for work and labour, and on an account stated. [*769

Plea 4. That the said promise was an agreement in writing, made on, &c., pursuant to stat. 5 & 6 W. 4, (c. 19, ss. 2, 3,) between William Edmund Hill, the then master of the ship, and the plaintiff and certain other persons whose names were subscribed thereto, whereby it was agreed, &c.: the terms of the agreement were then set out, which were in the form given by sched. (A) of stat. 5 & 6 W. 4, c. 19, with additional clauses, stipulating, among other things, that none of the crew should excite, or cause to be excited, commotion or strife, or do any thing to occasion mutiny, disobedience of orders, insubordination, or other bad or improper conduct, on board the said ship, &c.; that the crew should deliver the ship's cargo at London under the directions of the owner, or such person or persons as he should appoint for that purpose; and that none of *the crew should be entitled to his share or wages after mentioned until the arrival of the ship and discharge of the cargo at London, &c., nor unless he should have well and truly performed the voyage according to the agreement, &c.: and, in consideration of the services in the agreement mentioned, to be duly, honestly, &c., performed, the master promised to pay to the said crew, by way of compensation or wages, the amount against their names respectively expressed. The plea then stated that, afterwards and during the continuance of the voyage, and before the refusal to permit plaintiff to proceed, &c., to wit, on, &c., W. E. Hill died, and thereupon one Martin Smith, then being the first mate of, and next in command to the said W. E. Hill in and on board of, the said ship, then became and was, and exercised the duties of, master in and on board of such ship, and continued to be and was such master thereof until the completion of the said voyage. And that plaintiff, after the making of the said agreement, and during the continuance of the said voyage, and after the death of W. E. Hill, to wit, on, &c., and on divers other days, &c., and whilst he continued in and on board of the said ship in such capacity as aforesaid, wrongfully and improperly neglected and refused to perform his duty as such carpenter's mate as aforesaid, although plaintiff was then requested and commanded by the said M. Smith, as such master of the said ship as aforesaid, so to do; and plaintiff then, and whilst he was so on board of the said ship in such capacity as aforesaid, excited, and caused to be excited, great commotion and strife in and on board of the said ship, and mutinously refused to proceed on the [*770

said voyage, and endeavoured, as much as in him lay, to occasion mutiny, *771] disobedience *of orders and insubordination, and was guilty of other bad, violent, and mutinous and improper conduct, in and on board of the said ship. Wherefore defendant, so being such owner of the said ship as aforesaid, for such disobedience and neglect of duty and mutinous and improper conduct of plaintiff as aforesaid, during the continuance of the said voyage and before the completion thereof, to wit, on the day and year last aforesaid, discharged plaintiff from his said employment, as he lawfully, &c. Verification.

There were other pleas, which it is not material to state.

Replication to plea 4. That, although true it is that the said promise in the said first count mentioned was and is the agreement in the said plea alleged; and although true it is that the said W. E. Hill died, and that the said M. Smith became and was, and exercised the duties of, master in and on board of the said ship in manner and form as in the said plea is alleged; nevertheless, for replication thereto, plaintiff saith that defendant of his own wrong and without the residue of the cause in the said plea alleged broke his said promise in manner and form, &c. Conclusion to the country Issue thereon.

On the trial, before TINDAL, C. J., at the Croydon Summer Assizes, 1841, the material facts appeared to be as follows. The agreement was as stated in the declaration and fourth plea. The vessel sailed from London in March, 1838, and, in the beginning of 1839, was off the coast of Java, having 1050 barrels of oil on board, when Hill, the captain, died. Martin Smith, *772] the chief mate, then took the command. Smith was not a *natural-born subject of the queen, nor a person naturalized or made a denizen, or otherwise qualified to be master within the terms of stat. 3 & 4 W. 4, c. 54, s. 16. He proposed to the crew to sign new articles of agreement with him. The majority consented; but the plaintiff and five others said that the former articles were at an end, and refused to sign others unless the ship were carried to an English port; or to work the ship, unless for purpose of taking her to such port. On their persisting in this refusal, Smith put them on shore at a port in Java. The plaintiff afterwards obtained a passage to England, and applied to the defendant for his wages; which were refused. The lord chief justice, in summing up, said that, by the maritime law, the command, on Hill's death, devolved on Smith; that the crew had nothing to do with the fact of his being a foreigner; and that, if the plaintiff was acting on a declared design to refuse serving unless the ship were carried to an English port, the fourth plea was made out. The defendant, therefore, had a verdict on the issue joined upon the replication to that plea.

In Michaelmas term, 1841, *E. James* obtained a rule nisi for a new trial on the ground of misdirection.

Thesiger (with whom were *Platt* and *Hance*) now showed cause. Smith's disqualification is a point not raised by the pleadings. The replication admits that he was master, but alleges that the defendant broke his promise *de injuriâ*, and without the residue of the cause, &c. The residue is merely the alleged misconduct of the plaintiff. [COLERIDGE, J. Perhaps it will be said that the denial of mutiny is an argumentative denial that Smith was *773] lawfully master.] The replication *de injuriâ* *puts in issue strictly the cause alleged in the plea; that is, where misconduct is alleged, the misconduct: *Penn* v. *Ward*, 2 C. M. & R. 338, S. C. 5 Tyr. 975:

Oakes v. *Wood*, 2 M. & W. 791; and *Price* v. *Peek*, 1 New Ca. 380, 386; where TINDAL, C. J., says, "The traverse, *de injuriâ suâ propriâ absque residuo causæ*, puts nothing in issue, but each and every fact alleged in the special plea, and not admitted in the replication." (He was then stopped by the court.)

E. James and *Lush*, contrà. The ground of justification in the plea is disobedience and mutiny. Though the replication admits that Smith became and was and exercised the duties of master, there may have been commands which he, as a foreigner, was not entitled to give, and which might be disobeyed without mutiny. Refusing to sign the new agreement could not be mutiny, because such a contract could not legally be made with Smith. The point, that his commands were not legally binding, might be raised on the replication *de injuriâ*. [COLERIDGE, J. Do you say that Smith might be lawful master for some purposes and not for others?] The command devolved on him by the death of Hill, but only for the limited purpose of taking the vessel to the next English port. All acts done by him for any other purpose would be unlawful; he could not demand cooperation in them: and, if the refusal to give it was the only act of mutiny or disobedience proved, the replication is applicable. There was no evidence that any order of Smith's was actually disobeyed except the demand of signature to a new agreement. The validity of the objection to Smith as master appears from stat. 3 & 4 W. 4, *c. 54, ss. 12 and 16. By sect. 18 of that act, the ship, if not duly navigated, was liable to detention; and, by sect. 22, the goods (in which the plaintiff, by his agreement, had an interest) might have been forfeited. Difficulties would arise as to clearance, the master being a foreigner; and the vessel not being deemed British, a higher duty would attach upon the cargo. [*774

Lord DENMAN, C. J. The fourth plea is admitted to be true up to the point that Smith became and was and exercised the duties of master. That is an admission that he was master for all purposes. If the plaintiff meant to set up as an answer that there was some act which the situation of Smith did not warrant, and that such an act was attempted, that should have appeared on the record. Had it been expressly alleged that Smith was a foreigner not qualified to be master, or that his authority was disputed on any specific ground, the defendant might have answered that allegation, and the question which the plaintiff now seeks to raise might properly have arisen. But it is, in general terms, admitted that Smith was the master. That being so, did the facts proved amount to the mutinous conduct alleged in the plea? If it had appeared only that Smith required the crew to enter into a new agreement with him, I should have thought it very questionable whether the disobeying such an order, given by either a foreigner or an Englishman, would amount to mutiny. But here is a refusal, not only to sign the agreement, but to work the vessel unless to an English port. What could be mutiny if this was not? It is suggested that the plaintiff, having an interest in the voyage, might refuse to proceed except on certain terms: but if this point was *relied upon, the facts raising it should have been shown on the record. I think the verdict was right. [*775

WILLIAMS, J. I am of the same opinion. The ground of the replication is, in effect, that Smith was not master: but that objection was not open, since the plea alleges, and it is admitted by the replication, that Smith became and was and exercised the duties of master, which implies that he became master for all purposes. The plaintiff might have replied that he had not such authority: but the answer to the plea is made to turn

upon the question of mutiny; and upon the issue on that question the plaintiff seeks to allege that Smith was not master. That cannot be done.

COLERIDGE, J. The point made on the Navigation Act does not arise On the statement in the plea, Smith must be taken to have been master as much as Hill had been; not only de facto but de jure: and the replication must be deemed to admit that in the sense in which the plea states it. The only question then is, whether the plaintiff's conduct was such as would have been mutiny if Hill had continued master. Hill's duty was to prosecute the voyage; and the plaintiff refused to work the ship except in proceeding to an English port. Can any one doubt that this was mutiny? It is said that Smith had no right to require a new agreement: but the crew were still obliged to obey other orders which were lawful: and such obedience was again and again refused.

WIGHTMAN, J. The replication admits the title of Smith as master,
*776] without the residue of the cause *pleaded. The residue is mutiny. If nothing had appeared on this head but the refusal to sign an agreement, I should have thought the plea hardly made out: but the plaintiff and his companions refused to do any duty but that of navigating to the next English port. They could have no right so to refuse.

Rule discharged.

The QUEEN *v.* The Inhabitants of ROTHERHAM.

After appeal against an order of removal, and adjudication thereon at sessions, no case being reserved, the unsuccessful party obtained a certiorari to bring up the order, examination of the pauper, notice of appeal, and order of sessions, and, on the return, moved that the orders might be quashed.

Quære, whether a certiorari ought to have been granted to bring up the examination and notice of the appeal, and whether, being brought up, they could be noticed by the court, assuming that the sessions had jurisdiction to dispose of the case.

The order of removal, addressed "to the churchwardens and overseers of the poor of the township of Sheffield," recited a complaint made "by the churchwardens and overseers of the poor of Sheffield aforesaid," that the paupers had come to inhabit, &c., not having gained a legal settlement, &c., nor produced a certificate, and had become chargeable to the township of Sheffield aforesaid; and the justices did "adjudge the same to be true," &c. *Held* on the above motion, that the order sufficiently showed a complaint made by the proper officers of a township maintaining its own poor.

Also that the order, which, after the above recital, purported to be made "upon due examination of the premises" "upon oath," was good, though it did not more expressly state an examination into the settlement of the paupers in the appellant parish.

And though it directed the overseers of Sheffield absolutely to remove the paupers; not adding "unless notice of appeal shall be given within twenty-one days," &c., or words equivalent.

The pauper's examination, dated on the same day as the order of removal, purported to be "the examination of M. V. of the township of Sheffield, widow," and stated that the examinant and her three children, aged respectively seven and three years, and one year, were chargeable to Sheffield: and the jurat, signed by the justices, was "Taken on oath before us at Sheffield."

Held (assuming that the court could look into the examination for the purpose of ascertaining whether the justices had jurisdiction to make the order,)

That the examination sufficiently showed all the paupers to have been resident in Sheffield at the time when the order of removal was made.

Held, also, that an examination stating a complaint made by the overseers was not necessary to give the removing justices jurisdiction.

ON appeal against an order removing Mary Varley and her three children from the township of Sheffield in the West Riding of Yorkshire to the parish,
*777] *township or place of Rotherham in the same riding, the sessions confirmed the order. *Pashley*, in last Easter term, obtained a

certiorari(a) to bring into this court the order of removal, the examinations on which it was made, the notice and grounds of appeal, and the order of sessions. The documents being returned, a rule was obtained in last Trinity term, calling upon the prosecutors to show cause why the order of removal and order of sessions should not be quashed.

The order of removal and examinations were as follows.

"West Riding of Yorkshire (to wit.) To the churchwardens and overseers of the poor of the township of Sheffield in the said riding, and to the churchwardens and overseers of the poor of the parish, township or place of Rotherham in the said riding, and to each and every of them. Whereas complaint hath this day been made unto us, two of her majesty's justices of the peace in and for the said West Riding, (one being of the quorum,) by the churchwardens and overseers of the poor of Sheffield aforesaid, that Mary Varley and her three children, viz. Thomas aged seven years, Jemima aged three years, and James aged one year, have come to inhabit in the said township of Sheffield, not having gained a legal settlement there, nor produced any certificate owning them to be settled elsewhere, and that the said Mary Varley and her said three children are now actually become chargeable to the township of Sheffield aforesaid: We do therefore, upon due examination of *the premises taken before us upon oath, adjudge the same to be true; and we do likewise adjudge the last place of the lawful settlement of the said Mary Varley and her said three children to be in the said parish, township or place of Rotherham. These are therefore in her majesty's name to require you the said churchwardens and overseers of the poor of the said township of Sheffield, or some one of you, to convey the said Mary Varley and her said three children from and out of the township of Sheffield aforesaid to the parish, township or place of Rotherham aforesaid, and them to deliver to the churchwardens and overseers of the poor there, or to some one of them, together with this our order or a true copy thereof, who are hereby required to take care and provide for them as the law directs. Given under our hands and seals at Sheffield in the said riding this 3d day of September, 1841. [*778

"WM. JNO. BAGSHAW (L. S.)
"W. ALDERSON (L. S.)"

"West Riding of Yorkshire. The examination of Mary Varley of the township of Sheffield in the said riding, widow, taken upon oath before us, two of her majesty's justices of the peace for the said riding, the 3d day of September, 1841, concerning her settlement. The said examinant upon her oath saith that she is about forty years of age, and to the best of her knowledge and belief was born at the township of Rotherham. That about fifteen years ago, she, being then a single woman, (Mary Beeley,) took a house in Jesus Gate, Rotherham, belonging to Mr. Taylor, at 6*l.* a year rent, and in about nine months she married George Blocksage, who came to live in the house she had taken. He only lived about a *year; and examinant continued on the same premises and paid the rent half yearly. In about seven months after, she married again to James Varley, who went to reside on the same premises; and we stopped there about four months after we were married. The said James Varley died in July last, having acquired no settlement subsequent to the occupation at Rotherham above described; and examinant and three chil- [*779

(a) Counsel was instructed to oppose the rule being made absolute, but when the case was brought on, (April 16th,) it was objected that the parties opposing the rule had not taken office copies of the affidavits on which it was granted; and therefore cause could not be shown.

dren by the said James Varley, viz. Thomas aged seven years, Jemima aged three years, and James aged one year, are poor and chargeable to Sheffield. Taken on oath before us at Sheffield.

"WM. JNO. BAGSHAW.
"W. ALDERSON.

her
MARY ⋈ VARLEY.
mark."

The objections on which it was proposed that the orders should be quashed were stated in writing as follows.

"1. That the order of removal does not show a complaint made either by churchwardens and overseers of a parish, or by overseers of a township separately maintaining its own poor.

"2. That the order shows the necessary examination by the justices only into the inhabitancy and chargeability of the paupers in and to Sheffield, and does not show any examination whatever into the settlement in Rotherham, the adjudication as to which is preceded by nothing to warrant the same.

"3. That the said order absolutely and unconditionally requires the churchwardens and overseers of the poor of the said township of Sheffield to convey the paupers to the township of Rotherham, and them deliver to
*780] the churchwardens and overseers of the poor there, *who are by the same order required to provide for the said paupers, and is therefore bad and inoperative as contravening the express provisions of the statute of 4 & 5 W. 4, c. 76, s. 79.

"4. That from the examination whereon the order of removal was made it appears that the removing justices acted without jurisdiction, inasmuch as that examination contains no evidence whatever that the paupers were severally residing in the township of Sheffield when the said examination was taken.

"5. That the same want of jurisdiction also appears in this, that the said examination contains no evidence whatever that any complaint was made by the churchwardens and overseers of the township of Sheffield to the said justices, as alleged in their said order, respecting the inhabitancy and chargeability of the paupers in and to the township of Sheffield.

"6. That the said order of removal contains no evidence of a settlement of the paupers in the said township of Rotherham."

Pickering now showed cause.(a) 1. The order of removal is in the usual form. It will be presumed that a township having overseers maintains its own poor: and stat. 13 & 14 Car. 2, c. 12, s. 21, helps the intendment. The defect, if there be any, is not substantial, and might be amended by the sessions; *Rex* v. *Amlwch*, 4 B. & C. 757; *Rex* v. *Bingley*, 4 B. & Ad. 567. 2. It was not necessary that the order should particularly recite an examination into the settlement in Rotherham. The order is in the usual form, and purports to be made "upon due examina-
*781] tion of *the premises," which would include an inquiry into this fact. 3. Stat. 4 & 5 W. 4, c. 76, s. 79, provides for suspending the execution of an order of removal if notice of appeal be given; but that does not affect the form of the order. The proviso is not introduced, by way of qualification, into any enactment giving the power to remove; and therefore the existence of the specified case need not be negatived. 4, 5. These objections turn not on the order itself, but on matter extrinsic, which the court cannot look at in this proceeding. No case is sent up, and the examinations cannot be gone into; *Regina* v. *Abergele*, 8 A. & E. 394,

(a) Before Lord Denman, C. J., Williams, Coleridge, and Wightman, Js.

Regina v. *Justices of Cheshire*, 8 A. & E. 398. [COLERIDGE, J. Want of jurisdiction might be shown otherwise than by the contents of the order.] The sessions, by the lodging of the appeal, had authority to entertain the case, and therefore had jurisdiction, according to the rule laid down in *Regina* v. *Bolton*, 1 Q. B. 66. They have gone into the whole matter, and given a decision upon the merits: the sufficiency of the examinations was a point of which they were the proper judges: and this court cannot act as a court of appeal from their decision; *Rex* v. *Frieston*, 5 B. & Ad. 597.

Pashley, contrà. 1. The special authority given to justices out of sessions, for the removal of paupers, must be strictly pursued; *Chittinston* v. *Penshurst*, 2 Salk. 473. Intendment will be made in favour of a jurisdiction proved to exist, but not of its existence; *Rex* v. *All Saints, Southampton*, 7 B. & C. 785, 790. In a township maintaining its own poor under stat. 13 & 14 Car. 2, c. 12, s. 21, *churchwardens have no authority [*782 in the management of the poor; *Rex* v. *The Justices of the North Riding*, 6 A. & E. 863. It appears from *Rex* v. *The Justices of Warwickshire*, 6 A. & E. 873, that a majority of the proper officers should have acted. [Lord DENMAN, C. J. There an act was to be done by certain officers; and it was held that a majority of those legally authorized might do it. Suppose, here, that the overseers and two substantial farmers had made the complaint. COLERIDGE, J. The rule, utile per inutile non vitiator, applies. If the churchwardens are reckoned as nothing, the order implies that there was a majority of the proper officers, the overseers.] It ought to have been shown expressly that the complaint was made on behalf of a township maintaining its own poor; *Rex* v. *Bramshaw*, Burr. S. C. 98. The manner in which the churchwardens and overseers are spoken of here leaves it doubtful what district they represent. It ought to have been expressly found that they were officers of a particular township, maintaining its own poor. *Day* v. *King*, 5 A. & E. 359, shows the precision requisite in such cases. [WIGHTMAN, J. They are said to be the overseers and churchwardens of the poor "of Sheffield aforesaid," referring to the previous description. And the justices adjudge all the matter previously recited to be true. COLERIDGE, J. That includes the fact that the officers represent a township maintaining its own poor.] 2. The order should have expressly shown that the pauper, or a witness had been examined as to the settlement in Rotherham. An order of removal must be supported by examination of witnesses: *Rex* v. *Colbert*, Ca. Sett. & Rem. 152, S. C. Comb. 103. The *examinations cannot be looked at to [*783 supply the defect. [COLERIDGE, J. The form in Archbold, 3 Archb. Just. of the Peace, 513, (2d ed.,) does not state particularly an examination as to settlement. WIGHTMAN, J. Nor does the form in Burn's Justice, 4 Burn. (by D'Oyly & Wms.) 1158.] 3. Stat. 4 & 5 W. 4, c. 76, s. 79, expressly enacts that "no poor person shall be removed or removable" till twenty-one days after notice of chargeability has been given, with a copy of the order, &c., as there directed, nor then if there shall be notice of appeal. The clause differs from stat. 35 G. 3, c. 101, s. 2, which only gives an authority to suspend in certain cases. The form in Archbold, 3 Archb. Just. of the Peace, 513, (2d ed.,) requires the overseers forthwith to send a notice of chargeability, and copy of the order, &c., and to remove after twenty-one days if there be no appeal. 4, 5. The examinations show want of jurisdiction, and may properly be referred to for that purpose: and the objections may be taken, though the parties rais-

ing it have gone to trial on an appeal; *Rex* v. *The Commissioners of Sewers, Somerset*, 7 East, 71; *Lowther* v. *The Earl of Radnor*, 8 East, 113, 118. If the evidence returned shows that the magistrates had not jurisdiction to go into the inquiry, their decision may be overruled; *Regina* v. *Bolton*, 1 Q. B. 66; *In re Baines*, Craig & P. 31, 42. In *Regina* v. *Abergele*, 8 A. & E. 394, and *Regina* v. *The Justices of Cheshire*, 8 A. & E. 398, no want of jurisdiction appeared. In this case it does appear. For, in the first place, the examinations ought to show a complaint of chargeability. [WILLIAMS, J. What authority have you for that? An
*784] order of removal recites *a complaint; but why must an examination state it? Lord DENMAN, C. J. Has it ever been held that the fact of complaint is a subject of examination? COLERIDGE, J. Could it be a matter of contradictory evidence before the magistrates whether there was a complaint or not?] It must appear that the proper parties are applying. The officer, when applying for the order, would say, "I am the overseer" of such a parish. It is laid down in *Regina* v. *Alternum*, 10 A. & E. 699, 703, that every thing necessary to give jurisdiction ought to appear by the examinations. [Lord DENMAN, C. J. That must be taken with a reasonable application. We never dreamt of the justices inquiring whether or not the complaining party was overseer.] The examination ought at least to show that the pauper was resident in the parish, and chargeable to it: *Rex* v. *Woolpit*, 4 A. & E. 205; *Regina* v. *Black Callerton*, 10 A. & E. 679. The proper form of statement appears in the examinations set out in *Regina* v. *Ecclesall Bierlow*, 11 A. & E. 607.(*a*) A statement of chargeability is not equivalent to a statement of residence. The pauper describes herself as "Mary Varley of the township of Sheffield;" but the word "of" does not necessarily imply residence, as appears from 3 Hawk. P. C. 341, B. 2, c. 23, s. 103, 7th ed. See p. 346, s. 120; Com. Dig. *Abatement*, (F. 25.) And, to support an order of justices, this fact ought to appear, not by way of recital, but as matter of substantive information and proof. *Rex* v. *Daman*, 2 B. Ald. 378, is a parallel case. Unless the paupers were resident, there was no jurisdiction.
*785] *[COLERIDGE, J. You make the jurisdiction depend upon the truth of the complaint, not on the nature of it; which is contrary to the doctrine laid down in *Cave* v. *Mountain*, 1 Man. & G. 257, 262.] If the justices have decided erroneously upon some evidence, their decision cannot be contested; but if there was no evidence there was no jurisdiction. *Rex* v. *All Saints, Southampton*, 7 B. & C. 785, before cited, applies to this part of the case. It must be assumed that the justices here have returned all the examinations, because they were bound to do so: *Regina* v. *Outwell*, 9 A. & E. 836. 6. The order discloses no evidence of a settlement. [COLERIDGE, J. There is no doubt that there was evidence, whether sufficient or not.]

Pickering was then called upon by the court as to the 4th and 5th points. *Regina* v. *Black Callerton*, was decided on a case expressly submitting the point to this court. The 4th and 5th objections might have been taken at sessions, and should have been insisted upon there as specific grounds of
*786] appeal;(*b*) if not, they *must be considered as waived; and this even if they had been apparent on the face of the order; *Regina* v.

(*a*) See *Regina* v. *High Bickington*, p. 790, note (a) post.

(*b*) The written grounds of appeal sent by the appellants to the respondents, and returned under the certiorari, were—1. That the said Mary Varley is not legally settled in the said township of Rotherham. 2. That the said M. V. did not, when a single woman, take a house in Jesus Gate, Rotherham, belonging to Mr. Taylor, at 6*l*. a year rent, as in the examination of the

Withernwick, 6 A. & E. 273. There is no affidavit that they were not in fact so waived. Parties cannot, after neglecting to take an objection on appeal, bring it before this court by means of a certiorari. [COLERIDGE, J. We have nothing to do with the sessions. The objection stands as if two persons had acted who were not justices, there being here (as is contended) no evidence of a fact necessary to give jurisdiction, namely, residence. Lord DENMAN, C. J. Your argument would show that in any case where there was a total defect of jurisdiction, we might be called upon to assume that all was right because there had been a trial.] Then, as to the examination itself. In *Regina* v. *Toke*, 8 A. & E. 227, "of" was held to imply residence. And, here, the averment in the examination, that the parties are "chargeable to Sheffield," and the jurat "taken on oath before us at Sheffield," support the required inference. There was at least some evidence from which the justices might draw it. [Lord DENMAN, C. J. What evidence was there as to the eldest son?] If there was none, the order might still be good as to the other paupers. In *Rex* v. *Woolpit*, 4 A. & E. 205, the question of inhabitancy was expressly submitted to this *court. As to the complaint, no evidence was necessary. [Lord DENMAN, C. J. I do not think any thing of that objection.] [*787

Cur. adv. vult.

Lord DENMAN, C. J., in the ensuing vacation, (December 3d,) delivered the judgment of the court.

This case comes before us upon a return to a writ of certiorari, whereby the Court of Quarter Sessions was commanded to return their order, confirming the original order of two justices for the removal of certain paupers to the appellant township, *and also* the examination whereupon that original order was made, and the notice of appeal to the sessions, upon which nothing turns. The objections founded upon that return consisted of two parts: first, that the original order of removal was defective upon the face of it, for want of showing jurisdiction in the removing justices; and, next, that the examination whereon they proceeded was defective in not showing that the paupers were at the time in the township; and that, therefore, they had no jurisdiction to remove. Upon the first point (the form of the original order) the court gave sufficient answers to the various objections which which were urged in the course of the argument, which we do not consider it needful to repeat. We then thought, and think still, that the original order is unobjectionable. We shall now only add that we certainly should not be induced, upon slight grounds, to overturn a form of proceeding which we have reason to believe has been established by the usage of very near a century.

said M. V. is stated; nor did she at any time occupy any such house in the township of R. aforesaid at such an amount of rent. 3. That it does not sufficiently appear by the examination of the said M. V., whereon alone the said order of removal was made, at what time the said M. V. became legally settled in the said township of R. 4. That it does not sufficiently appear by the examination of the said M. V. in what manner the said M. V. became legally settled in the said township of R., or that she is legally settled there. 5. That it does not appear by the said examination in what union, parish, township or place the said M. V. and her said three children, or any of them, were inhabiting at the time of the making of the said order of removal. 6. That the said examination contains no evidence whatever of any complaint having been made before the said justices, by the said churchwardens and overseers of the said township of Sheffield, of the said M. V. having come to inhabit in the said township of Sheffield as in the said order of removal is alleged. 7. That the said order of removal is bad; and that the said examination, whereon the same was made, is defective and insufficient to support the same.

One objection only was felt as creating any difficulty; and it was this:
*788] that it does not appear upon the face of *the examination by the removing justices that the paupers, at the time of the removal, were residing in the township; and that, therefore, there was no jurisdiction to remove. This objection involves consequences more extensive, perhaps, than may at first sight appear, as to the jurisdiction of the Court of Quarter Sessions, and as to the matters into which this court will inquire, where they (the sessions) have undoubted jurisdiction over the subject brought under our consideration. It raises two questions of some importance. First, whether the writ of certiorari itself did not issue improvidently, so far as it required the return of the original examination and of the notice of appeal, the same forming a portion of the evidence submitted to the sessions upon the hearing of the appeal.(a) And, next, whether, although returned, this court ought to go farther than to examine the validity of the original order and of the order of sessions, without examining the evidence upon which they proceeded, in a matter obviously within their ordinary jurisdiction, and where no case has been stated for our opinion as to the admissibility or effect of that evidence, or any part of it. Into these questions, however, we do not feel it necessary to enter, because, giving full effect to the objection, and judging the examination as by that objecttion we were called upon to do, we think it sufficient.

The point for consideration is, whether, upon the face of the examination, by fair and reasonable intendment, (and by that rule we were desired to consider it,) it does not sufficiently appear that the paupers were inhabiting in the removing township at the time of the examination, and of making the order.

*789] *And, first, with respect to the mother. She is stated to be "of Sheffield;" and her examination is taken by the removing justices "at Sheffield:" moreover, she and the other paupers are stated to be "chargeable to Sheffield."(b) Now, this statement of being chargeable we find to have been considered by this court as material upon this very point of inhabitancy. In the case of *Rex* v. *Binegar*, 7 East, 377, it was stated in the order of removal, "that the paupers *lately came* and intruded themselves into" the parish, "endeavouring there to settle as inhabitants thereof;" and the objection to the order was, that the complaint did not state that the paupers *then* were, but *lately came*, and so that the justices had no jurisdiction. To this it was answered by the court: "The order states, and the magistrates adjudge it to be true, that the paupers are *likely to become chargeable* to the parish, which could not be *if they were not in the parish at the time.*" And there is certainly no ground for presuming any change of circumstances, as the examination and order are by the same justices, and bear date on the same day, the 3d of September. From these circumstances, taken together, we think it sufficiently appears that the mother was *then* in the township of Sheffield.

Then as to the children: the helpless infancy of the two younger (three years and one year of age) raises a presumption of law and common sense, that they would be with the mother for custody and protection, and the more so, in this instance, as, from the examination, we find that their father was then dead. As to the eldest, (seven,) though the inference may not be so strong, he is nevertheless of an age up to which the period of nurture

(a) See *Ex parte The Overseers of Tollerton* p. 792, 798, post.
(b) See *Regina* v. *High Bickington*, p. 790, note (a), post.

as made by the removing justices, was rightly made. It was there suggested that, inasmuch as the sessions had affirmed the orders *on hearing the merits*, they had probably heard other evidence. But ASHURST, J., said, "As it is extremely clear that the court of sessions have no power to make an original order of removal, this question must depend on the validity of the order of the two justices; if that be bad in substance, the court of sessions cannot amend it." He added, that the sessions "were not warranted in inquiring into any other question than this, whether the order of the two justices was good or not." The present application will enable this court to attain the end which the court aimed at in *Rex* v. *Margam*, 1 T. R. 775. Here, the point is effectually raised upon documents of which this court will take cognizance. *Rex* v. *Tedford*, Burr, S. C. 57, shows that, when the grounds on which the justices who made the order proceeded once appear, as they do necessarily on the face of the examinations, this court will review their decision. In *Rex* v. *Wittlebury*, 6 T. R. 464, Lord KENYON, said, "The case of *Rex* v. *Tedford*, Burr. S. C. 57, is a very considerable authority to show that when the sessions state all the facts as well as their determination we are not precluded from examining the conclusion drawn by them." In *Rex* v. *Great Wishford*, 4 A & E. 216, 224, it is said by COLERIDGE, J., *"Every one will agree that the jurisdiction, upon matters of fact, is in the sessions: this court has it only when the matter of fact is referred to it by the sessions, or where they have decided on the fact without any evidence or against evidence." Taking the examination and the order of removal together, as it was contended in *Regina* v. *Rotherham*, antè, p. 776, they may be taken, it is as apparent as if the sessions had so stated, on the face of their order, that there is no evidence before the removing justices to warrant their adjudication. The examination discloses the only grounds of their order. "It has always been taken as a rule" "that where there is a general order of two justices good upon the face of it, and the party appeals from it to the sessions, and they make an order specially, stating the case as it appeared upon the evidence before them, the court will take the special case in this last order to be the foundation upon which the first order, by two justices, was made; and, therefore, if the evidence set out upon the last order is not sufficient to maintain their judgment thereon, the court, will not only quash the last but the first order likewise;" *Rex* v. *Reading*, Ca. K. B. Temp. Hard. 79, 82. It is within the ordinary province of this court to interfere by certiorari in such a case. Lord HOLT says, in *Groenvell* v. *Burwell*, 1 Ld. Raym, 454, 469, that "it is a consequence of all jurisdictions, to have their proceedings returnable here by certiorari, to be examined here." Stat. 4 & 5 W. 4, c. 76, s. 79, requiring that a copy of the examination on which an order of removal is made be sent to the parish to which the removal is directed, makes such examination in writing a necessary proceeding *in the case. In *Rex* v. *Inhabitants* —— *in Glamorganshire*, 1 Ld. Raym. 580, it is laid down that "This court will examine the proceedings of all jurisdictions erected by act of parliament. And if they, under pretence of such act, proceed to encroach jurisdiction to themselves greater than the act warrants, this court will send a *certiorari* to them, to have their proceedings returned here, to the end that this court may see that they keep themselves within their jurisdiction; and if they exceed it, to restrain them. And the examination of such matters is more proper for this court." Recently, in *Regina* v. *The Justices of Carnarvonshire*, 2 Q. B. 325,(*a*) this court by mandamus compelled the sessions to hear

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(*a*) See, as to this case, *Regina* v. *The Justices of Kesteven*, p. 810 post.

an appeal, where they had wrongly decided that the grounds of appeal were insufficient. *Regina* v. *The Justices of the West Riding*, (*Keighley* v. *Wilsden*,) 2 Q. B. 331,(a) shows that the same rule applies to an examination. If the court corrects the mistake of sessions by mandamus, whenever they erroneously hold either an examination or grounds of appeal to be bad, they must on the same principle correct the mistake when a bad examination is held good. In the former case the sessions refuse to exercise the jurisdiction which they possess; in the latter, they exercise a jurisdiction which they do not possess; and that calls for control by certiorati. In *Regina* v. *The Justices of Carnarvonshire*, 2 Q. B. 328, COLERIDGE, J., observes, "If the sessions have gone into the merits, and have decided without sending a case to us, we do not interfere;" and he points out, as distinguishing *Ex parte Broseley*,
*797] 7 A. & E. 423, from the case *then before the court, that the examination there was not objected to. It seems to follow that a decision of sessions on the examination might be reviewed like a decision on the grounds of appeal. It would be anomalous that the respondent should be entitled to a mandamus where the examination is wrongly held bad, yet the appellant should be left without remedy where a bad examination has been held good. In *Rex* v. *Preston on the Hill*, Ca. K. B. Temp. Hard. 249, 250, Lord HARDWICKE says: "It were to be wished that a bill of exceptions would lie to justices of the peace in case of settlements, because they sometimes act in an arbitrary manner, and will not state the fact specially to the court." Suppose Tollerton had not appealed, and the pauper, whose right of appeal is not affected by stat. 4 & 5 W. 4, c. 76, but, under stat. 13 & 14 C. 2, c. 12, s. 2, accrues only on actual removal,(b) had, while in custody under the order, on the way from Idle to Tollerton, been brought by habeas corpus before this court. If, in such a case, the constable returned that two justices had taken an examination and thereupon made an order, also setting out the examination and order, that would be insufficient on the face of it: and the court would look at the defective examination, as showing what the proof was on which the order was made; *Nash's Case*, 4 B & Ald. 295.

Cur. adv. vult.

Lord DENMAN, C. J., in the vacation following this term, (December 3d,) delivered the judgment of the court.

*798] *One of the questions, which, in the case just disposed of, (c) we observed to be involved in the discussion, has now come before us. And it is this: whether the writ of certiorari ought to require any thing more to be returned than the record of the Court of Quarter Sessions, thereby meaning the original order of removal, and the proceedings of the sessions thereon upon the hearing of the appeal. In the present instance, the application is to require the return of that record, *and also* of the examination whereupon the original order of removal was made. In the first place we find, upon reference to the officers of the Crown Office, that there is no memory nor any note to be found of any certiorari (except where a case has been granted by the sessions) having issued, requiring the return of any such additional matter. The case just disposed of is of course an exception: and the writ is considered as having issued improvidently, so far as respects the direction to return such additional matter as is therein specified.

The cases cited in support of the present application are entirely foreign to the purpose. In all of them, without exception, a case appears to have

(a) See *Regina* v. *The Justices of Kesteven*, p. 810, post.
(b) See *Rex* v. *Hartsfield*, *Carth*. 222; *Regina* v. *Colbeck*, 12 A. & E. 161, 166.
(c) *Regina* v. *Rotherham*, p. 788, antè.

been granted by the sessions, and so to have been brought before this court. In the case of *Rex* v. *Tedford*, Burr, S. C. 57, it appears that a case was stated by the Court of Quarter Sessions. In *Rex* v. *Margam*, 1 T. K. 775, a case also appears to have been stated; and this court (though not precisely in the usual form) in substance ordered that case to be restated. In *Rex* v. *Wittlebury*, 6 T. R. 464, a case had been granted by the sessions: and the remarks of Lord KENYON, which were *much pressed upon us, [*799 regarded the facts stated in that case, and are utterly without application to the present. *Rex* v. *Wishford*, 4 A & E. 216, (the latest authority cited,) was also the common case of an order of sessions upon a case reserved.

Nothing therefore has been adduced to show that we ought to do what is now required. But, on the contrary, we find that an understanding seems to have prevailed in direct opposition to it. In the case of *Rex* v. *Oulton*, Burr. S C. 64, we find the following remarks in the judgment of PROBYN, J. "This court can take no notice of any thing but the order. I remember" a case "where *the original examinations* were returned up with the order: but the court said they could take notice of nothing but what was contained in the body of the order."

Upon the whole, we consider this to be a speculative novelty, without the warrant of any principle, precedent, or authority, and that therefore there must be no rule.

Rule refused.(a)

(a) See the next case.

The following case was decided in Hilary term, 1843, [*800

The QUEEN v. The Justices of BUCKINGHAMSHIRE.

Where the sessions, on hearing an appeal against an order of removal, have confirmed it without granting a case, this court will not direct the order of removal, with the examinations on which it was founded, and the order of sessions, to be brought up by certiorari, on the ground that the examinations contain no legal evidence in support of the order of removal.

Paupers were removed by order of justices to a parish therein described as "the parish of Poplar, in the county of Middlesex." The real description of the parish was All Saints, Poplar, in the same county: *Held*, not a material variance. And that, if it were so, the parish could not allege it on motion for a certiorari, having appealed and not raised the objection at sessions.

Platt, in Michaelmas term, (November 25th,) 1842, obtained a rule nisi for a certiorari to the justices of Buckinghamshire to bring into this court an order of two of the said justices for the removal of Maria Bavin and her two children from the parish of High Wycombe, in the said county, to the parish of All Saints, Poplar, in the county of Middlesex; the examinations on which the order was made; the notice and grounds of appeal against the said order; and an order of sessions confirming the same; together with all proceedings of the said sessions touching the said order of removal. The affidavits in support of the rule set forth the following facts and documents.

The paupers were removed by an order, dated March 5th, 1842, addressed "to the overseers of the poor of the parish of High Wycombe, in the county of Bucks, and to the overseers of the poor of the parish of Poplar, in the county of Middlesex," and reciting and adjudicating as follows: "Whereas complaint hath been made unto us whose names are hereunto

set and seals affixed, being two of her majesty's justices of the peace acting in and for the said county of Bucks, one whereof being of the quorum, *801] by the overseers of the poor of the said parish *of High Wycombe, that Maria Bavin, single woman, and her two illegitimate children, viz. Henry aged three years or thereabouts, and Hester aged one year or thereabouts, have come to inhabit in the said parish of High Wycombe, not having gained a legal settlement there, nor having produced any certificate acknowledging themselves to be settled elsewhere, and now actually become chargeable to the same parish: We the said justices, upon examination of the premises upon oath, and other circumstances, do adjudge the same to be true: and do also adjudge the place of the legal settlement of the said Maria Bavin and her said two illegitimate children to be in the said parish of Poplar, in the said county of Middlesex. These are therefore," &c. The order then required the said overseers of the said parish of High Wycombe to remove the paupers "from and out of your said parish of High Wycombe to the said parish of Poplar," &c., ending in the usual form.

The examinations (not dated) were: 1. That of Maria Bavin, which was as follows. "Bucks, to wit. The examination of Maria Bavin, at present residing in the parish of Great Marlow in the said county, single woman, touching the place of her legal settlement, taken on oath before us, two of her majesty's justices of the peace for the said county, this 5th day of March, A. D. 1842; who upon her oath saith: 'When I was about seventeen years old, I went to service with Miss Francis of Clapham, Surrey, at the wages of 8*l.* a year with a month's warning. I received my wages quarterly. I stayed there a year and a half. I then went to Mr. Mackie's of Isleworth, in a place of all work. I was hired at the wages of 4*l.* a year, and a month's warning. I stayed there two years and a *802] quarter. I then went to Mr. Thomas *Pitman's of Poplar, Middlesex: he kept a coffee and eating house. I did not agree for any wages. I received vails: my vails were nearly ten guineas a year. I was to give and receive a month's notice before I left. I stayed there two years and four months. I left there the Christmas before the cholera morbus was in England. I have not done any other act to the best of my knowledge to gain a settlement. I have two illegitimate children, namely,' &c. (as in the order.) 'I have been in Marlow workhouse three weeks last Wednesday with my two children.'

"The mark of ✕ MARIA BAVIN.

"Sworn before us. T. R. BAKER.

"A. HIGGINSON."

2. The examination of Richard Reeves of Great Marlow, in the county of Bucks, who said: "I am master of the workhouse at Great Marlow. Maria Bavin and her two children came into the house three weeks last Wednesday: they are chargeable to the parish of High Wycombe, in the county of Bucks."

"Sworn," &c. "RICHARD REEVES."

Copies of the order and examinations were served upon the overseers of All Saints, Poplar, who gave notice of appeal, and sent written grounds signed by two persons styling themselves churchwardens and two styling themselves overseers "of the poor of the parish of All Saints, Poplar, in the county of Middlesex." The latter document was headed: "Take notice that the grounds of our appeal against a certain order under the hands and seals," &c., "for the removal," &c., "from the parish of High Wycombe,

in the county of Bucks, to the parish of All Saints, Poplar, in the county of Middlesex, are," &c. Then followed ten grounds of objection to the examinations, and the two following. *" 11. That the said Maria [*803 Bavin was not in fact ever hired, nor did ever serve the said Mr. Pitman; nor did, during any supposed service with the said Mr. Pitman, live in our parish. 12. That the said Maria Bavin was never a yearly hired servant to the said Mr. Pitman, nor did ever serve him for a year."

The appeal, in which the churchwardens, &c., of the said parish of All Saints, Poplar, were appellants, and the churchwardens, &c., of the said parish of High Wycombe respondents, came on for hearing at the quarter sessions for Buckinghamshire, June, 1842. The order of removal, examinations and grounds of appeal were read in evidence. Before the respondents proceeded to prove their case, the appellants contended that they were not at liberty to go into evidence in support of their order or of the pauper's settlement, or to try the merits of the appeal, alleging, as reasons, seven of the grounds of objection to the examinations set out in their notice. The sessions overruled all the objections insisted on, and refused to grant a case. They then desired the respondents to go into the merits of of their appeal, and afterwards confirmed the order upon such merits. The order of sessions was not set forth on affidavit. The affidavits in support of the rule stated that the only question which the appellants were prepared to try was whether the examinations were good upon the face of them, they alleging them to be bad as not showing any settlement of the paupers in their parish. It was also stated in one of these affidavits that the parties applying for the certiorari were "the churchwardens and overseers of the poor of the parish of All Saints, Poplar."

**Pashley* now showed cause. The object of this application is, [*804 that the order of removal, confirmed at sessions, may be impeached in this court by the examinations or by affidavit. The court will not grant a certiorari for that purpose. *Ex parte Tollerton*, antè, p. 792, is in no material respect distinguishable from this case. The order of justices, being good on the face of it, and in a matter over which the magistrates had jurisdiction, is conclusive, on the principles laid down in *Brittain* v. *Kinnaird*, 1 Brod. & B. 432; *Regina* v. *Bolton*, 1 Q. B. 66, and *Ex parte Clarke*, 2 Q. B. 619, 633—635. Every fact which, from the nature of such an order, must appear on the face of it is decided by it, and cannot afterwards be questioned. Thus, in *Yorke* v. *Brown*, 10 M. & W. 78, the adjudication of the Insolvent Debtors' Court, that a prisoner should be discharged at the end of twelve months from the time, which was specified, of making the vesting order, was held good proof of the order having been made at that time; Lord ABINGER, C. B., observing: "The very thing the court is to do is to adjudge the prisoner to be discharged from all the debts due at the time of making the vesting order; therefore that date is an essential part of the adjudication;" "and consequently," he added afterwards, "the adjudication is good proof of it." There is nothing in *Regina* v. *Middleton in Teesdale*, 10 A. & E. 688; *Regina* v. *Alternun*, 10 A. & E. 699, and other similar cases, inconsistent with the doctrine that the order must show the facts necessary to give jurisdiction, and is conclusive upon them. The court there looked into the examinations because, in each instance, *it was put in the place of the Court of Quarter [*805 Sessions, and the examinations were brought before it, by the case sent up. In *Regina* v. *Rotherham*, antè, p. 776, the documents were still

in the possession of the Court of Quarter Sessions, and were sworn to be so in the affidavits on which the certiorari was obtained. Here that fact is not stated. Further, the examinations are no part of the judicial proceeding, and ought not to be brought up by certiorari, even if the order were returned here. As Lord ABINGER observed of the warrant to the sheriff in *Taylor* v. *Clemson*, 2 Q. B. 978,(a) they are "not a judicial instrument," but "merely an act of one of the parties litigant;" and the court, on this account, would not look into them, if returned.

Platt and *Power*, contrà. There are objections of form on the face of the order. 1. The respondent parish is not shown, in the body of the order, to be in Buckinghamshire. [COLERIDGE, J. The order is addressed to the overseers of High Wycombe in the county of Bucks, and the parish is afterwards called "the said parish of High Wycombe." Lord DENMAN, C. J. You have appealed to the Buckinghamshire sessions.] 2. The appellant parish is All Saints Poplar; the order calls it "Poplar." *Rex* v. *Poole*, 2 Nol. P. L. 230, 4th ed., may be supposed adverse to this objection: there St. James's Poole was described as "the parish of Poole, or town and county of Poole;" and it was held sufficient: but the reason was
*806] "there being but one parish in the town and *county of Poole, and Poole being the common name of the place." (They also objected that the order directed a removal at once and unconditionally, notwithstanding stat. 4 & 5 W. 4, c. 76, s. 79.) As to this see *Regina* v. *Rotherham*, antè, p. 766.

Then as to the principal point. If the court will not call for the examinations in such a case as this, magistrates may set the law at defiance. [COLERIDGE, J. Your motion was made before the court gave judgment in *Regina* v. *Rotherham*, antè, p. 766, and *Ex parte Tollerton*, antè, p. 792. We have held that where the sessions have not granted a case we cannot award a certiorari for the purpose of looking into the examinations. Lord DENMAN, C. J. The appellants must discuss those at sessions: but if the sessions decide upon them, and grant no case, we cannot look into the materials they had for their judgment.] The examinations may be referred to as showing that the justices had no jurisdiction. There is no evidence in them that the paupers ever came to reside in High Wycombe. In *Regina* v. *Rotherham*, antè, p. 766, there was some evidence in support of the jurisdiction; and the court took it into consideration. In *Ex parte Tollerton*, antè, p. 792, the attempt was simply to obtain a review of the judgment at sessions. A case may be supposed in which the removing justices may have had before them neither complaint nor evidence of chargeability or of residence. There, according to *Regina* v. *Bolton*, 1 Q. B. 66, the want of jurisdiction to enter upon the inquiry might be shown by affidavit, and, a fortiori, by the examinations. If neither were admissible in such a case, the rule, that justices cannot give jurisdiction,
*807] must fall to *the ground. In *Regina* v. *St. James, Westminster*, 2 A. & E. 241, the court did not say that, in general, affidavits might not be received to show excess of jurisdiction.

Lord DENMAN, C. J. Some expressions in *Regina* v. *Bolton*, might, perhaps, seem consistent with the argument in support of this rule; but the judgment in that case, when properly considered, means only this: that, if justices have acted in a matter not regularly before them, that may be shown by affidavit; as if they should have proceeded to remove without a

(a) See pp. 1013, 1021, S. C. 2 G. & D. 346. The words were recited from 2 G. & D 277.

complaint. Here, if there had been no complaint, the magistrates would have had nothing before them on which they could make an order; but, there being a complaint, they were bound to inquire into all the facts on which an order must be grounded; chargeability, residence and settlement. It appears that they have done so: and, that being the case, the late cases show that this court will not have the examinations brought before it for the purpose of instituting a nice inquiry whether all the necessary facts were fully stated. That may be a matter of appeal, but is not a subject to be considered here. We decided this on great consideration in *Regina* v. *Rotherham*, antè, p. 776, and *Ex parte Tollerton*: and those cases do not interfere with *Regina* v. *Bolton*.

As to the formal objections: the words "said parish" sufficiently show that High Wycombe in the county of Bucks is meant in the body of the order. As to the substitution of "Poplar" for All Saints *Poplar, [*808 there are numerous cases besides that of *St. James*, *Poole*, 2 Nol. P. L. 230, 4th ed.,(*a*) which show that it is not material; and, however incorrect the description might be, the parish has adopted it by appealing, and has been heard on the merits. It appears that the objection was not taken at the sessions:(*b*) and, if it had been, I hope it would have been overruled.

I must observe that, although we discharge this rule, we are extremely desirous that there should, on appeals, be a fair trial of all points arising between the parties. We have taken great pains to require full statements in notices and examinations: and we may also require of the justices in sessions that they should enter into the cases there with a disposition, by reasonable intendment, to come at the truth and do justice. It only remains to add, here, that no special case has been granted; and we are bound to say that there is no ground for a certiorari to remove the examinations.

PATTESON, J., having been out of court during part of the argument, delivered no judgment.

COLERIDGE, J. The order of removal here is good on the face of it: but it is contended that the justices had not jurisdiction to make it, and that the examinations may be brought up, or affidavits used, to show that fact. I agree that, as the court laid down in *Regina* v. *Bolton*, 1 Q. B. 66, there are cases in which, from necessity, we may make such an inquiry. But let us see whether that is applicable here. Magistrates have *power [*809 to inquire and to remove, on a complaint being laid before them by parish officers, alleging chargeability, residence and settlement. Into those facts they are to inquire: and we must assume here that they have done so; for they state it by their order. If there was insufficient proof on any of those heads, they should have stopped the proceeding; but if, under such circumstances, they have omitted to do that, they have only come to a wrong conclusion on the facts, and so made a wrong order in a matter within their jurisdiction. Then the case is that put by DALLAS, C.J., in *Brittain* v. *Kinnaird*, 1 Brod. & B. 432, 438, that if magistrates adjudge a ship of seventy-four guns to be a boat, "the conviction is still conclusive, and we cannot look out of it."

WIGHTMAN, J., concurred. Rule discharged with costs.

(*a*) See ibid p. 231, note (1).
(*b*) This was admitted on the argument.

*810] *The following case was decided in Easter term, 1844.

The QUEEN *v.* The Justices of the Parts of KESTEVEN, LINCOLNSHIRE.

The court will not receive a case from sessions which, in stating the points submitted, directs that, if the court shall decide in one of the modes suggested, the case shall be sent back to the sessions for final determination.

Where the sessions, on appeal, decide, on a point preliminary to the whole case, or to the reception of a particular piece of evidence, that they will not hear the case farther, their decision is conclusive, if the point involve matter of fact only; otherwise, if it raise a point of practice which this court can perceive to be matter of law. In the latter case, this court will grant a mandamus to enter continuances and hear; in the former, not.

The question, whether an examination or statement of grounds of appeal give sufficient information to the opposite party is of the former kind. Therefore, where the grounds of appeal stated a settlement by apprenticeship in a third parish, but did not describe the house in which the residence took place, and the sessions, on that objection, dismissed the appeal after hearing the respondents' case opened and one witness examined, (the appellants not being heard except on the objection,) this court refused a mandamus to enter continuances and hear.

A RULE was obtained in last Michaelmas term, calling on the justices of the parts of Kesteven, Lincolnshire, to show cause why a mandamus should not issue calling upon them to enter continuances and hear the appeal of the inhabitants of Great Ponton in the said parts of Kesteven against the after mentioned order of removal. The material statements on affidavit in support of the rule were as follows.

Two justices made an order for the removal of Miriam, the wife of William Welbourn, from the township of Spittlegate in the parts of Kesteven to the parish of Great Ponton in the same parts. The examinations stated a settlement of W. Welbourn in Great Ponton by apprenticeship to one John Green, and service and residence under it. Great Ponton gave notice of appeal, and stated, among other grounds, "that the said W. W., after his service with his said master the said John Green for part of the said term of the said apprenticeship, with the consent of his the said W. W.'s said master, to wit, from May or June, 1833, to the end of the same term, served one Samuel Nowell of Grosvenor Wharf, Pimlico, *811] *in the county of Middlesex, builder, under the said indenture in the said examinations respectively mentioned, in the parish of Harlaxton in the said parts of Kesteven in the county of Lincoln, and inhabited and resided therein more than forty days during such service, being then single and unmarried and without child or children."

The affidavit, by George Kewney, gentleman, attorney for the appellants, proceeded to state that the appeal came on for hearing at the quarter sessions held at Bourn, October, 1843, and that Thomas Manners, gentleman, the advocate for the respondents, having stated their case, called Charles Welbourn, the brother of William, "and proceeded to examine him as a witness in support of the said order; but, before he the said T. M. had completed the examination of the said C. W., this deponent objected to certain questions put by the said T. M., on the ground that such questions went to extract evidence of facts not stated in the said examinations; whereupon the said T. M. stated that, as a forty days' residence by the said W. W. in the said parish of Great Ponton with the said John Green under the said indenture was admitted by this deponent on behalf of the said appellants, he the said T. M. had an objection to make to the said statement of the grounds of the said appeal previous to this deponent entering into the case on behalf of

the said appellants, which objection he the said T. M. would, as he considered it a fatal one, by the permission of the court at once mention." "That, the said justices having consented thereto, he the said T. M. objected that it was incompetent for the said appellants to go into or to give any evidence in support of the settlement alleged by the said statement of the grounds of the said appeal to have been gained by the *said W. W. in the said parish of Harlaxton, inasmuch as the said statement of the grounds of the said appeal did not set forth the particular house in Harlaxton in which the said W. W. resided during the time he served under the said indenture in the said parish of Harlaxton, as aforesaid, and did not specify or particularize the said house by the name of the landlord or in any other manner." That *Regina* v. *The Justices of Suffolk*, 6 A. & E. 109,(*a*) was cited in support of the objection; and that the point was argued, the deponent contending that the objection was invalid: "but the said justices determined that in their opinion the said statement of the said grounds of appeal relating to the said alleged settlement in Harlaxton aforesaid was insufficient in particularity, because the house in which the said W. W. resided at H. aforesaid was not specified by the name of the landlord thereof or in any other manner, and that consequently they the said justices could not receive any evidence in support of such alleged settlement; and the said justices therefore confirmed the said order of removal, subject to the opinion of this honourable court in manner following, that is to say, that, if this honourable court should be of opinion that the said statement of the said grounds of appeal was insufficient in particularity as aforesaid, then the said order of removal to stand confirmed, but should this honourable court be of a contrary opinion, that continuances should be entered, and the said justices should proceed to hear the said appeal. And this deponent further saith that he had one witness to give evidence of the service of the said W. W. under the said indenture with the said Samuel Nowell in the said parish *of Harlaxton, and the residence of the said W. W. therein for more than forty days during such service, and three other witnesses to give evidence in support of the case on behalf of the said appellants, in attendance at the said general quarter sessions," &c, "which witnesses he was prepared to call and should have called in case he had been allowed to do so by the said justices." The deponent added that, this court having lately declared an intention not to receive cases from quarter sessions upon orders of removal, when so stated that the decision of this court would not be final, the appellants, if such decision were adhered to, would be without remedy, unless a mandamus were awarded, although they had good grounds of appeal on the merits; which merits they had been prevented from going into; and although the justices had granted a case believing that this court would receive it, and intending that, if their own decision were erroneous, the appellants should have a remedy.

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The affidavit of Mr. Manners, the advocate for the respondents, stated the proceedings at sessions as follows. "That, he, this deponent, having stated his case on behalf of the said respondents, namely a service," &c., "and residence," &c., "under an indenture," &c., "the said George Kewney, as advocate for the said appellants, admitted a primâ facie settlement in such parish, but contended that he should show a subsequent settlement in the parish of Harlaxton, as set forth in his statement of grounds of appeal; whereupon he, this deponent, as advocate for the said respondents, called

(*a*) The case referred to was probably *Regina* v. *The Justices of the Eastern Division of Sussex* 10 A. & E. 682.

Charles Welbourn, the brother of the said W. Welbourn, into the witness box, and proceeded to examine him as to the apprentice W. W. having slept at his said master's house in the appellants' parish of Great Ponton the
*814] last *night of his said apprenticeship: and, upon the said G. Kewney, as advocate of the said appellants, objecting to certain questions put to such witness, as foreign to the evidence set forth in his sworn examination, he, this deponent, by permission of the court, took an objection to the grounds of appeal given by the appellants, as far as related to the alleged subsequent settlement intended to be set up in the parish of Harlaxton." The affidavit then set forth the argument upon the objection, and proceeded to state: "That, after hearing the advocates on both sides on the said objection so raised by this deponent to the said grounds of appeal, the court of quarter sessions decided that the grounds of appeal were insufficient and defective, and confirmed the order." "That, after the court had so confirmed the said order, the said justices, on the urgent application of the said George Kewney as advocate for the said appellants, granted a case," &c. The chairman of the sessions also made affidavit, setting out the proceedings in nearly the same words. And the clerk of the peace gave, on affidavit, a copy of his minute of the order of sessions, as follows:

"*Great Ponton*, appellants. *Spittlegate*, respondents.

"Order of removal confirmed, subject to opinion of Court of Queen's Bench on case granted to appellants, on objection by respondents, 'That the statement of grounds of objection did not sufficiently set forth the residence and service of the husband of the pauper in the parish of Harlaxton, where subsequent settlement alleged.' If decided that grounds of objection sufficient in this respect, continuances to be entered, and the appeal to be reheard: otherwise the order to stand confirmed."

*815] **Mellor* now showed cause. Where the sessions have granted a case, this court will not award a mandamus to enter continuances and hear, at the instance of the party who obtained the case, and has neglected to bring it up; *Regina* v. *The Justices of the West Riding*, (*Warmsworth* v. *Doncaster*,) 1 A. & E. 606; *Rex* v. *The Justices of Suffolk*, 6 A. & E. 109; *Rex* v. *The Justices of Northamptonshire*, 6 A. & E. 111, note (*a*).

Whitehurst, contrà, was called upon by the court as to this point. It would have been useless to bring up the case, because this court has declared that cases are not to be sent up in such a form that the decision here will not be final; *Regina* v. *Wistow*; (*a*) *Regina* v. *Worth*; (*b*) *Regina*

(*a*) The QUEEN *v.* The Inhabitants of WISTOW.

Easter Vacation, May 10th, 1841. The question at the end of the case sent by the sessions (Kingston upon Hull, July, 1840) was stated as follows. "If the court shall be of opinion that the said service of the statement of the grounds of appeal was bad and insufficient, then the aforesaid order shall stand confirmed. But, if the court shall be of a contrary opinion, then the appeal to stand respited until the general quarter sessions to be held for the said borough of Kingston upon Hull next after the judgment of the court." The case now coming on in the crown paper, (before Lord DENMAN, C. J., PATTESON, WILLIAMS, and WIGHTMAN, Js.,) Lord DENMAN, C. J., said: We cannot hear this case. A point is reserved for our opinion, and in the mean time the hearing respited to the next sessions. We do not give opinions under such circumstances.

Archbold for the respondents. *Raines* for the appellants.

(*b*) Hil. T. 1843. The question there sent up by the sessions was, whether certain evidence was receivable: if this court should hold that it was, the appeal was to go back for rehearing; if the court should think it not receivable, the order of removal to be quashed. This court, however, heard and decided the case. It will be reported with the cases of Hilary term, 1843.

v. *Ickham*.(*a*) [PATTESON, J. It does *not appear that you objected to the form, or applied to have the case drawn in a more correct one. WIGHTMAN, J. Why did not you abandon the case? You reserved the chance of proceeding on that if the court would grant the indulgence. Lord DENMAN, C. J. We have not in all instances refused to hear cases stated in this manner. PATTESON, J. Perhaps the same indulgence might have been shown here as in *Regina* v. *Ickham*.] In *Regina* v. *Wistow* the court said they could not hear a case so stated. If the present case had been brought up, and the court had thought the appellants right, they would have directed a further hearing. The effect of this rule, if the appellants succeed, will be the same. [*816

Mellor was then desired to proceed in showing cause. The sessions have already heard. The question in such cases must always be whether or not the court below has declined the exercise of jurisdiction in a matter within its competency. Here it has not. *Ex parte Broseley*, 7 A. & E. 423, *where a mandamus was refused on that ground, is a similar case. In *Regina* v. *Churlbury and Walcott*, antè, p. 378, COLERIDGE, J., said, as to the strictness now insisted upon in giving full information by examinations and notices, "The antagonist either says that this has not been done, or he says that the case is clearly stated, but that, admitting it as stated, it is not enough." "Whether that which the statute requires has been complied with, the sessions are to judge. When they decide on this, it is just the same as if they heard all the case." [Lord DENMAN, C. J. What did the sessions here doubt upon? They are the best judges whether the notice of grounds is sufficiently particular or not.] That was the opinion of this court in *Regina* v. *Kingsclere*, antè, p. 388. At all events the sessions have gone into the question and decided it. The objection was not preliminary to going into the case, but preliminary to the reception of particular evidence, according to the distinction taken by the court in *Rex* v. *Frieston*, 5 B. & AD. 597. *Regina* v. *The Justices of Carnarvonshire*, 2 Q. B. 325, which will be cited on the other side, turned on peculiar circumstances, does not appear to have been fully argued, and is not reconcileable with other authorities. The court there considered that the sessions had not entered into the merits; but it has since been held that a decision proceeding on the insufficiency of examinations is a complete decision on the merits, or at least on the point of settlement: PATTESON, J., expresses this opinion in *Ex parte Overseers of Ackworth*, antè, p. 397, note (*a*). (*b*) In the case *In the Matter of Pratt*, 7 A. & E. 27, a party appealing against a conviction of *trespass admitted the alleged act, but offered evidence in justification, [*817 [*818

(*a*) The QUEEN *v.* The Inhabitants of ICKHAM.

Trinity Vacation, June 11th, 1843. The appellants relied on an indenture of apprenticeship: the respondents contended that it was invalid, not having been enrolled pursuant to stat. 4 G. 4, c. 25, ss. 2, 4, and 6 G. 4, c. 107, s. 138. The sessions, (Kent, October, 1842,) on this objection, confirmed the order without hearing further evidence, but granted a case, which stated that, if this court should think that the omission to enrol prevented a settlement being gained, the order of sessions was to be confirmed, if otherwise, the court was to determine whether or not the case should be sent back to the sessions to be heard. After argument by *Whateley*, *Deedes*, and *Horn*, in support of the order of sessions,

Lord DENMAN, C. J., said: We do not think it right that the court should have a single question put to it in this manner; and in future we shall not allow it. This case may be sent back to the sessions.

WILLIAMS and COLERIDGE, Js., concurred.

Starr, *Espinasse*, and *Keane*, for the appellants, were not heard.

(*b*) See *Regina* v. *Perranzabuloe*, antè, p. 400.

which the sessions deemed inadmissible and thereupon confirmed the conviction, refusing to state a case: and this court, on motion for a mandamus to enter continuances and hear, was of opinion that the sessions had heard the appeal. Further, the sessions here decided rightly. On this point *Mellor* cited *Regina* v. *The Justices of Derbyshire*, 6 A. & E. 885; *Regina* v. *The Justices for the Eastern Division of Sussex*, 10 A. & E. 682, and *Regina* v. *The Recorder of Pontefract*, 2 Q. B. 548. *The Court* gave no judgment upon it, and did not hear it argued on the other side.

Whitehurst, contrà. Where the sessions have decided on a mere preliminary objection, this court will grant a mandamus. By stat. 4 & 5 W. 4, c. 76, s. 81, appellants are not "to be heard," unless proper grounds of appeal have been delivered. The sessions here have decided that the grounds of appeal were insufficient, and therefore that the appeal should not be heard. The appellants ought not to lose their right to a mandamus because their advocate went into the preliminary question. *Regina* v. *The Justices of Carnarvonshire* is in point, and appears to have been sufficiently argued; two counsel were heard against the rule; and many cases were cited. *Regina* v. *The Justices of the West Riding*, (*Keighley* v. *Wilsden*,) 2 Q. B. 331, is a still stronger authority for the appellants. There this court differed in opinion from the quarter sessions as to the effect of evidence disclosed in the examinations, and on that ground ordered them to enter continuances and hear the appeal. In *Rex* v. *The*
*819] **Justices of Derbyshire* this court discussed the question whether the sessions had been right or wrong in their judgment upon the facts stated in the grounds of appeal. (He was then proceeding to argue that the notice of grounds in this case was sufficient.)

Lord DENMAN, C. J. Observations on that point cannot vary the question. It is satisfactory that we may now take it as universally known that, on cases sent from the sessions, the Court of Queen's Bench will not decide merely for the purpose of putting the inferior court in motion. To receive cases on which the sessions only ask us whether they shall go forward or not is merely creating additional expense. On the other question before us we do not feel unmixed satisfaction, since it becomes necessary that we should overrule two cases. The decision in *Regina* v. *The Justices of Carnarvonshire* is clearly wrong; that in *Regina* v. *The Justices of the West Riding*, if there be any distinction, still more wrong. In each of those cases the court, perhaps led by the manner in which it was argued at the bar, did, in effect, grant a new trial on the evidence. The language used by the court, in *Regina* v. *The Justices of Carnarvonshire*, seems to explain the mistake. It was said there that, when the sessions, on a "preliminary objection," which is invalid, refuse to hear, the court will grant a mandamus. That is true, if the objection turn upon such a point of practice as the court can see to be matter of law; if the sessions have acted on a supposed rule which really is no rule. But, if, on a preliminary objection, they decide a matter of fact, we are bound by that decision.
*820] *The question as to the sufficiency of a notice of grounds of appeal in its statement of the facts on which the appellants mean to rely must be for the sessions; we can form no opinion of it: and we have lately expressed ourselves to that effect when *Regina* v. *The Justices of Carnarvonshire* was under the consideration of the court, and an attempt was made to distinguish it from the case then depending.(*a*) Here no distinction can be drawn; and we are called upon to say whether or not

(*a*) *Regina* v. *Charlbury and Walcott*, antè, p. 378, is probably the case referred to.

our decision was right in *Regina* v. *The Justices of Carnarvonshire*, and the other case referred to. I think it was not. This rule must be discharged.

PATTESON, J. If the sessions thought there was doubt enough on the sufficiency of the grounds of appeal to warrant granting a case, they should have heard the appeal through, and granted a case subject to the question. I hope it will be understood, in future, that, if the sessions are so satisfied that they think they ought to decide against the appellants or the respondents, they should not grant a case: but, if they have a doubt, they should hear the appeal through, and grant a case. I question whether Mr. Whitehurst is entitled to say here that he did not accept of a case. If it was offered in such a form as to be, in effect, no case, he should have remonstrated on that ground, and said that he did not ask for a case so stated: having failed to do so, he ought not to apply for a mandamus. Probably, however, the parties here were not aware of the rule we *have laid down respecting the statement of cases. As to the other point, I [*821 was not present at the decision in *Regina* v. *The Justices of Carnarvonshire;* but *Regina* v. *The Justices of the West Riding* was still worse. And I hope it will be understood in future that, where the question is whether the examinations or notice give sufficient information to entitle parties to go into their case, that is for the determination of the sessions.

WILLIAMS, J. One part of the decision in *Regina* v. *The Justices of Carnarvonshire* certainly turned on a misapplication of the terms "preliminary objection." If the sessions here had refused altogether to go into the case, the question would have been different: but it is clear, from the mode in which the appellants themselves put it, that this appeal was heard. If we held otherwise, it might be said that a case was not heard at the sessions unless all the witnesses were heard; as if one were examined and four not. I think that this was a hearing and decision, and that the two cases are not distinguishable.

WIGHTMAN, J. I was present at the decision of *Regina* v. *The Justices of Carnarvonshire*, though not at that of *Regina* v. *The Justices of the West Riding*. Both turned on the view then taken of what constituted a preliminary objection. If the preliminary points had turned on mere matter of law and practice, the decisions might have been well grounded; but that was not so; and the same observation applies particularly to the *present case, where the sessions clearly decided on a matter of fact [*822 and one touching the merits. Rule discharged.

Whitehurst, then applied for leave to bring up the case as granted, but this was Refused.(*a*)

(*a*) In *Regina* v. *The Inhabitants of Macclesfield*, Trinity term, (June 5th,) 1844, the concluding paragraph of the case was, that, if this court deemed the examination sufficient, the sessions should be directed to enter continuances and hear the appeal: and the court (Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.) refused to hear the case argued. Lord Denman, C. J., observed that the sessions had no right to direct an entry of continuances without the leave of this court.

STACKWOOD *v.* DUNN.

To assumpsit for work and labour, money had and received, and paid, and on an account stated, defendant pleaded that the promises were made by him jointly with L. and set off a debt due from plaintiff to defendant and L. jointly.

Special demurrer, showing for cause that the debts were not mutual, and the plea double. Plea held good.

ASSUMPSIT for work and materials, money had and received, money paid, and on an account stated.

Plea. That the several promises were made by defendant jointly with one Josiah Living, who is still alive, and not by defendant alone: and that plaintiff, before and at the time of the commencement, &c., was, and still is, indebted to defendant and the said J. L. in a large, &c., to wit, &c., for the use and occupation of a certain messuage, &c., of defendant and J. L., by plaintiff and at his request, and by the sufferance and permission of defendant and J. L., occupied, &c.; and for the price of goods before then sold and delivered by defendant and J. L. to plaintiff, and for money before then lent by defendant and J. L. to plaintiff, &c., (claims in the like form for money paid, money had and received, and on an account stated:) which sums, so due and owing from plaintiff to defendant and
*823] J. L., exceed the *damages sustained by plaintiff by reason of the non-performance, &c.: out of which sum, so due and owing from plaintiff to defendant and J. L., defendant and J. L. are ready and willing and hereby offer to set off, &c., according to the form, &c.

Special demurrer, showing for cause that the debts were not mutual; that J. L., not being a defendant, could not, either alone or with defendant, set off a debt due to plaintiff; and that the plea was double, in alleging that the promises were made, not by defendant alone, but by defendant and J. L. jointly, and also a set-off.

Joinder in demurrer.

Gunning, for the plaintiff. The plea is bad on the grounds assigned. There is no precedent for such a plea. Nor is there any injustice in disallowing this method of pleading; because the defendant might have pleaded in abatement. Had he done so, by stat. 3 & 4 W. 4, c. 42, s. 8, he must have pleaded that the third party was resident within the jurisdiction of the court, and must have shown the residence by affidavit. [COLERIDGE, J. Suppose the third party to be out of the jurisdiction of the court: is the defendant to lose the set-off?] Perhaps the plaintiff, under sect. 9, might have replied the discharge of the third party by bankruptcy and certificate, or under an act for the relief of insolvents. [COLERIDGE, J. Your demurrer admits that you are suing on a debt due from the two jointly.] This, on the declaration, is a debt due from one: if the plea contain a good confession, then the attempt is to set off a debt due to two against a debt claimed from one only, and admitted to be so claimable: such rights
*824] are not *mutual; and the set-off is not given by stats. 2 G. 2, c. 22, s. 13, and 8 G. 2, c. 24, ss. 4, 5; Bul. N. P. 179. The rule is illustrated by the exceptions which have been allowed. In *George* v. *Clagett*, 7 T. R. 359, a party who had purchased goods from a del credere factor, believing them to be the factor's property, was allowed to set off against the principal a debt due from the factor. There, and in *Rabone* v. *Williams*, 7 T. R. 360, note (a), the ground of the decision was that, as against the buyer, the principal and factor were identified: and this is the explanation of *Carr* v. *Hinchliff*, 4 B. & C. 547.(a) The cases of this class are collected and commented upon in 2 Smith's Lead. Ca. 79: and the commentator says that the rule of identifying the factor with the principal "only applies where the party contracting has not the means of knowing that the party with whom he contracts is but an agent." Here it does not appear that there has been any ignorance on either side. [COLERIDGE, J. How does that qualification apply to a case like this, where the debts on

(a) See *Tucker* v. *Tucker*, 4 B. & Ad. 745, 750.

both sides are in fact in the same right?] The debt set up by the defendant is not in the same right with that claimed by the plaintiff. [WIGHTMAN, J. That is the fallacy of your argument. You sue a single party on a joint debt, as you can do, if the defendant does not choose to plead in abatement: but still it is a joint debt on which you are suing.] This plea is at any rate double. The plaintiff, if he replied, must admit either that the debt is joint or that there is a set-off. [COLERIDGE, J. You might make a similar objection to many pleas which are perfectly good.]

**Bramwell*, contrà, was stopped by the court. [*825

Per Curiam.(a) Judgment for defendant.(b)

(a) Lord Denman, C. J., Williams, Coleridge, and Wightman, Js.
(b) See Lord Mansfield's judgment in *Rice* v. *Shute*, 2 W. Bl. 695, 697.

In the Matter of Captain DOUGLAS.

On return to a habeas corpus, alleging that the prisoner is detained as a deserter under stat. 5 & 6 Vict. c. 12, s. 22, it must be expressly shown that the party is a soldier and ought to be with his corps. And, if this do not appear by the return, the party must be discharged.

Stat. 33 G. 3, c. 52, s. 62, enacts that demanding or receiving money, &c., as a gift or under colour thereof, by a British subject holding office in the East Indies, shall be deemed to be extortion and a misdemeanor, and be punished as such; and the offender shall forfeit to the Crown the whole gift, or the value thereof.

Held, that a warrant, issued upon an information ex officio under this statute, and expressed to be *to answer for certain misdemeanors whereof* the party *was impeached, and also for certain penalties and forfeitures* sued for by the Attorney General, is criminal process, under which the party may be taken on his return home after a discharge from illegal custody by habeas corpus.

ARCHIBALD DOUGLAS, Esquire, a captain of the 49th regiment of Madras native infantry, was charged, before John Hardwick, Esquire, one of her majesty's justices of the peace, on the 4th of November instant, with being a deserter from the said regiment; and the magistrate, acting on stats. 3 & 4 Vict. c. 37, and 5 & 6 Vict. c. 12, s. 22, committed him to Tothill Fields prison. He was afterwards, by authority of the secretary at war, given up to Lieutenant Colonel Hay, the officer commanding the East India Company's forces at Chatham, and by him removed, under military arrest, to that place. A habeas corpus cum causâ was thereupon obtained, addressed "to Lieutenant Colonel Hay, and to any and every officer and officers, and person or persons, having the custody of Captain Archibald Douglas, a captain in the Indian army:" and he was now brought into court in obedience to the writ. The *depositions [*826 made before Mr. *Hardwick* were also brought up by certiorari.

The return to the habeas corpus was as follows: "I, Edward Hay, Esquire, lieutenant colonel," &c., "in the writ to this schedule annexed named, do certify and return," &c., "That Archibald Douglas, in the said writ also named, before and at the time of the making of the charge hereinafter mentioned, that is to say on the 4th day of November, 1842, was and continued to be, and now is an officer commissioned in the service of the East India Company, and, so being such officer, was, on the 4th day of this instant, November, at the police office in Marlborough street, in the county of Middlesex, brought before John Hardwick, Esquire, one of her majesty's justices of the peace in and for the Metropolitan Police District, and one of her majesty's justices of the peace acting for the county of Middlesex; and then and there a charge was made against the

said A. Douglas, upon the oath of John Estcourt Boucher and others, of being a deserter from the Honourable East India Company's 49th regiment of infantry, contrary to the statutes in that behalf made and provided: and thereupon the said J. H., so being such justice as aforesaid, having heard the evidence of the said J. E. B. and others in support of the said charge, duly made his warrant of commitment of the said A. Douglas in the tenour following.

"Metropolitan Police District, to wit.—To the Governor of Tothill Fields Bridewell or his deputy. Receive into your custody the body of Archibald Douglas herewith sent you, brought before me John Hardwick,
*827] Esquire, one of her majesty's justices of the peace in and for the *said district, and charged, upon the oath of John Estcourt Boucher and others, with being a deserter from the Honourable East India Company's 49th regiment of infantry, contrary to the statute, &c. Him therefore safely keep in your said custody until he shall be discharged by due course of law: and for so doing this shall be your sufficient warrant. Given under my hand and seal this 4th day of November, 1842.

(Signed) J. HARDWICK. (L. S.)

"Let Captain Douglas have every accommodation, as the rules of the prison and the safety of his person will admit. J. H.

"And thereupon the said A. Douglas was duly conveyed to the said Tothill Fields Bridewell: and the said John Hardwick, so being such justice, did thereupon duly transmit an account thereof, in pursuance of the statute in that behalf made and provided, to the Secretary at war in the tenour following." (Then followed a "Description return," in the form required by stat. 5 & 6 Vict. c. 12, s. 62, which, except the details of personal description (omitted here), was as follows.

"Probable date of enlistment, and where.	Entered as a cadet in the year 1817, made lieutenant 8th November, 1818, and captain 25th May, 1831.
Probable date of desertion, and from what place.	May, 1842, from Ootacamund, on the Neilgherry hills.
Name and occupation and address of the person by whom apprehended.	Samuel Hughes, one of the police inspectors of the A. division.
Particulars in the evidence on which the prisoner is committed. *828]	That, his leave of absence from service applying only to the Neilgherry hills, he was absent without permission of the Governor *General of India, and without leave to come to Europe, which is specially required by the Company's regulations.
Whether the prisoner was apprehended or voluntarily rendered himself as a deserter.	Prisoner was apprehended.
Whether the prisoner confessed before the magistrate that he is a deserter.	Denies being a deserter, his time of service having expired, and also because he has leave of absence until March, 1843.

"I do hereby certify that the prisoner has been duly examined before me as to the circumstances herein stated, and has declared in my presence that he is not a deserter from the before-mentioned corps."

(Signed by the magistrate.
Signed also by the prisoner and the informant.)

"And thereupon an order was duly issued from the office of the said Secretary at War in the tenour following:

"It is her majesty's pleasure that you cause a proper guard to be made from the forces under your command, to receive from the civil power at Tothill Fields Bridewell Captain Archibald Douglas, committed on the 4th November, 1842, as a deserter from the 49th," &c., "Madras Infantry,

and convey him to the East India Company's depôt at Chatham, to be thence sent under proper guard to Madras, there to be proceeded against according to law. Wherein the civil magistrates and all others concerned are to be assisting, in providing quarters and otherwise as there shall be occasion.

Given at the War Office the 5th day of November, 1842.

By her majesty's command.

In the absence of the Secretary at War.

(Signed) L. SULLIVAN.

The officer commanding the forces of the Honourable East India Company, Chatham.

*"Addressed to me, being the officer commanding the forces of the Honourable the East India Company at Chatham as aforesaid. And I further certify that, in obedience to the said last-mentioned order, I caused a proper guard to be made, and did all other things as therein was ordered, and received the said Archibald Douglas into my custody on the 7th day of November, 1842, and I have since kept him in my custody according to the last-mentioned order, to the end that the said Archibald Douglas may be proceeded against according to law. And these are the causes of my detaining the said Archibald Douglas in my custody; and whose body I have ready as by the said writ I am commanded." [*829

The return having been read,

Kelly, with a view to a motion for the prisoner's discharge, proposed to read an affidavit as explanatory of the circumstances under which the return was made.

Sir *F. Pollock*, Attorney General, who supported the return, opposed the putting in of affidavits.

Kelly contended that the affidavits offered would not infringe the rule which excludes affidavits contradictory of the return. The prisoner is apprehended and detained under stat. 5 & 6 Vict. c. 12, s. 22,(*a*) which empowers the constable to arrest "any person reasonably suspected to be a deserter," and a justice to place him in the proper custody, "if by his confession, *or the testimony of one or more witnesses upon oath, or by the knowledge of such justice, it shall appear that such suspected person is a soldier, and ought to be with the corps to which he belongs." Here the return does not expressly affirm that the prisoner is a soldier and ought to be with his corps. The affidavits would show his rank and the circumstances under which he is here; where his corps is; and that, for reasons which would appear, he is not a person who at present ought to be with it. [Lord DENMAN, C. J. You do not make a case for reading affidavits. Your proposed argument would show that the return is insufficient.] [*830

Then, on the return itself, the prisoner must be discharged, because it does not state in terms, or otherwise show, that the prisoner is a "soldier," (by which term in sect. 22 is clearly meant a common soldier,) or that he ought to be with his corps, which facts are necessary to give the justice jurisdiction.(*b*)

Lord DENMAN, C. J., said that the court were struck with this objection, and he called upon

(*a*) Made applicable, by sect. 32, to the forces of the East India Company. Kelly urged that this enactment applied only to "the forces of the East India Company *while* they shall be in any part of the United Kingdom."

(*b*) Kelly stated another objection (see p. 829, note (*a*)); but the court decided on this only.

Sir *F. Pollock*, Attorney General; who admitted that the facts in question ought to have appeared before the magistrate, and, if proved to him, should have been stated in the return.

Per curiam.(a) Prisoner discharged.

Sir *F. Pollock*, Attorney General, then stated that an information had *831] been filed against Captain Douglas for *extortion and malversation in an office which he had held in India, and moved that he might be committed to take his trial for misdemeanor (b) in this country.

(a) Lord Denman, C. J., Williams, Coleridge, and Wightman, Js.

(b) Stat. 33 G. 3, c. 52, s. 62, enacts: "That the demanding or receiving any sum of money, or other valuable thing, as a gift or present, or under colour thereof, whether it be for the use of the party receiving the same, or for, or pretended to be for the use of the said company, or of any other person whatsoever, by any British subject, holding or exercising any office or employment under his majesty, or the said United Company, in the East Indies, shall be deemed and taken to be extortion and a misdemeanor at law, and shall be proceeded against and punished as such, under and by virtue of this act, and the offender shall also forfeit to the King's majesty, his heirs and successors, the whole gift or present so received, or the full value thereof."

Sect. 63 enacts: "That the court or jurisdiction before whom any such offence shall be tried shall have full power and authority to direct the said present or gift, or any part thereof, to be restored to the party who gave the same, or to order the whole, or any part thereof, or of any fine which the court shall set on the offender, to be paid or given to the prosecutor or informer, as such court in its discretion shall think fit."

Sect. 140 enacts: "That all penalties, forfeitures, seizures, causes of seizure, crimes, misdemeanors, and other offences, which shall arise, or be incurred or made under or shall be committed against this act, shall be sued for, prosecuted, examined, recovered, and adjudged in any of his majesty's courts of record at Westminster, or in the supreme court of judicature at Fort William in Bengal, or in one of the Mayor's courts at Madras or Bombay respectively, in manner following; (that is to say) all such pecuniary penalties, and all forfeitures of ships, vessels, merchandise, and goods, shall and may be sued for, condemned, and recovered by action, bill, suit, or information, wherein no essoin, protection, wager of law, or more than one imparlance, shall be granted or allowed; and all such seizures, whether of any person, or of any ships, vessels, merchandises, and goods, and all causes of such seizure, shall be cognisable in such actions, suits, or prosecutions, as shall bring into question or relate to the lawfulness or regularity of any such seizure; and all such offences as by this act are not made punishable by pecuniary penalties, or by any forfeitures of goods, but by fine or imprisonment, or both, or are hereby created without providing any particular punishment, shall be prosecuted by indictment or information as misdemeanors, for breach thereof, and shall be punished by fine or imprisonment, or both, at the discretion of the court in which such prosecution shall by virtue of this act be begun and carried on; and if such prosecution for a misdemeanor shall be in any of the said courts in the East Indies, and the person or persons prosecuted shall be there convicted, it shall be lawful for such court to order, as part or for the whole of the punishment, any such person or persons to be sent and conveyed to Great Britain."

Sect. 141 enacts: "That whenever any action, bill, suit, information, or indictment shall be brought or prosecuted in any of his majesty's courts of record at Westminster, for any offence against this act, whether for a penalty, forfeiture, or misdemeanor, the offence shall be laid or alleged to have been committed in the city of London or county of Middlesex, at the option of the informer or prosecutor; and all actions, bills, suits, informations, and indictments for any offence or offences against this act, whether filed, brought, commenced, or prosecuted for a penalty or forfeiture, or for a misdemeanor, in any of his majesty's courts of record at Westminster, or in the said supreme court, or any such Mayor's court as aforesaid, shall be brought and prosecuted within six years next after the offence shall be committed, and a capias shall issue in the first process; and in the case of an offence hereby made punishable by any penalty or forfeiture, such capias shall specify the sum of the penalty or forfeiture sued for, and the person or persons sued or prosecuted for such penalty shall, on such capias, give to the person or persons to whom such capias shall be directed, sufficient bail or security, by natural-born subjects or denizens, for appearing in the court out of which such capias shall issue, at the day or return of such writ, to answer such suit or prosecution, and shall likewise, at the time of such appearance, give sufficient bail or security, by such persons as aforesaid, in the said court, to answer and pay all the forfeitures, and penalties sued for, if he, she or they shall be convicted of such offence or offences, or to yield his, her or their body or

Kelly contended that, before that question should be considered, Captain Douglas should be at liberty to leave the court.

Lord DENMAN, C. J. Before this motion is made, the court must see that their present judgment has its due effect. The judgment is that Captain Douglas is at liberty to leave the court and go where he pleases. We cannot order him to remain.

Captain Douglas then left the court.

Afterwards, on the same day,

Kelly, on behalf of Captain Douglas, stated that he had been arrested on a sheriff's warrant as he was quitting the court. [Lord DENMAN, C. J. This must be brought before us in the regular way, by affidavit.]

During the same day, an affidavit of the fact of the arrest was put in. The warrant also, on which Captain Douglas had been arrested, was read in court. It *was signed with the name of the sheriff of Middlesex, [*832
and addressed to a person named, as "my bailiff." It ran as follows:

*" *Middlesex.* } By virtue of the Queen's writ to me directed, I [*833
command you that you take Archibald Douglas, Esquire, if he shall be found in my bailiwick, and him safely keep, so that I may have his body before the Queen at Westminster, on Friday, the 18th of November next, to answer our sovereign lady the Queen for certain misdemeanors whereof he is impeached, and also for certain penalties and forfeitures sued for in the Queen's court before the Queen by Sir Frederick Pollock, Knight, her majesty's Attorney General, on the Queen's behalf, against the said Archibald Douglas.

Pursuant to the 33 G. 3, c. 52, s. 141; upon an information exhibited for certain misdemeanors, amounting in the whole to 12,000*l*.

"Dated the 15th day of November, 1842.
"Penalties sued for, 12,000*l*.

"E. and J. LAWFORD,
"ROBINSON."

*At the foot of the warrant, after the name of the sheriff, was the [*834
following memorandum:

"Before you arrest the defendants, beware that they are not ambassadors, or servants to ambassadors, or any otherwise privileged or protected.(*a*)

The ex-officio information, referred to in the warrant, had been filed on the preceding day.

Kelly, *Rogers* and *Chambers* then moved for the discharge of Captain

bodies to prison; but if the prosecution shall be for any offence or offences against this act, punishable only as a misdemeanor, then the person or persons against whom such capias shall issue, being thereupon arrested, shall be imprisoned and bailable according to law, as in other cases of misdemeanor."

(*a*) It was stated in argument that the warrant had in fact been made up at the sheriff's office by filling up, with some alterations, a printed form of a warrant for an attachment for contempt. The capias on which the warrant issued was as follows: "Victoria, by the grace of God," &c. "To the sheriff of Middlesex, greeting, We command you that you do not forbear, by reason of any liberty in your bailiwick, but that you take Archibald Douglas, if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us at Westminster," &c., "to answer to us for certain misdemeanors whereof he is impeached, and also for certain penalties and forfeitures sued for in our court before us by Sir Frederick Pollock, knight, our Attorney General, on our behalf, against the said Archibald Douglas, amounting in the whole to the sum of 12,800*l*. Witness Thomas Lord Denman," &c.

"By the Court, DEALTRY."

Endorsed, "Pursuant to statute 33 G. 3, c. 52, s. 141, upon an information exhibited in the court of our lady the Queen before the Queen herself, against the within named Archibald Douglas, for certain misdemeanors."

Douglas. It does not distinctly appear whether the arrest is under criminal or civil process. But, even if sect. 62 of stat. 33 G. 3, c. 52, create what may technically be termed a criminal charge, the proceeding here is, in effect, instituted for the recovery of 12,000*l*. penalties. It is like an Exchequer process, or a qui tam action. The form is manifestly taken from the ordinary form of bailable process. The Attorney General is named: but the
*835] court will look to *the effect. It must be considered as if the information, though filed by the Attorney General ex-officio, were really laid by the East India Company. Then the court will not permit the arrest to take effect. In *Rex* v. *Delaval*, 3 Burr. 1434, S. C. 1 W. B. 410, this court had discharged a young woman on habeas corpus, and it having been suggested that an attempt would be made to interfere with her freedom as she returned from court, Lord Mansfield declared that any one who did so would do it at his peril; and, in observing upon the authorities, he said that, "wherever the court does not think fit to deliver the parties into any special custody, they will privilege them, redeundo. If the court refuses that, it impliedly directs the parties to break the peace, even in Palace Yard. In *Rex* v. *Blake*, 4 B. & Ad. 355, a party was discharged by a judge at chambers from an irregular writ de contumace capiendo; as he returned from the judge's chambers he was arrested on a second writ de contumace capiendo, which was regular; and it was held that he was entitled to be discharged. Even if the process be criminal in the fullest sense of the word, the court will discharge the party if the criminal process appear to be set on foot by the party instituting the former process under which the illegal custody has taken place. Thus, though a party discharged from illegal custody on a criminal proceeding is in general not privileged from arrest on civil process, yet, if the plaintiff in the civil suit be privy to the detainer on the criminal process, the court will order a discharge; per Parke, J., in *Jacobs* v. *Jacobs*, 3 Dowl. P. C. 675, 677. Here the whole proceeding has the
*836] appearance of a deliberate trick. Captain Douglas is illegally *imprisoned on the statute, (5 & 6 Vict. c. 12,) which, as appears by the interpretation clause, sect. 56, extends only to soldiers and non-commissioned officers: and, in the mean while, an information is filed against him on the day before his discharge from the illegal detainer.

Sir *F. Pollock*, Attorney General, Sir *W. W. Follett*, Solicitor General, *Clarkson*, *W. F. Pollock* and *Forsyth*, contrà. The only question is, whether this be a criminal charge. If it be, the party is not privileged when returning home; and, even when he is at home, the officer armed with a warrant under the criminal charge may break open the dwelling-house. This negatives the possibility of a stratagem; for no stratagem in such a case would be necessary, the law giving the power to arrest the defendant whether away from home or not. Now sect. 62 of stat. 33 G. 3, c. 52, (which carries out the object of stat. 24 G. 3, c. 25, ss. 64, &c.,) expressly enacts that the offence with which Captain Douglas is charged shall be a misdemeanor, and be punished as such. It is true that the defendant is "also" to forfeit the whole gift or present: but the forfeiture is to the Crown.(a) An ex officio information was filed for the same offence, in *Rex* v. *Stevens*, 5 East, 244. This case is reported only as to certain points of criminal pleading: but the original proceedings have been inspected; from which it appears that the defendants were fined 5000*l*. and imprisoned for two years; besides which they forfeited to the Crown 12,500*l*., the amount of the gift received. This shows that the liability to the forfeiture or penalty

(a) Unless the court otherwise order, under sect. 63.

does not prevent the proceeding from being strictly of a criminal [*837 *nature. *Rex* v. *Blake*, 4 B. & Ad. 355, merely decided that, where a party had been discharged from imprisonment on irregular process for costs in an Ecclesiastical Court, he could not be taken redeundo by a regular process for the same costs. *Rex* v. *Delaval*, 3 Burr. 1434, S. C. 1 W. Bl. 410, shows only that, where a party is discharged on habeas corpus, he shall have the full benefit of that discharge: but it does not prove that such a discharge protects from criminal process. It may be worth while to point out that a discharge from criminal process gives, in general, no protection redeundo from any other process; *Goodwin* v. *Lordon*, 1 A. & E. 378; *Anonymous* case in 1 Dowling's Practical Cases, 157.

Kelly, in reply. The general law is not in dispute: but here the prosecutors, by asserting the claim of a penalty on the face of the warrant, have given a civil character to the whole proceeding.

Lord DENMAN, C. J. Where a party, being unlawfully in custody upon civil process, is discharged from such custody by this court, he is privileged, during his return home, from arrest under civil process. The question therefore is, whether the process upon which Captain Douglas is now detained be civil or criminal. And the question is of great importance: for the necessity of duly enforcing the criminal law is not less imperative than that of protecting from illegal arrest. A party discharged from illegal civil process is privileged during his return home: but the home itself, as was well put by Mr. *Clarkson, is no protection against criminal process. Then, [*838 is this warrant upon a civil or criminal process? I think it perfectly clear that it is upon a charge of misdemeanor, although one consequence of the conviction for misdemeanor may be the forfeiture of certain penalties to the Crown. The charge sounds in crime, and leads to punishment. The arrest in this case is therefore not forbidden by the duty which this court owes to itself of protecting the individuals whom it may discharge, during their return to liberty. The nature of the privilege of a party returning after a discharge has been much discussed. But, if this warrant had been put into the hands of the officer soon after the party had left the precincts of the court, (which of themselves are a protection from violence,) we should be bound to say that there was no privilege against such a warrant, provided the proceeding were bonâ fide. The remark of PARKE, J., in *Jacobs* v. *Jacobs*, 3 Dowl. P. C. 677, applies only to cases where a party has, by trick and collusion, availed himself of criminal process, to which he has been privy, for the purpose of getting custody of the person charged. That the court would not permit. We should not allow a plaintiff in a civil suit to avail himself of a custody under a criminal process set on foot only to carry the civil process into effect. But here the first charge was of one offence; the second of another. There is not the least ground for saying that the Crown issued the first in order to obtain the means of detaining under the second. The second arrest is therefore not illegal: and the privilege claimed cannot be allowed upon any principle of common law.

*WILLIAMS, COLERIDGE, and WIGHTMAN, Js., concurred; and [*839

No rule was granted.

JAMES GODDARD and HOLLAND GODDARD *v.* THOMAS INGRAM and WILLIAM WARTNABY.

Indebitatus assumpsit against J. and W.; plea, the Statute of Limitations; replication, that the debt accrued within six years. The debt was originally contracted with J., W. and S.; and S., more than six years afterwards, and within six years of the action being brought, made a payment in respect of it to plaintiff. S. became bankrupt shortly after; and the jury found that he made the payment in fraud of J. and W., and in expectation of immediate bankruptcy. *Held* that, nevertheless, the payment barred the operation of the statute.

ASSUMPSIT for money lent, money paid, interest, work and labour, and on an account stated.

Plea 2. That the several alleged causes of action in the declaration mentioned did not, nor did any or either of them, accrue to the plaintiffs at any time within six years next before the commencement of this suit, in manner, &c. Replication. That the causes of action did accrue within six years, &c., in manner, &c.: conclusion to the country. Issue thereon. Several other issues were joined.

On the trial, before GURNEY, B., at the Leicester Summer assizes, 1841, the plaintiffs proved that Ingram, Wartnaby, and a person since deceased, named Henry Shuttleworth, had been partners as attorneys at Market Harborough, and that the firm had kept a banking account with the plaintiffs, who were bankers at the same town. The partnership of Shuttleworth, Ingram, and Wartnaby was dissolved in 1829: and the claim of the plaintiffs arose upon the state of the balance at the time of the dissolution, which was then in favour of the plaintiffs to the amount of about 2000*l.* Some payments were subsequently made, up to 1832, reducing the balance to between 1400*l.* and 1500*l.* None of these payments were made within six *840] years of the commencement of the *action, which was in 1841. It appeared that, up to the year 1835, letters had been written by the plaintiffs to the different members of the late firm of Shuttleworth, Ingram and Wartnaby, pressing for a settlement of accounts. In that year the two defendants had complained, in conversation with a customer of the bank, that Shuttleworth was greatly indebted to themselves on the balance of partnership accounts, and requested the customer to persuade the plaintiffs to sue the three, adding that, if this was not done, they would avail themselves of the Statute of Limitations. Upon this being mentioned to the plaintiff, Holland Goddard, he declared that he would have nothing to do with the partnership disputes of Shuttleworth and Co.; that all the three were jointly liable; and that he should look to all to discharge the debt. No action however was then commenced.

The plaintiffs relied upon two payments as taking the case out of the Statute of Limitations. The first was as follows. In 1839, Messrs. Goddards were directed by parties who had a balance in their hands, and were indebted to the firm of Shuttleworth and Co., to pay to the members of that firm a sum on account of the debt. Messrs. Goddards paid accordingly; and Shuttleworth paid his third part, amounting to 23*l.* 17*s.* 6*d.*, to Messrs. Goddards on account of the balance owing from Shuttleworth and Co. to Messrs. Goddards. The second payment was as follows. The plaintiff, James Goddard, was indebted, on his single account, in 35*l.* 11*s.* 6*d.* to Shuttleworth and Co. On 12th December, 1839, he placed that sum to the account of Shuttleworth and Co., in the bank of the plaintiffs, by a check signed James Goddard. A day or two afterwards, Shuttleworth called at

does not prevent the proceeding from being strictly of the credit [*841
*nature. *Rex* v. *Blake*, 4 B. & Ad. 355, merely decide been done,
a party had been discharged from imprisonment of bankruptcy issued
costs in an Ecclesiastical Court, he could not be ta der which he was after-
process for the same costs. *Rex* v. *Delaval*, 3 the commencement of the
410, shows only that, where a party is discharg a distance of more than six
have the full benefit of that discharge: but defendants insisted that these
discharge protects from criminal process. could not, especially being
out that a discharge from criminal proce the case out of the statute as
redeundo from any other process; Gr
Anonymous case in 1 Dowling's Pract and on this issue for the defendants,
Kelly, in reply. The general law de, not bonâ fide, but in fraud of the
cutors, by asserting the claim of a bankruptcy." The jury found for the
given a civil character to the wh further question from the learned Baron,
Lord DENMAN, C. J. Whe ments to have been made by Shuttleworth
civil process, is discharged fr The verdict was for the plaintiffs on all the
during his return home, fror
fore is, whether the proc *Hill*, for the plaintiffs, obtained a rule for a
be civil or criminal. A misdirection, and also on the ground that the
cessity of duly enforcin ght of evidence. In this term,(a)
protecting from illega showed cause. The payment made, and that
is privileged during rth, do not bar the effect of the statute of limitations.
by Mr. *Clarkson, that Shuttleworth was acting in fraud of the *partners,
is this warrant up void as against them. In 6 Vin. Abr. 473, [*842
clear that it is ur are collected, which show how far the courts
the conviction f fraudulent acts. It was formerly understood that a pay-
the Crown. ledgment, barred the statute by furnishing evidence of the
arrest in this and thus drawing it down to within six years of the action.
owes to itsel held that the payment or acknowledgment operates only by
their return of a fresh promise; *Pittam* v. *Foster*, 1 B. & C. 248; (b)
a discharg 6 B. & C. 603; *Burleigh* v. *Stott*, 8 B. & C. 36; *Gowan*
into the h 3 B. & Ad. 507; (c) and, accordingly, a conditional promise will
court, (v statute, unless the condition be performed; in that case, indeed,
bound t the promise may be described as unconditional; *Irving* v.
the pr 3 M. & W. 90. Then did the defendants make a fresh promise in
Jacob this specific debt, within the six years, either expressly or im-
trick The finding of the jury negatives the presumption of Shuttleworth's
bee do this in respect of the firm. Moreover, the payment was not
the till the statute had run out; so that the liability had ceased to exist,
to no authority could remain to revive it. In *Whitcomb* v. *Whiting*,
c 2 Doug. 652, where it was held that a payment by one of several makers of
a note barred the statute as against all, it did not appear that the statute had
run out when the payment was made: Lord MANSFIELD said, "when cases of
fraud appear, they will be determined on their own circumstances;" and
WILLES, J., added that the other maker of the note had "had the *ad- [*843
vantage of the partial payment, and, therefore, must be bound by
it." Payment by one binds the others, as Lord MANSFIELD there said, on
the principle that each is agent for the others. This principle explains
Jackson v. *Fairbank*, 2 H. Bl. 340; *Wood* v. *Braddick*, 1 Taunt. 104;

(a) November 16th. Before Lord Denman, C. J., Williams, Coleridge, and Wightman, Js. The case was adjourned.
(b) See *Bland* v *Haselrig*, 2 Vent. 151.
(c) See *Bateman* v. *Pinder*, antè, p. 574.

36; *Pease* v. *Hirst*, 10 B. & C. 122; *Perham* ...*rston* v. *Robertson*, 4 Man. & R. 440; and ...494. But here the agency is negatived. ...s the point raised, that the payment was ...out; (*a*) and there the decision was on the ...*n* v. *Robertson*, where the point was not ad-...ud in either of those two cases. The language ... *Tredgold*, 2 B. & C. 23, is against the liability ... must be admitted, on the authority of *Jackson* v. ... *Braddick*, that even the dissolution of the partner-... end to the power of each partner in this respect, (though ... the power expires; *Petherick* v. *Turner*, cited in *Wood* v. ... still the act must be done in the ordinary course of business ... implied consent, at least, of the others. That is clearly a ... the jury, like the effect of an acknowledgment; *Linsell* v. *Bonsor*, ...a. 241. In default of evidence, the presumption is that all is done ...rdinary course: but this may be negatived; as, for instance, if, upon
...4] a sale by two *partners, one partner, in the presence of the other and the vendee, were to refuse to warrant, but the other were to warrant. Suppose, in the present case, the two defendants on this record had been present when Shuttleworth made the payment, and had protested against it; would that have been a valid promise by the three? One partner cannot, after the dissolution of the partnership, without the consent of the other, give a cognovit for debt and costs as between attorney and client on behalf of the two; *Rathbone* v. *Drakeford*, 6 Bing. 375. Even as to matters which relate to a subsisting firm, one cannot bind the other by submission to arbitration; *Adams* v. *Bankart*, 1 C. M. & R. 681, S. C. 5 Tyrwh. 425.(*b*) A collusive receipt by one of two partners will not operate as a discharge to their debtor; *Henderson* v. *Wild*, 2 Campb. 561. The partner cannot go beyond his power as an agent, any more than any other agent can; and the limitation of an agent's power in general will be enforced as to acknowledgments barring the statute; *Linsell* v. *Bonsor*.

Hill, *Mellor*, and *K. Macaulay*, appeared now in support of the rule, but were not called on.

Lord Denman, C. J. The rule for a new trial must be made absolute. We cannot forbear acting upon the numerous authorities. Rule absolute.

(*a*) The fact, however, seems to have been so in *Wood* v. *Braddick*, 1 Taunt. 104.
(*b*) See *Stead* v. *Salt*, 3 Bing. 101. Also *Boyd* v. *Emmerson*, 2 A. & E. 184.

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*845]

*MILES *v.* BOUGH.

An act for building a bridge (11 G. 4, & 1 W. 4, c. lxix, local and personal, public) created trustees, and provided that parties who agreed to give or lend money in aid of the trust should pay it to the treasurer of the trustees at such times and in such proportions as the trustees should order: and that, on neglect or refusal to pay, the trustees might sue for and recover the same, in the name of their treasurer, by action of debt or on the case. *Held*,

1. That debt or case might be brought, at the option of the trustees, on an agreement either to give or to lend.
2. That no party could be sued for non-payment of a call till he had received due notice thereof, though the statute did not expressly require notice.
3. That an order by the trustees to pay the money at a given banker's, *to the account of M., treasurer to the trustees*, was a good call.

The act provided that, where any notice was to be given by the trustees, such notice

should be in writing or in print, signed by three or more of the trustees or their clerk or clerks for the time being by their order. *Held,*

4. That it was sufficient for the declaration to state that the calls were made by order of the trustees, and that the defendant had due notice of the calls, to wit, by notice in writing, signed by the clerks of the trustees; and that it was no objection, at least after verdict, that the notice was not alleged to have been given by order of the trustees.
5. That a notice signed with the names of the clerks to the trustees, but signed in fact not by such clerks, but by a clerk employed by them, was insufficient; and that, where this appeared to be the only notice, the objection was not cured by an express promise to pay. But
6. That a jury might infer a good notice, ordered by the trustees and duly signed, from the fact of an express promise to pay, though it appeared in evidence that a bad notice had been sent to the defendant; if it did not appear by direct evidence that this was the only notice sent.
7. *Semble,* per Coleridge, J., that a signature by one of two joint clerks to the trustees, in the name of the two, was sufficient.
8. That an agreement to lend 25*l.* might be inferred for a written memorandum, signed by defendant, recognising an agreement to subscribe some money, coupled with an express promise to pay calls corresponding with a loan of 25*l.*, and actual payment, on a previous occasion, of a sum corresponding to a call, defendant at the same time taking a receipt expressed to be for a call on a loan of 25*l.* And that such evidence was not invalidated by sect. 4 of stat. 29 C. 2, c. 4, though a prospectus had been issued by the trustees before the agreement, showing that the whole sum would not be called for within a year, and though in fact it was not so called for.

The act provided that the trustees should keep a book, and proper entries be made therein of the names of the trustees who should attend the meetings, and of all orders and proceedings made or taken relative to the execution of the act; and that *the chairman of every meeting of the trustees should subscribe his name at the end of the proceedings of the said trustees at such meeting;* and all such books should be admitted as evidence in all courts and upon all occasions whatsoever. In practice, the clerk of the trustees made up the entry of the proceedings in the book after the close of a meeting, and the chairman of that meeting used to sign the entry of the proceedings at some subsequent time. *Held,*

9. That the book in which the proceedings were so entered and signed was good evidence within the above provision.
10. But that the statute did not make such book the only evidence of the proceedings; and therefore an order of the trustees to give notice of calls might be inferred, as above, (pl. 6,) though not entered in the book, from the defendant's promise.

The statute required a pecuniary qualification in the trustees, and imposed a disqualification in case of being interested in contracts, or a licensed victualler, &c., and inflicted a penalty for acting without being qualified, or without taking the oath after mentioned, or if interested, &c.: but it provided that all acts of persons acting as trustees, though not qualified, or being disqualified, previous to their being convicted of the offence, should be valid. It then enacted that no person should be capable of acting as trustee (except in administering the oath) until he should have taken and subscribed an oath set out in the statute, which oath it should be lawful for any trustee to administer: and the oath so taken and subscribed by each trustee should be entered in the book of proceedings. *Held,*

11. That the acts of trustees who had not been sworn were not valid.

At the beginning of the book of proceedings the statutory form of oath was copied out, with blanks for the names; and beneath this were the signatures of the several trustees, without date or other memorandum. In the subsequent minutes of proceedings at the several meetings were entries stating that the several trustees, whose names were subscribed to the oath, had been sworn at such meetings. *Held,*

12. That this was sufficient evidence of the trustees having been duly sworn.

DEBT by the treasurer of the trustees for the purposes of an act of parliament, &c., (11 G. 4, & 1 W. 4, c. lxix., local and personal, public) (*a*), *being the nominal plaintiff for and on behalf of the trustees. [*846

The first count alleged that heretofore, to wit, 1st *January, 1835, [*847

(*a*) "For building a bridge across the river Avon, from Clifton, in the county of Gloucester, to the opposite side of the river in the county of Somerset, and for making convenient roads and approaches to communicate therewith."

Sect. 1 recites a bequest made by William Vick of moneys in trust to be laid out in

defendant agreed with the trustees to lend the sum of 25*l.* to the said trustees
*848] towards carrying the said act into execution; the said sum, with *interest thereon, to be secured and repaid to defendant in manner in and by the act directed in that behalf: and thereupon, according to the said

building a bridge over the Avon, from Clifton Down to Leigh Down, procuring the act of parliament, making compensation, &c.; that an alteration of the plan was desirable; that divers persons had subscribed, and others were willing to subscribe, money in aid of the trust, if such alteration were made, and that several persons had agreed to lend and advance certain sums, on condition of a toll being imposed till principle and interest should be repaid. It is then enacted that the fund, and all sums subscribed or to be subscribed, be vested in the master of the society for the time being of Merchant Adventurers in Bristol, the senior sheriff of Bristol for the time being, and Thomas Daniel, and their successors to be elected as after mentioned, discharged of the trusts of the will and upon the trusts thereinafter declared.

Sects. 2 and 3 give power to the existing trustees to elect thirty-five new trustees.

Sect. 4 directs the supplying of vacancies in the number of trustees, by election to be made by the surviving and remaining trustees. "And every trustee who shall be so elected and appointed as aforesaid (having taken and subscribed the oath or affirmation hereinafter directed, and being qualified in manner hereinafter mentioned,) shall have the same power and authority to act in the execution of this act as was vested in the trustee in whose place or stead he shall have been elected and appointed as aforesaid."

Sect 5 enacts: "That no person (except he shall become a trustee by virtue of his situation or office) shall be capable of being elected or appointed a trustee, or of acting as a trustee under this act, unless at the time of his election or appointment and acting he shall be seised or possessed," &c., (a pecuniary qualification was then set forth); and if any such person hereby appointed or who shall be elected or appointed a trustee under this act (except as aforesaid) shall act as such without being qualified as aforesaid, or without taking the oath or affirmation herein-after mentioned, or shall act as a trustee relating to any matter or thing in which he shall be personally concerned or interested, or being a licensed victualler, or being concerned or interested in any contract relating to this act, every such person shall for every such offence forfeit and pay the sum of 100*l.* to any person or persons who shall sue for the same, to be recovered, together with full costs of suit, in any of his majesty's courts," &c.; "Provided also, that all acts and proceedings of any person or persons acting as a trustee or trustees in the execution of this act, though not being duly qualified or being disqualified as aforesaid, previous to his or their being convicted of the said offence, shall, notwithstanding such conviction, be as good, valid, and effectual as if such person or persons had been duly qualified and not disqualified to act as a trustee or trustees according to the directions of this act.

Sect. 6. "Provided also, and be it further enacted, that no person shall be capable of acting as a trustee in the execution of this act (except in administering the following oath or affirmation) until he shall have taken and subscribed an oath or affirmation in the form or to the effect following; (that is to say,)

"'I, A. B., do swear,'" &c., (the words of the oath were then set out;) "which oath or affirmation it shall be lawful for any one of the said trustees to administer, and he is hereby required to administer the same to any other of the said trustees; and the said oath or affirmation so taken and subscribed by each such trustee shall be entered in the book of proceedings of the said trustees to be kept by their clerk for the time being."

Sect. 11 enacts: "That the said trustees shall cause to be provided and kept a proper book, and proper entries made therein of the names of the several trustees who shall attend the respective meetings, and of all orders and proceedings made or taken relative to the execution of this act; and the chairman of every meeting of the said trustees shall subscribe his name at the end of the proceedings of the said trustees at such meeting; and all such books, and also all books kept for registering mortgages," &c., "shall be admitted as evidence in all courts and upon all occasions whatsoever; and all such books shall at all seasonable times be open to the inspection of the said trustees and of any creditor," &c.

Sect. 13 enacts: "That the said trustees shall and may, whenever they shall think proper, appoint and employ a treasurer or treasurers, clerk or clerks, surveyor or surveyors, and such other officer or officers, person, or persons, for the execution of this act, or for any other matter or thing relating to the powers hereby vested in the said trustees, as they the said trustees shall think proper; and the said trustees shall and may from time to time remove them or any of them, and in like manner appoint others in the room of those removed."

act, defendant *then became and was liable to pay the sum so agreed to be lent to the treasurer of the trustees, at such times and in such parts and proportions as the trustees should order and direct; that afterwards, to wit, on 20th November, 1837, a part, to wit, 15 per cent. only, of the moneys given and lent towards carrying the act into execution having before then been called for by the trustees or paid by the persons who had respectively agreed to give or lend the said moneys, the trustees by their order then made, ordered and directed that ten per cent. should be paid by the persons who had agreed to give or lend money towards carrying the act into execution, the same to be paid to plaintiff, then being the treasurer of the trustees, on or before 20th January, 1838; which day, at the commencement of this suit, had long elapsed; of which order of the trustees defendant, before the last-mentioned day, to wit, on 22d November, 1837, and on divers days, &c., had due notice, to wit, by notice in writing signed by the then clerks of the trustees, and then left at the then usual place of abode of defendant; and defendant was then requested by the trustees to pay the amount by the said order directed to be paid, at the time and in manner in the *said order in that behalf mentioned: yet the defendant has not paid the said amount, or any part thereof. Whereby, and by reason of the non-payment, &c., an action has accrued to plaintiff to demand and have from defendant 2*l.* 10*s.*, being ten per cent., &c. [*849] [*850]

2d count. That afterwards, to wit, 15th October, 1838, 25 per cent. only having been called for and paid, the trustees ordered 10 per cent. to be paid to plaintiff on or before 19th January, 1839, of which defendant had notice on 16th October, 1838. The form of the count was in other respects like that of the first.

Several clauses are then added, regulating the conduct of the company, and giving them powers for carrying the purposes of the act into effect.

Sect. 85 enacts: "That the several persons who have agreed to give or lend, or who shall hereafter agree to give or lend, any money towards carrying this act into execution, and their several and respective heirs, executors, and administrators, shall and they are hereby required to pay the respective sums so agreed to be given or lent, or which shall hereafter be agreed to be given or lent, to the treasurer of the said trustees, at such times and in such parts and proportions as the said trustees shall order and direct and if any person shall neglect or refuse to pay the same as aforesaid, it shall be lawful for the said trustees to sue for and recover the same in the name of their treasurer in any of his majesty's courts of record, by action of debt or on the case, or by bill suit, or information, wherein no essoign, protection, wager of law, or more than one imparlance shall be allowed."

Sect. 109 enacts: "That in all cases where it may be necessary for any person to serve any notice or other proceeding upon the said trustees, service thereof respectively upon any one of the said trustees who may be a member of a committee for managing the affairs of the said trustees, or left at his last or usual place of abode, or upon the clerk or clerks of the said trustees, or left at the office of such clerk or clerks, or at his or their last or usual place of abode, shall be deemed sufficient service of the same upon the said trustees; and in all cases where it may be necessary for the said trustees to give any notice to any person or body whomsoever under the provisions of this act, such notice shall be in writing or in print, and be signed by any three or more of the said trustees, or by the clerk or clerks for the time being to the said trustees by their order, and shall be delivered to such person, or left at his last or usual place of abode, or be delivered to some member of such body, or left at his last or usual place of abode, or to some clerk or other officer of such body, or left at the office of such clerk or other officer, or at his last or usual place of abode, except in cases in which any other mode of giving such respective notices is by this act particularly directed; and in all cases where any public notice is by this act directed to be given by the said trustees," (except where otherwise by this act directed,) "such notice shall be in writing or in print, and be signed by any three or more of the said trustees, or by the clerk or clerks to the said trustees for the time being, and be affixed," &c.; "and all such notices so published and given shall be good and available in law for all the purposes of this act"

3d count. The same, mutatis mutandis, stating an order on 17th August, 1839, 35 per cent. only having been called for or paid, for 10 per cent., to be paid to plaintiff on or before 14th September, 1839; notice to defendant on 19th August, 1839.

4th count. The same, stating an order on 16th November, 1839, 45 per cent. only having been called for or paid, for 20 per cent., to be paid to plaintiff on or before 20th January, 1840: notice to defendant on 18th November, 1839; whereby an action, &c., for 5*l.*

5th count. The same, stating an order on 6th August, 1840, 65 per cent. only having been called for or paid, for 20 per cent., to be paid on 14th September, 1840; notice to defendant on 8th August, 1840.

Pleas. 1. That defendant did not agree in manner, &c.: conclusion to the country. Issue thereon.

2. That plaintiff was not, at the time of the commencement of this suit, the treasurer of the said trustees for the purposes of the act, in manner, &c.: conclusion to the country. Issue thereon.

3. That defendant had no notice of the respective order of the trustees in
*851] the declaration mentioned, or *any or either of them, in manner, &c.: conclusion to the country. Issue thereon.

4. A plea of fraud; which was traversed in the replication. Issue on the traverse.

5. This plea was demurred to. Joinder in demurrer.

6. That no such orders as in the declaration mentioned were, nor was any or either of them, made at a meeting of the trustees duly held in accordance with the directions of the act, as in and by the said declaration, &c.: conclusion to the country. Issue thereon.

7. That the trustees in the declaration mentioned were not, or was any or either of them, at the times of making the orders respectively, trustees or a trustee duly appointed and qualified according to the directions and within the true intent and meaning of the act, &c.: conclusion to the country. Issue thereon.

8. This plea was demurred to. Joinder in demurrer.

On the trial of the issues in fact, before MAULE, J., at the Bristol Summer assizes, 1841, for the purpose of proving the agreement by defendant to lend the 25*l.*, a paper was put in, signed by defendant among others, in the summer of 1836, of which the following is a copy.

"Clifton Suspension Bridge.

"The undersigned having engaged to subscribe the several sums set against our respective names towards the erection of this bridge upon the terms that the additional sums subscribed shall amount to the sum of 17,000*l.*, and it appearing that upon this condition subscriptions to the amount of
*852] 9000*l.* and upwards have *been obtained, we hereby agree (with the view to avoid the consequences of further delay, and in the expectation that, when the works shall have been commenced, further aid will more readily be obtained) to dispense with the condition above stated, and that the subscriptions we have made shall be, and be deemed to be, so made, subject only to and upon the terms of the acts of parliament passed for carrying the undertaking into effect."

The engagement referred to in this document was not produced, or its existence shown: and the only attempt made to prove the amount of the defendant's undertaking was proof of payment by him of a call earlier than those now sued for, which payment corresponded to 25*l.*; and that a receipt was given to him, expressed to be on a call on a loan of 25*l.* It appeared

also that, before the above document was signed, a prospectus had issued, which, as was contended for the defendant, showed that it was not intended to call for the sums till the expiration of more than a year. It was objected that, as the agreement was not to be performed within a year, a memorandum in writing was necessary under sect. 4 of the Statute of Frauds, 29 C. 2, c. 3; that the paper did not satisfy this requisite, not naming the sum; and that the defect could not be supplied by oral evidence. The learned judge overruled this objection.

To prove the proceedings of the trustees, including the appointment of the treasurer, a book was produced as evidence under sect. 11 of the local act. The book contained what purported to be the proceedings of the trustees at their several meetings; and the minutes of each meeting were signed with the name of *the chairman of such meeting. It appeared, however, by parol evidence, that those signatures were not affixed at the time of or immediately upon the close of the several meetings; but that the course of proceeding was for the clerk, at some time after each meeting, to enter the minutes in the book, and for the chairman to call at some subsequent time, at the office where the book was kept, and then to affix his signature. It was objected that this was not a compliance with sect. 11, and that the book was not evidence. The learned judge overruled this objection. [*853

To show that the trustees had been duly sworn, so as to entitle them to act, the following evidence was relied upon for the plaintiff. At the beginning of the book was a transcript of the form of oath set out in sect. 6, leaving blanks for the names. Below this were the signatures of the trustees who had acted, without any memorandum of the persons before whom they had taken the oath, or (with two or three exceptions) of the dates of the signatures. But the minutes of the several meetings contained entries, purporting that trustees, at different meetings, had taken the oath; and the names of these trustees corresponded with the signatures below the form of oath. The counsel for the defendant objected that this was not a sufficient proof of the swearing by the trustees; but the learned judge held it to be sufficient.

The orders (except one) (*a*) were proved by the book: the following is the form of one of them, made 20th November, 1837. "Ordered and directed, that *the sum of 10*l.* per cent. be paid by the several subscribers or persons who have agreed to give or lend money towards carrying the act into execution, the same to be paid into the bank of Messrs. Miles, Harford and Company on or before the 20th day of January next, to be placed to the account of Philip John Miles, Esq., treasurer of the trustees." The other orders, so far as respects the present decision, were in the same form. The plaintiff was proved to have been appointed treasurer, and also to be a partner in the bank of Miles, Harford and Co. It was objected for the defendant that the order should have been made to pay to the treasurer as such, and that the calls therefore were invalid. The learned judge overruled this objection. [*854

It was then proved that the following letter had been written to the defendant, before the commencement of the action.

"Sir,

"Preparatory to taking legal proceedings against you for the recovery of the calls in arrear on your subscription of 25*l.* to the Clifton Suspension Bridge, we are desired, for the last time, to apply to you for the payment of

(*a*) The claim in respect of this was abandoned on the argument in banc.

such arrears, which amount to the sum of 17*l.* 10*s.*, and to inform you that, unless the same are paid into the bank of Messrs. Miles, Harford and Co. of this city, to the credit of Philip John Miles, Esq., the treasurer of the trustees, on or before this day week, we shall lose no time afterwards in complying with the positive directions we have received to institute proceedings against you. Five of the calls made upon you are in arrear: and the subjoined statement will show the amount of each, and the times at which
*855] the same *were severally ordered by the trustees and became payable by you.

"We are, sir, your obedient servants,
"OSBORNE, WARD, and Co.
"Bristol, 30th November, 1840.

"Mr. William Bough.

"Instalment.	Amount.	When made.	When payable.
3d.	10*l.* per cent.	20th November, 1837.	20th January, 1838.
4th.	10*l.* per cent.	15th October, 1838.	19th January, 1839.
5th.	10*l.* per cent.	17th August, 1839.	14th September, 1839.
6th.	20*l.* per cent.	16th November, 1839.	20th January, 1840.
7th.	20*l.* per cent.	6th August, 1840.	14th September, 1840.

"P. S. You will be pleased to take notice that the trustees will expect you to pay interest on the arrears at the current rate from the date of this letter to the day of payment."

It was shown that Messrs. Osborne and Ward were attorneys in partnership, who had been appointed clerks to the trustees; but their names were written, not by either of themselves, but by a clerk whom they, as attorneys, employed in their service. It was also proved that, after this notice had been given, the defendant had expressly promised to pay the three calls first mentioned in it. For the defendant it was objected that the action did not lie till notice of the calls had been given, and that the above notice, so signed, was insufficient under sect. 109. The learned judge overruled this objection.

It was also objected for the defendant that the action was misconceived, and should have been brought in case, under sect. 85. The learned judge overruled the objection, reserving leave to move for a nonsuit upon it, if the court should consider that the question as to the form of action could be raised in this way.

Verdict for the plaintiff.

*856] *In Michaelmas term, 1841, *Bompas*, Serjt., obtained a rule nisi for a nonsuit, or new trial, or reduction of damages.

Erle and *Butt* now showed cause. First, the objection as to the chairman's signature rests on a misinterpretation of sect. 11. "At the end of the proceedings," does not mean the moment at which the proceedings close, but the place in the book where the entry terminates; the words "at such meeting," are connected with "proceedings:" the effect is that the chairman of every meeting must sign his name at the foot of the entry of the proceedings which have taken place at that meeting. There is no provision as to the time of signature; nor would such a provision have been reasonable: it would practically be impossible to draw the minutes regularly up, and have them signed, at the meeting: indeed the proceedings are in strictness not ended till the meeting is over; so that it would be impossible to comply with the act, as interpreted on the other side. *The Southampton Dock Company* v. *Richards*, 1 M. & Gr. 448, is a case directly in point for the plaintiff, and must be considered to have overruled *Regina* v. *The Mayor of Evesham*, 8 A. & E. 266, which was cited

when this rule was obtained, if the two be inconsistent. There is, however, no inconsistency. *Regina* v. *The Mayor of Evesham* decided only that, under the particular circumstances of the case, the party applying for a mandamus had not established sufficient ground for the interference of this court.

Next, as to the swearing in of the trustees. The *whole facts, including the time of swearing, appear from the book itself; it cannot be material that one part is explained by the other. It does not, indeed, appear in express terms before which trustees the several oaths were taken: but that need not appear: the oaths do appear to have been taken at meetings which are specified, and which must be attended by trustees. The oath is only for the purpose of binding the conscience of the party: it could not be the subject of an indictment for perjury. Even if it had not been taken at all, it does not follow that the proceedings would be void. In *Rex* v. *The Justices and Treasurer of Herefordshire*, 1 Chit. Rep. 700, it was held that the election of a county treasurer by the justices was not avoided by the fact that one of the justices had not taken the qualification oath prescribed by stat. 18 G. 2, c. 20, s. 1. So parties are not trespassers for acting under the warrant of a justice who has not taken the oath; *The Margate Pier Company* v. *Hannam*, 3 B. & Ald. 266. Here sect. 6 is merely by way of proviso: and sect. 5, in which sect. 6 is incorporated, makes good the acts of trustees though not qualified. [*857

Next, the orders calling for the payment are good. Sect. 85 directs that the payments are to be made to the treasurer: the orders direct that they shall be paid to his account at the bank. This is no more than if his house were specified as the place of payment. If no place had been named, there might perhaps have been a ground for objection. Besides, the defendant has expressly promised to pay.

Next, as to the notice of calls. Sect. 85 requires no notice. Where the notices, to which sect. 109 *refers are necessary, they are expressly required by the act.(a) Again, the defendant, having expressly promised to pay, cannot now object to want of notice of liability. [*858

Next, the agreement to lend the money is not within sect. 4 of the Statute of Frauds, 29 C. 2, c. 3. Under sect. 85 the trustees might call for the money when they chose: that is, the money was payable on request. That the request is not in fact made within the year is immaterial. And, further, the express promise is evidence of a legal agreement, whatever form was necessary.

Lastly, as to the form of action. That is properly a question on the record, not a ground of nonsuit. Further, stat. 85 gives an absolute option to the company to sue either in debt or case. And, without the express language of the clause, it is enough that sect. 85 orders payment to be made. "Debt lies upon any statute, which gives an advantage to another, for the recovery of it;" Com. Dig. *Debt*, (A 9,) referring to an *Anonymous* case in 6 Modern Reports, 26.

Bompas, Serjt., and *Manning*, Serjt., contrà. First, if the book, with such signatures, be evidence under sect. 11, it would be evidence at whatever

(a) Sect. 35, the clause for the assessment of the value of lands taken, damaged, &c., speaks of twenty-one days' notice to the trustees of a refusal to accept an offer; of twenty-one days' notice to parties interested in the lands; and of seven days' notice, by the trustees, of the inquisition to be held for the assessment. Sect. 43 requires notice of complaint of damage to be given to the trustees within six calendar months of the doing thereof. Sect. 45 requires tenants at will, &c., to give up possession at the expiration of six months' notice by the trustees. Other instances occur in the act.

*859] distance of time *from the meetings the signatures were made. The argument from inconvenience is inadmissible: the object of the clause was to furnish complete means of authentication. [COLERIDGE, J. Must the signature be made at the very instant that the proceedings are ended? Where is it to be made?] The minutes should be made up at the time: the signature of the minutes constitutes the end of the proceedings, and is the actual termination of the meeting. The construction suggested on the other side makes the words of sect. 11 unmeaning. It leaves the clause exactly as if the words had been only "subscribe his name." [Lord DENMAN, C. J. Might not that as well have been said in *The Southampton Dock Company* v. *Richards*?] There the words were, "which shall be signed by the chairman at each respective meeting:" and it was held that they meant only "the person who is chairman at each respective meeting," and did not constitute a provision as to the time or place of signature. Here "the chairman of every meeting" is first mentioned; then it is directed that he shall sign "at the end of the proceedings of the said trustees at such meeting." And there the decision of this court in *Regina* v. *The Mayor of Evesham* was not brought to the notice of the Court of Common Pleas. The words of stat. 5 & 6 W. 4, c. 76, s. 69, which were in question in the case last mentioned, are much less precise than those of the present act: yet PATTESON, J., said, "the words of the act imply that the minutes shall be drawn up at the time of the meeting, and signed at that time." [Lord DENMAN, C. J. I think *860] you press that case too far. All *parties there had, in the first instance, assumed that the minutes were regularly made: and afterwards one of the parties called on the mayor and town clerk to make the entry in another way.]

Then as to the swearing of the trustees. The only evidence of the statutory oath having been taken must be the book; because sect. 6 requires the entry to be made in the book. "The oath or affirmation," (not the mere fact of its being taken,) "so taken and subscribed," is to be entered in the book. Therefore the part of the book where the oath is copied, with the subscription placed under it, contains the only compliance with the act, if there has been any compliance; and no other part of the book can be looked to as to this. Now this part of the book does not show the time of swearing, nor even the trustee by whom the oath was administered, nor that it was administered by any trustee at all, which is essential to the oath, by sect. 6. The proviso at the end of sect. 5 only gives validity to the acts of trustees who are not duly qualified, or are disqualified: it has no reference to the oath, which is distinguished from the qualification. [Lord DENMAN, C. J. We need not trouble you on that point: if the oath is not proved to have been taken, the defect is not cured by sect. 5.]

Next, as to the calls. Sect. 85 authorizes no order to pay except to the treasurer. The treasurer would be the person to sign the receipt. If the calls were not properly made, the promise to pay would be without consideration. The treasurer is, indeed, one of the banking firm: but how does the party who is called upon to pay know that? The order does not require a payment to the account of the treasurer in that character: the clerk *861] who received a payment made in *compliance with such an order would be justified in placing it to the private account of the plaintiff.

Next, no notice of the calls has been given to the defendant, in the form required by sect. 109. [Lord DENMAN, C. J. We agree with you on this

point: but Mr. *Erle* and Mr. *Butt* contend that no notice was necessary.] Stat. 109 includes all notices that are requisite, whether the necessity for giving them arise from express enactment or otherwise. And how can there be a neglect or refusal to pay, so as to authorize the action under sect. 85, without a notice that the money is to be paid? A party might be absent from the place in which the meetings were held; and he would thus be subjected to an action without any means of knowledge.

Next, a written agreement should have been proved, under the fourth section of the Statute of Frauds. It was clearly the understanding that the money was to be paid at distant intervals; and, if payment within a year was not contemplated, even the fact of payment within the year would not have taken the case out of the statute; *Boydell* v. *Drummond*, 11 East, 142. [Lord DENMAN, C. J. I think you can hardly make any thing of this objection.] The point, then, is not pressed.

Lastly, sect. 85 must be understood to authorize suing in case or debt according to the circumstances.(*a*) Debt may be maintainable where the defendant has agreed to give the money, but not where he has only agreed to lend. In *Cane* v. *Chapman*, 5 A. & E. 647, case was brought for nonpayment of money according to the requisition of a *statute. How [*862] can two parties be each in the other's debt on the same contract? This objection may be taken on application for a nonsuit: a plaintiff may withdraw from court upon finding his action misconceived. In *Sadler* v. *Robins*, 1 Camp. 253, 256, it was held that a party might be nonsuited for an objection appearing on the record.

Lord DENMAN, C. J. The first objection is as to the admissibility of the book which was produced in evidence. It is objected that the signature of the chairman of each meeting at which the proceedings took place was not affixed at such meeting, and that this is required by sect. 11. I think, on this point, we are bound by the decision of the Court of Common Pleas in *The Southampton Dock Company* v. *Richards*, 1 Mann. & G. 448. I cannot distinguish the language of the act which was the subject of decision there from that of the act now before us: and it appears to me that, on such a point as this, authority and precedent should have great weight. Had we, indeed, decided otherwise on a former occasion, we might pause before we relinquished our own view. But *Regina* v. *The Mayor of Evesham*, 8 A. & E. 266, may admit of the distinction arising from the contrast between sect. 69 of stat. 5 & 6 W. 4, c. 76, and sect. 11 of the present act. The important distinction, however, is in the fact that in *Regina* v. *The Mayor of Evesham* both parties were in fault, and therefore, in our discretion, we did not issue a mandamus.

It is, secondly, objected that the trustees do not appear to have been sworn. As we are all of opinion that *such a defect would not be [*863] cured by the clause at the end of sect. 5, which refers to the qualification only, we must consider whether such a defect does appear. Now it seems to me that the trustees clearly are sworn, and appear so to be by the book. The form of the oath, which is copied in the blank page of the book, is signed successively by all the trustees; and, from time to time, entries are made, in the proceedings of the several meetings, showing what trustees were sworn at the several times, and what others were present. There can be no reasonable doubt that there is, on the whole, a proper record of the oaths.

(*a*) See the remarks of Lord Ellenborough upon stat. 11 G. 2, c. 19, s. 19, in *Winterbourne* v. *Morgan*, 11 East, 395, 401.

Thirdly, it is objected that there has been no proper call, because the orders direct that the sums shall be paid into the bank to be placed to the account of the treasurer, not stating that they are to be paid to him *as* treasurer. But, as the order states him to be treasurer, it does, I think, sufficiently indicate in what character he is to have the money paid to him. The mode of the payment is designated: and, as for any liability to abuse, it seems to me that an actual payment into the hands of the treasurer would be subject to still greater risk.

The fourth objection is, that no notice of calls has been given by three or more trustees, or by the clerk or clerks for the time being to the trustees, by their order, as required by sect. 109. The persons who are called on to pay money have a right to know that the call is made by the proper authority. That is the object of sect. 109. Now, the notice is not signed by any trustees, or by any clerk or clerks appointed by the trustees, but by some person whom the clerks to the trustees, in their character of *864] attorneys, have in their service. If there was in fact any notice *of the order of the trustees, that might have been shown by a very little evidence. On this ground, therefore, there must be a new trial. It is suggested that the defendant has waived this difficulty by his express promise. Now, when we do not know the facts, an express promise may enable us to infer that what is right has been done: but, when we do know the facts, and they are insufficient, the promise does not make them sufficient.

The objection on the want of a written agreement was given up in argument.

Then, as to the form of action. Whether a rule to enter a nonsuit be the proper way of raising this question, I do not think it necessary to inquire. I rather agree with my brother *Manning* that the question may be raised in this way, because the plaintiff may be supposed to withdraw himself from the trial if the action be misconceived. But I need not determine as to this point, because I think the legal objection is invalid. I have no doubt that the meaning of sect. 85 is, that debt or case may be brought at the will of the company: the words "as the case may be" are not inserted. They would probably bring tort where they wanted to recover for consequential damage. I admit that there is a difficulty in making a man debtor on the ground that he has agreed to lend: but the act removes the difficulty by giving the right of action.

WILLIAMS, J. I agree in what my lord has said, as to the inference to be drawn from a promise where the fact itself is known, which is supposed to have been the ground of the promise.

*865] As to the point on which there has been the most *discussion, I do not propose to enter into it, because I shall decide expressly on the authority of *The Southampton Dock Company* v. *Richards*, 1 Man. & G. 448. An opinion pronounced in one court must always be a reason for adopting the same opinion in another: and I cannot distinguish that case from the present; indeed, I think the case in the Common Pleas the stronger of the two: for there the words in the act were, "shall be signed by the chairman at each respective meeting."

Then, though it be true that we have here no jurat, showing that an oath was administered to any trustee by another trustee, yet we have, first, the signatures at the foot of the oath, which is set forth as given by the statute and, next, we have in the regular entry of the proceedings, a

statement that the persons so signing in fact took the oaths. From this we are entitled to presume that all things were ritè acta.

I do not think that we are called on to say whether the question as to the form of action can be properly determined on motion for a nonsuit; for it seems to me that debt does lie. It is true that the statutory agreement is not, in itself, a statement of a debt; but can we say that it may not assume the character of a debt from the express enactment in sect. 85? I do not accede to the argument, that the words must be applied in different instances secundum subjectam materiam; the statute expressly gives the option.

COLERIDGE, J. The evidence as to the swearing in of the trustees, as I understand it, appears to me sufficient. I think it quite immaterial that the signature beneath the oath occurs in one page of the book, and *the [*866 entry of the fact, as part of the proceedings, in another. It is objected that the subscription does not show that the oath was administered by a person properly qualified; but we must assume that, in fact, it was duly administered, that is, by a trustee.

As to the order to pay: it seems that sect. 85 requires payment to be made to the treasurer, and that the order requires payment to be made into a bank, "to be placed to the account of Philip John Miles, Esq., treasurer." Now suppose the plaintiff to be, not a partner in the bank, but a stranger. Still we must presume that the ordinary course would be pursued at the bank; and that the account would be headed, "Philip John Miles, treasurer of," &c. It is said that the bank might place the money to the plaintiff's general account: that, indeed, would not be a payment under the act; but I do not agree that this could be done according to the terms of the notice.

Then, as to the objection, which lies at the root of all, to the admissibility of the book in evidence. After much doubt, I have come to the same conclusion with the rest of the court, and on the same grounds. It would be very mischievous that, on such a point, two of the courts should give conflicting decisions. This clause occurs in many statutes; and it must be acted upon by magistrates, trustees, and numerous other parties. I think, therefore, that, whatever we might say if this were res integra, we ought to consider ourselves bound by the decision of the other court, unless we see a clear distinction between the cases, or feel ourselves authorized to say that the Court of Common Pleas are undoubtedly wrong. I am not prepared to say that they are wrong. I have certainly a doubt as to the *meaning of the words "at such meeting." My brother [*867 *Bompas* says that, if we do not require the signature to be made at the meeting at which the proceedings took place, the words have no meaning. It seems to me that, whatever be the meaning of the words, you have the same difficulty. If the signature may be made at a distinct time, you must suppose that the words do not confine in this respect: and, if it must be made immediately upon the close of the meeting, you still must interpret these words in the same way. It has been argued that our previous decision in *Regina* v. *The Mayor of Evesham*, 8 A. & E. 266, is inconsistent with the decision in the Common Pleas. Perhaps, in absolute strictness, the two are not quite reconcileable. And if we thought our own decision the better of the two, and could not make the two consistent, I agree that we ought not to give way from false delicacy. But it is to be recollected that, on an application for a mandamus, many points come under the consideration of the court, by which they regulate the exercise

of their discretion: and, when we look at all the circumstances of *Regina* v. *The Mayor of Evesham*, we find that the objection to granting the mandamus was not exclusively grounded on the fact that the minutes were not signed at the meeting at which the proceedings took place. We looked at all that had taken place, and, upon considering all the circumstances, refused the mandamus. It seems to me, therefore, that we may consistently adhere to the decision of the Common Pleas, and that we ought to do so.

Then as to the lesser point, the sufficiency of the notice. It is true that sect. 85, which authorizes the making of the calls, does not expressly re-
*868] quire a notice. *Still, where an action is given only if the party "shall neglect or refuse to pay," I cannot but think that both reason and justice require that the party should have notice. A strong case was put by my brother *Manning*; a party may not be resident, and, without notice, may have no means of knowing that he has to make any payment. Then, does the notice which has been given satisfy the requisites of sect. 109? Is it signed by three trustees or the clerk or clerks of the trustees by their order? The section says that, if the trustees do not choose to sign, they may order their clerk or clerks to do so. It is not in the nature of a general authority: the clerk is substituted specifically for the trustees. Now here the names of Osborne and Ward are written by the clerk whom these gentlemen, in their general character of attorneys, employ. That is an attempt to substitute, for a deputy, his deputy. Whether what has taken place as to the three calls be a waiver of this objection is a point upon which I feel much doubt; but, as my Lord and my brother WILLIAMS entertain a clear opinion that it is not, my doubt ought to have no weight.

As to the form of action, I should rather have thought case the more proper remedy. That however is unimportant, on two grounds. First, the legislature may have meant to give a pure discretion, without reference to the particular nature of the agreement, meaning that a party who agreed either to give or lend should be liable to either form of action, without restriction to one or the other "as the case may be." The words of the enactment seem to be used without much reference to the case which may arise. But, further, though I do not mean to say that the objection, if valid, is one which cannot be ground of nonsuit, it appears that my brother MAULE has
*869] not reserved leave to move for a nonsuit *absolutely, but only if we shall think the case to be open to a nonsuit under these circumstances. Now the objection is on the record; so that it is not necessary to decide upon it on motion for a nonsuit.(*a*)

Rule absolute for a new trial

The second trial took place before COLERIDGE, J., at the Bristol Summer assizes, 1843. The points which arose, so far as is material to the following decision,(*b*) were two. The plaintiff confined his evidence to the three calls first mentioned, antè, p. 855. As to those, he proved that the defendant had expressly promised to pay them. The notice of the calls set out, antè, p. 854, was not produced: but a notice, signed "Osborne and Ward," was put in by the defendant; and it was shown that this notice was written by a clerk whom they employed in their character of attorneys; that Mr. Osborne managed the business of the trust, and that Mr. Ward was not in the habit of signing notices of calls. No evidence was given of an express order

(*a*) Wightman, J., was absent.
(*b*) It was proposed to raise questions on other points by a bill of exceptions.

by the trustees to give the notice, though the book of proceedings was produced for other parts of the case. The learned judge told the jury that a signature of the notice by one clerk to the trustees, in the name of both, was valid; and that they might infer a due notice, and an order by the trustees to give such notice, as to the three calls, from the fact of the promise. Verdict for the plaintiff, for the amount of the three calls.

In Michaelmas term, 1843, *Bompas*, Serjt., obtained a rule for a new trial on the ground of misdirection, or for arresting judgment, because the declaration did not *aver that the trustees had ordered notice to be given of the calls. In the following Trinity term,(a) [*870

Butt and *Carrow* showed cause. The promise is good evidence that all was done which was necessary to create a liability: and that is not met by proof of an irregular notice having been given as to one of the calls; for such a notice is quite consistent with the giving of a regular notice also. In *Gibbon* v. *Coggon*, 2 Campb. 188, a promise by the drawer of a foreign bill to pay it was considered evidence of protest and dishonour. So in *Croxon* v. *Worthen*, 5 M. & W. 5, a promise by the maker of a promissory note to pay it was held to be proof of presentment. Supposing only one clerk to have signed, that is sufficient, as the two fill a joint office. Nor is a formal order to give such notice requisite at all: it may be implied from the general duty of the clerk of the trustees to take the necessary steps which would follow upon the making of the calls. In *Taylor* v. *Clemson*, 2 Q. B. 978, 1008, it was considered that a payment might be made from the funds of a company without a formal order, where such payment was in the regular course of business.

As to the motion in arrest of judgment, all that is necessary is that the defendant should appear to have had due notice of the calls. After verdict at least, it must be assumed that, if an order to give the notice was necessary, that was proved by proving the due notice which is averred.

Manning, Serjt., contrà. By sect. 11, all orders must be entered in the book; the book is made evidence of the orders; and, that being so, it is the proper evidence. *Even if an order by parol could be made, it ought to be entered in the book. Further, the notice was not proved. [*871 The promise may have been made in ignorance of the fact that notice was given without order from the trustees, or that it was improperly signed. It shows at most only that some notice, good or bad, was given. Sect. 109 is precise in confining notices to two only methods; the evidence ought to show which was pursued. *Taylor* v. *Clemson*, 2 Q. B. 978, is now under the consideration of the House of Lords on a writ of error. Here, too, the declaration states what sort of notice was given; and that should be proved. [COLERIDGE, J. Suppose the allegation had been only that due notice was given.] That might have been good, except on special demurrer; but here the allegation which follows cannot be rejected. The declaration states the notice to have been signed by the clerks: it may have been signed by one clerk. [COLERIDGE, J. Would not that satisfy sect. 109? And could the clerks dissent? Would not notice by one be notice by both? The two fill one office.]

Next, it should appear, on the record, that every material step has been properly taken. A notice, not authorized by the trustees, could not create a liability.

Lord DENMAN, C. J. As to the motion in arrest of judgment, it seems to me that the statement in the declaration is sufficient. The order to pay is

(a) May 22d, 1844.

alleged to have been made by the trustees; and it is alleged that notice of such order was given to the defendant.

Then, as to the proof of due notice, the defendant seems to me to have furnished it against himself, by promising to make the payments. It is said *872] that he *might not have known the facts; but against a party who makes a promise it may be assumed that he has knowledge of such facts as give validity to the promise. It is objected that the book ought to be produced showing such an order; but the order might be given without a formal entry in writing; and sect. 11 does not make the book the only evidence. Then, as to the signature of the notice, I think there was sufficient evidence of a due signature. The plaintiff says, "I charge the defendant with having received a notice duly signed; he might have received other notices unduly signed; but, as he has promised, I call on the jury to infer that he must have received a good notice." In that I can see nothing irrational.

PATTESON, J. I think the objection, that the record wants an averment of the notice having been given by order of the trustees, could not prevail upon demurrer. I am clearly of opinion that it cannot prevail after verdict. The declaration states the calls to have been made by order of the trustees, and notice of those calls to have been given to the defendant.

As to the evidence, I agree with my lord that sect. 11 does not enact that no evidence shall be given of the orders except by the contents of the book. And, lastly, I think the promise was sufficient to raise a presumption of due notice having been given. It is argued that the promise only shows some notice given, but not that it was due notice, as the declaration avers. That is a distinction which I never heard taken before.

WILLIAMS and COLERIDGE, Js., concurred. Rule discharged.(*a*)

(*a*) See the next case.

*873] *The following case was decided in Michaelmas vacation, 1843.

The WEST LONDON Railway Company *v.* BERNARD.

By statute (6 & 7 W. 4, c. lxxix.) incorporating a railway company, it was enacted that the proceedings of all meetings of the company should be entered in a book, and "*signed by the chairman of such respective meetings;*" and that the proceedings, so entered and signed, should be deemed originals, and allowed to be read in evidence, &c.

Held, that the chairman who presided when the proceedings took place might sign such entry at the next meeting.

Resolutions of a meeting on August 18th, being entered in the book, were subscribed at the next meeting as follows. "Confirmed, 24th August, 1836. W. G." W. G. was chairman of both meetings. *Held*, a good signature of the proceedings of August 18th.

DEBT against defendant as a subscriber to a certain undertaking for making and maintaining a railway to be called *The Birmingham, Bristol and Thames Junction Railway.*(*a*) The action was for calls. Plea 7. That no such calls or call as in the declaration mentioned were or was ever made in manner and form, &c.: conclusion to the country. Issue thereon.

On the trial, before Lord ABINGER, C. B., at the Surrey assizes, July, 1842, it appeared that the company (*a*) was incorporated by stat. 6 & 7 W. 4, c. lxxix., local and personal, public, "for making a railway from the basin of the Kensington Canal at Kensington to join the London and Birmingham and Great Western Railways at or near Holsden Green in the county of Middlesex, and to be called," &c. By that statute, sect. 118, it

(*a*) The undertakers were afterwards called the West London Railway Company.

is enacted, "That the orders and proceedings of all meetings, as well general as special, of the said company, and of the said directors and committees respectively, shall be entered in some book or books to be provided and kept for that purpose, and shall be signed by the chairman of such respective meetings; and such orders *and proceedings, when so entered and signed, shall be deemed original orders and proceedings, and shall [*874 be allowed to be read in evidence in all courts, and before all judges, justices, and others, and that without due proof of such respective meetings having been duly convened, or of the persons making or entering such orders or proceedings being proprietors or being directors or members of the committee, or of the signature of such chairman, as the case may be, all of which last-mentioned acts shall be presumed."

To prove the authority for making the calls, the plaintiffs produced the book kept according to sect. 118. It contained an entry dated August 18th, 1836, and headed "Minutes of meeting," &c.: after which came resolutions of the meeting; one of them being as follows.

"Resolved that a call of 2*l.* per share be made upon the proprietors, payable at," &c., "on," &c.

Under this entry was written, in a different hand, "Confirmed, 24th August, 1836. W. Gunston." Gunston appeared by the former minute to have been the chairman on the 18th, and he was also chairman on the 24th, when the next meeting took place.(*a*) There were other entries of resolutions to make calls, confirmed in the same form. The defendant's counsel objected that such an entry was no evidence of the resolution of a meeting signed by the chairman of such meeting, within sect. 118; that the minutes themselves were not signed at all; and that the party who signed the confirmation did so at a period long subsequent to the meeting at which the resolution was made, and as chairman of a different meeting. The Lord *Chief Baron received the evidence, but reserved leave to move to enter a nonsuit on another point: and the plaintiffs had a verdict. [*875

In Michaelmas term, 1842, *Channell*, Serjt., obtained a nisi for a nonsuit on the point reserved; (*b*) or for a new trial on account of the improper reception of the above evidence.

Thesiger and *E. James* now showed cause. *The Southampton Dock Company* v. *Richards*, 1 Man. & G. 448, decides this point. The words of the local act there, ("shall be signed by the chairman at each respective meeting,") were less favourable to the validity of the minute than the words used here. In *The London and Brighton Railway Company* v. *Fairclough*, 2 Man. & G. 674, where the local act required the minutes of meetings to be signed "by the chairman of such respective meetings," and the signature was added as in the present case, the first cited decision was admitted to be conclusive. In a later case in this court, *Miles* v. *Bough*, antè, p. 845, *Regina* v. *The Mayor of Evesham*, 8 A. & E. 266, was cited as conflicting with the first of these authorities, but the decision was in accordance with them: and *Regina* v. *The Mayor of Evesham* was in fact a very different case. There a draft of the minutes had been made, and taken away from the place of meeting, and a copy only returned. [Lord DENMAN, C. J. There

(*a*) On the argument in banc, the book itself was produced, and the contents appeared as here stated.

(*b*) This was ultimately decided on the authority of the last ruling, (pp. 638—640,) in *The London Grand Junction Railway Company* v. *Freeman*, 2 Man. & G. 606, which, as to the point in question, was held not materially distinguishable from the present case. No further notice of this point is deemed necessary.

*876] *was some reasonable doubt whether the minute returned was quite the same thing.] And the point arose on motion for a mandamus, which Lord DENMAN, C. J., noticed as a distinction in *Miles* v. *Bough*. PATTESON, J., said, in *Regina* v. *The Mayor of Evesham*, "The words of the act" (5 & 6 W. 4, c. 76, s. 69) "imply that the minutes shall be drawn up at the time of the meeting, and signed at that time. It may be inconvenient; and perhaps, if the town clerk had drawn up the minutes, and had them signed, after the meeting, we might not say that the thing was incorrect when so *done*. But we cannot order a thing to be done in an irregular manner." That is all that was decided. It will scarcely be insisted, on the present argument, that the time of signing is material: and, as to the mode, it is true that the chairman did not sign at the foot of the resolutions themselves; but he signed a confirmation which imbodied them, and so, substantially at least, complied with the statute.

Bompas and *Channell*, Serjts., contrà. The intention of the act was that the entry of proceedings should be vouched by the signature of a person present. The case in the Common Pleas, recognised by this court in *Miles* v. *Bough*, must be acceded to: but it is going far to say that the minutes of a meeting may be signed by the chairman of a subsequent one. [Lord DENMAN, C. J. He is not less the "chairman of" the former meeting, because he presides at the next. I think it would be better that the chairman should sign at the meeting where the proceedings take place,
*877] *because, otherwise, if a different chairman presides at the next, they may go for nothing. But we must abide by the decided case.] This goes farther. The party here signs, not as the chairman of the former meeting, but as chairman of a subsequent one who by their resolution confirm it; and he does not sign the former resolutions any otherwise than by subscribing the resolution to confirm: which is, in fact, no signing of the previous minute. In the cases referred to, where signature at a subsequent meeting has been held sufficient, the objection was raised by extrinsic evidence, the minute on the face of it showing no irregularity. Here the document does not even purport to be signed conformably with the statute. (A third point was discussed; but the court thought it had not been sufficiently raised at the trial, and therefore gave no judgment on it.)

Lord DENMAN, C. J. *The Southampton Dock Company* v. *Richards* is now admitted to be the ruling case on this subject. The minutes of August 18th might therefore be signed by the chairman of that day's meeting on August 24th. The words "confirmed, 24th August," cannot do away with the signature of the *chairman*, which is subscribed, and is all that the statute requires.

PATTESON, J. It is contended that the signature following the words "confirmed, 24th August," is only a signature of the confirmation, not of the minute itself. If so, this book has not a signed minute from beginning
*878] to end. But there is nothing in the objection, the *signature on the 24th being by the same person who presided on the 18th.

WILLIAMS, J. Signature of the minutes by the chairman, when presiding at a subsequent meeting, has been held sufficient; and there is no distinction which prevents our deciding so in this case.

COLERIDGE, J. These minutes are subscribed by the person who was chairman when the proceedings took place. The signature is none the worse, because he signs as chairman of a subsequent meeting.

Rule discharged.

In the Matter of Arbitration between MARSHALL and Others, and DRESSER, Public Officer, &c.

An agreement of reference, between M. and D., recited a dispute relating to a transaction under which five bills of exchange were drawn upon and accepted by P.: and, as to the nature and circumstances of, or attending, such transaction and bills, it was agreed that the same, and all matters in question touching and concerning or in any wise relating thereto, should be referred to arbitration. The arbitrator awarded that the bills, and all moneys thereby secured, were the property of M.; and that the said bills and moneys, and all proceeds thereof, should be delivered and paid to M.; and that, in case D. should have received any part of the money secured by and mentioned in the bills, he should pay it to M. The award was silent as to damages.

M. moved to set aside the award, as not final, and for giving no damages, on affidavit, that at the hearing it was shown that the bills had been delivered to D., and it was understood that D. had received the whole amount from the acceptor, and therefore no evidence was offered on that head on either side. The affidavits in answer denied such understanding, and such receipt of proceeds; and stated that, on the hearing, no allegation of such receipt had been made, nor any claim in respect thereof, and that no question as to such receipt had been made a matter of difference at the arbitration, but that M. had there contended that D. was bound to pay the whole amount, whether he had received any thing or not.

Quære, whether the affidavits could be taken into consideration upon this motion? But, (assuming that they could, and that the receipt of proceeds appeared by them not to have been a matter in difference on the arbitration,)

Held, that it appeared that the arbitrator had considered the two questions as mixed up together; that one part of the award could therefore not be separated from the other; and that the whole was bad as not being final.

By agreement, dated 29th December, 1841, betwen Henry Cooper Marshall, Moses Atkinson, and Joseph Robert William Atkinson, assignees of Thomas *Winmore Wilson, of the one part, and Henry Dresser, general manager and public officer of the Yorkshire District Bank, of the other part, it was recited that divers disputes between the assignees and the bank, relating to the several accounts, transactions, and dealings between the bankrupt and the bank and other persons, had been amicably adjusted, so far as respected the parties to the agreement, save and except one relating to a certain transaction or dealing for a large quantity of yarn, delivered by the said T. W. Wilson to Edward Parker, for which five bills of exchange, for 1000*l.* each, were drawn by the bankrupt upon, and accepted by, E. Parker: and, as to the nature and circumstances of, and attending, such transaction or dealing and bills, it was agreed that the same, and all matters in question touching and concerning or in any wise relating thereto, should be referred to two arbitrators, with power to appoint an umpire. [*879

The agreement was set out in the affidavit upon which the rule hereinafter mentioned was obtained; and it was further stated that the arbitrators appointed an umpire, and a meeting was held before the arbitrators and umpire, which was attended by the attorneys respectively of the assignees and the bank, when evidence was produced, on behalf of the assignees, that the bills were given by Wilson to the bank under circumstances which were set forth in the affidavit for the purpose of showing that the bank was not entitled to retain the bills. The affidavit further stated that, at the hearing, it was understood and believed that the bank had received the whole amount of the bills from the acceptor; that, therefore, no evidence was *offered on behalf of the assignees on that head; that such assumption was not denied, nor any evidence offered to the contrary, on behalf of the bank; and that it was insisted, on behalf of the assignees, [*880

that the bank were bound to pay the assignees the whole amount with interest.

That the umpire afterwards made his award, whereby he "did award, adjudge, and determine: That the said several bills of exchange, amounting to the said sum of 5000*l.*, and all the moneys thereby respectively secured, were the right, title, and property of the said Henry Cooper Marshall," &c., "as such assignees as aforesaid; and that the said bills and moneys, and all proceeds thereof, should be forthwith delivered and paid to the said Henry Cooper Marshall," &c., "accordingly; and that, in case the said banking company, or any person or persons on their behalf, and for their use and account, should have received the whole or any part of the money secured and mentioned in the said respective bills of exchange, or any of them, the said banking company should pay, or cause to be paid, to the said Henry Cooper Marshall," &c., "as such assignees," "interest on the said respective moneys at and after the rate of 3*l.* per centum per annum, to be computed from the respective times when such moneys should or might have been received by or on the behalf or for the use of the said banking company, and until the actual payment thereof to the said assignees."

The affidavit stated that it was now alleged by the bank that they had received no part of the money on the bills: but the deponent said that, if the bank had used due diligence, the whole might have been received from
*881] the acceptor; and he believed the bank had *received a large amount. That the acceptor was now wholly unable to pay; and that, by reason of the bank wrongfully withholding the bills, the same had become of little or no value, and the money was likely to be lost to the bankrupt's estate.

W. H. Watson, on behalf of the assignees, obtained a rule, in last term, for setting aside the award, on the grounds, "that the said award is uncertain, and not final, in not finding how much has been received by the said banking company on the bills mentioned in the said award, and whether the said bills mentioned in the said award are paid in all or in part; and the arbitrator ought to have awarded a specific sum for damages for the detention of the said bills; and that the umpire has not determined all matters submitted to him, viz., in not finding any damages or amount payable to the assignees in respect of the said bills, or the detention thereof."

The affidavits in answer denied some of the statements on the other side, as to the evidence given of the circumstances under which the bills were received, and also denied that it was understood, believed, or stated that any money had been received for the bills; and alleged that it was stated, on behalf of the bank, and was the fact, that nothing had been received; but that it was contended, on behalf of the assignees, that, although the bank might not have received any thing, it was bound to pay the whole. That the bank "was not charged, on the hearing of the said arbitration, with having received any money on account of the said bills; nor was it ever understood or suggested, at the hearing before the said arbitrators and
*882] umpire or any of them, nor was *it at any time in any way before the making of the said award suggested, assumed, or asserted, that the said bank, copartnership, or any person or persons on their behalf and for their use and account, had received the whole or any part of the moneys secured and mentioned in the said respective bills of exchange, or any of them." That no inquiry or question respecting any receipt of moneys by or on behalf of the said bank in respect of the said bills, or any or either of them, or any part thereof, was in any way made or put before the said

arbitrators and umpire, or any or either of them, at any time before the making of the award, as a question in difference between the parties to the said arbitration. "That, as no assertion, suggestion, inquiry, or question was made before or put to the said arbitrators or umpire respecting such receipt of money on account of the said bills of exchange as aforesaid, it did not occur to the said bank" to give "any evidence of such non-payment of the said bills." That the bank had, since the award, tendered the bills to the assignees, who had refused to accept them.

T. F. Ellis now showed cause. The finding of the arbitrator is not final as to the receipts of the proceeds of the bills: and, if the arbitrator had been bound, or entitled, to inquire into this matter, of course the award could not have been sustained; *Pedley* v. *Goddard*, 7 T. R. 73. But the affidavits show that this was not a matter in difference before him. [Lord DENMAN, C. J. Can we look into the affidavits for the purpose of upholding an award bad on its face?] The award is not bad except *upon the assumption that the arbitrator had the matter before him; and [*883 that is a question which can be determined only upon affidavit, unless the submission expressly include the matter, which will not be pretended. The question is, whether the arbitrator had power to enter upon the inquiry at all.(a) Now here, if the arbitrator had found the fact that the bank had received the proceeds of the bills, and if he had ordered such proceeds to be paid over to the assignees, the bank, on the one hand, might have refused performance of so much of the award, and, on the other hand, the award could not have been set aside in toto, but would merely have been bad as to the part relating to the proceeds, for excess of jurisdiction. [COLERIDGE, J. That is, unless the disputed part of the award be inseparably mixed up with the part relating to that which is within the arbitrator's jurisdiction.](b) That is not the case here: the question, who is entitled to the bills, is perfectly distinct from the question what use has been made of them by the party not entitled. The latter might have been made a matter in difference, but was not. [Lord DENMAN, C. J. Two cases rather appear to favour your view; *Aitchison* v. *Cargey*, 13 Price, 639, and 2 Bing. 199, (in error,)(c) and *Manser* v. *Heaver*, 3 B. & Ad. 295.] As to the damages, the silence of the arbitrator is equivalent to a finding that there are none; *Dunn* v. *Warlters*, 9 M. & W. 293.

R. V. Richards, (with whom was *W. H. Watson*,) contrà. All matters relating to the bills have been referred *to the arbitrator. Supposing the court to assume from the affidavits that no question as to the [*884 proceeds was raised before him, still the award shows that he has mixed up the two questions. Then it is admitted that the award is bad as to the proceeds. (He was here stopped by the court.)

Lord DENMAN, C. J. We are satisfied that we cannot hold this to be mere excess of jurisdiction. The case is not like *Manser* v. *Heaver*, 3 B. & Ad. 295, where the bad part of the award could be separated from the other. I think the question as to the proceeds was the very matter referred: at all events the arbitrator, professing to act upon what he considers submitted to him, makes an award on the whole, which will not bind the parties to the submission.

WILLIAMS, J., concurred.

COLERIDGE, J. At first I was much struck with the argument that the

(a) See *Regina* v. *Bolton*, 1 Q. B. 66.

(b) See *Tomlin* v. *The Mayor of Fordwich*, 5 A. & E. 147.

(c) S. C. in B. R., *Cargey* v. *Aitchison*, 2 B. & C. 170: see judgment of Best, J.

bad finding was merely as to a matter in respect of which the arbitrator had exceeded his power: but there is a twofold answer. The first is that which Mr. *Richards* has given. How can we tell that the arbitrator's view as to the proceeds has not affected his determination as to the other matters? Secondly, I think the affidavits themselves leave it in doubt whether this was not made a matter in difference: and this shows the inconvenience of looking at affidavits on such a question.

WIGHTMAN, J., was absent. Rule absolute.

*885] *EDWARDS *v.* Sir HENRY EDWARD BUNBURY, Baronet.

On a hearing before the assistant tithe commissioner appointed to ascertain the amount of a commutation rent charge under stat. 6 & 7 W. 4, c. 71, a land owner denied the right of B., an alleged tithe-owner, to rectorial tithe of his lands, asserting that they were tithe free. The assistant commissioner decided that B. was owner of the rectory, and, as rector, entitled to the said tithe.

Held that, on a feigned issue under sect. 46, the land owner could not deny that the lands were subject to the payment of tithe to B., for the purpose of raising the question of title as between B. and a third party.

THE Assistant Commissioner appointed, under stat. 6 & 7 W. 4, c. 71, ("for the Commutation of Tithes in England and Wales,") to ascertain and award the total sums to be paid by way of rent charge instead of the tithes of the parish of Mildenhall, Suffolk, made his award, December 30th, 1841, part of which was as follows:

"And, whereas, in the course of the proceedings had and taken for the commutation of the said tithes, a question has arisen between Sir Henry Edward Bunbury of Great Barton, in the said county of Suffolk, baronet, and George Hennington Harris," &c., "and others, owners of certain lands comprising a certain district called Burnt Fen, containing by estimation 3000 acres or thereabouts, situate," &c., "touching the right of the said Sir Henry Edward Bunbury to the great or rectorial tithes arising and growing from and upon the said lands within the said district called Burnt Fen, the said Sir Henry Edward Bunbury alleging that he is seised in fee and owner or proprietor of the impropriate rectory and parsonage of Mildenhall, and in particular of the great or rectorial tithes of the above-mentioned lands within the said district called Burnt Fen, and that he is as such rector or otherwise well entitled to all the said tithes:" the award then stated a denial of these allegations by the opposing parties, and assertion by them that all their lands
*886] in the district are exempt from *great or rectorial tithes by prescription or otherwise, in support of which they had produced evidence. And it afterwards proceeded: "I do further decide and determine that the said Sir Henry Edward Bunbury is owner of the impropriate rectory of Mildenhall, and that he is, as such rector or otherwise, well entitled to all the great tithes arising from all the said lands of the said parish belonging to the said George Hennington Harris, and others, and being part of the said district called Burnt Fen," &c., "and the said claim of exemption so made as aforesaid in respect of all the said lands, part of Burnt Fen," &c., "hath no foundation in fact, and is altogether void and invalid."

Frederick Edwards, the plaintiff in this cause, considering himself aggrieved by the award, a feigned issue was prepared on his behalf (under
*887] stat. 6 & 7 W. 4, c. 71, s. 46,) (*a*) and delivered to the agent of Sir *Henry Edward Bunbury. The issue stated the question in dispute as follows: "For that whereas heretofore, to wit," &c., "a certain ques-

(*a*) Stat. 6 & 7 W. 4, c. 71, s. 45, enacts: "That if any suit shall be pending touching the right to any tithes, or if there shall be any question as to the existence of any mo-

tion arose between the plaintiff and defendant whether the lands of the said plaintiff, situate in the Burnt Fen, in the parish of Mildenhall, were, to wit, then, subject to the payment of all or any manner of tithe to the said defendant: and thereupon the said defendant asserted and affirmed that the said lands of the said plaintiff were, to wit, then, subject to the payment of tithe, to wit, great tithe, to the said defendant, which the said plaintiff, to wit, then, denied, and asserted that the said lands of the said plaintiff were not then subject to the payment of such tithe to the said defendant." The parties not agreeing on the form of the issue, an application was made to WILLIAMS, J., at chambers, for the purpose of having it settled; and the learned judge referred the case to the full court. In this *term, *Paget* obtained a rule [*888] calling on the defendant to show cause why he should not accept the draft of feigned issue in the form prepared by the plaintiff.

B. Andrews, with whom was *Worlledge*, now showed cause. The first objection to this issue is, that it raises a question of title, which was not a proper subject matter of inquiry before the assistant commissioner, and therefore could not be the subject of an issue under sect. 46. The court has already decided this last point in *Eagle* v. *The Dean and Chapter of Ely*; (a)

dus or composition real, or prescriptive or customary payment, or any claim of exemption from or non-liability under any circumstances to the payment of any tithes in respect of any lands or any kind of produce, or touching the situation or boundary of any lands, or if any difference shall arise whereby the making of any such award by the commissioners or assistant commissioner shall be hindred, it shall be lawful for the commissioners or assistant commissioner to appoint a time and place in or near the parish for hearing and determining the same; and the decision of the commissioners or assistant commissioner shall be final and conclusive on all persons, subject to the provisions hereinafter contained."

Sect. 46, so far as it is material to this case, is as follows: "Provided always, and be it enacted, that any person claiming to be interested in any lands or in the tithes thereof who shall be dissatisfied with any such decision of the commissioners or assistant commissioner may, if the yearly value of the payment to be made or withholden according to such decision shall exceed the sum of 20*l*., cause an action to be brought in any of his majesty's courts of law at Westminster against the person in whose favour such decision shall have been made, within three calendar months next after such decision shall have been notified in writing, in such manner as the commissioners or assistant commissioner shall direct, to the parties interested therein or to their known agents, in which action the plaintiff shall deliver a feigned issue, whereby such disputed right may be tried, and shall proceed to a trial at law of such issue." "And every defendant in any such action shall enter an appearance thereto, and accept such issue; but in case the parties shall differ as to the form of such issue, or in case the defendant shall fail to enter such appearance or accept such issue, then the same shall be settled under the direction of the court in which the action shall be brought, or by any judge of his majesty's courts of Law at Westminster, and the plaintiff may proceed thereon in like manner as if the defendant had appeared and accepted such issue: and the parties in such action shall produce to each other and their respective attorneys or counsel, at such time and place as any judge may order before trial, and also to the court and jury upon the trial of any such issue, all books, deeds, papers, and writings, terriers, maps, plans, and surveys relating to the matters in issue in their respective custody or power:" and the verdict in such action, or the judgment of the court on a special case (to which the verdict may be made subject) "shall be final and binding upon all parties" to such action, unless the court order a new trial.

(a) In B. R., Hilary term, 1842. Not reported. In this case, one of two feigned issues, which it was proposed to tender, would have raised the question whether the defendants were entitled to take the tithes of corn, grain, &c. Andrews, in the argument above reported, said that the court, after hearing counsel on both sides, ultimately decided that an issue in that form could not be allowed, the only question being whether or not the lands were exempt from the payment of tithes to any person; and that it was referred to one of the learned judges present to settle terms of an issue, which his lordship did by altering the form so as to put in issue the exemption only. Byles, during the same argument, said that the case came on late on one of the last days of the term, and that, although doubt was expressed on the bench as to the propriety of an issue

and their ruling was acted upon by the Court of Exchequer in *Birch* v. *Barker*.(a) The purpose of the statute is to convert tithe into rent charge: *889] the question material to that *object is not title but amount. (The court then called upon counsel in support of the rule.)

Kelly, *Byles*, and *Paget*, contrà. This point has never yet been decided. The plaintiff's case is, that his lands in Burnt Fen pay tithe to no one; or, if to any one, not to the defendant. The recital in the award shows that both these questions were dealt with by the assistant commissioner. [Lord DENMAN, C. J. He may have awarded what he had no authority to award. I do not know that the commissioners have power to try a quare impedit.] If the commissioner found a person actually in perception of the tithe, it might not be proper for him to inquire into the title; but, if conflicting claims are alleged on behalf of several persons, he must inquire, since he must state in his award who has the tithe. A dispute on this point is within the words of sect. 45, "any difference," "whereby the making of any such award" "shall be hindered." The apportionment of rent charge, which is to be made, under sect. 54, according "to the average titheable produce and productive quality" of the lands, and which is founded on the award, must, by sect. 55, state, not only "the amount charged upon the said several lands," but "to whom and in what right the same shall be respectively payable." The interpretation clause, sect. 12, says that, "in the construction and for the purposes of this act," "'land owner' or 'tithe owner'" "shall mean and include every person who shall be in the actual possession or receipt of the rents or profits of any lands or tithes," (with certain exceptions,) "and that without regard to the real amount of interest of such person." That applies where some person is in the actual receipt of the *890] *tithe; but here the plaintiff denies that any one is so. In *Birch* v. *Barker* the question raised before the commissioner was, whether a modus existed or not; he found that there was none; the rector then alleged, as a conclusion of law from that finding, that he was entitled to the tithes; and the Court of Exchequer held that this latter proposition, derived as a conclusion of law from the antecedent one, could not be made the foundation of a distinct issue. Here the award shows that the commissioner has had before him the very question, not only whether any tithe is payable, but whether or not Sir H. E. Bunbury is the party entitled; and, in fact, there is a rival claimant. [COLERIDGE, J. Then, as you say, the question between him and Sir H. E. Bunbury is to be tried on an issue between other parties. WILLIAMS, J. Why might it not be tried between the proper parties hereafter? COLERIDGE, J. Either there is another claimant than Sir H. E. Bunbury, or there is not. If there is none, the question of title ought not to be raised at all. If there is, it ought not to be tried between the present parties.] It is important to the plaintiff to set up both defences; that the land is not liable, and that Sir H. E. Bunbury is not entitled; and

bringing title in question, no decision was given on the point. Lord Denman, C. J., expressed his opinion that the point was not decided on that occasion. A rule appears to have been made in the cause, on January 29th, that the issue should be whether the lands situate in Lakenheath Fen, &c., were and are in the whole, or whether any part, &c., was, and is, exempt from the payment of all or any manner of tithes; and that the remainder of the rule nisi (January 22d, 1842, for tendering issues as first above stated) should be discharged.

(a) Exchequer, Hilary term, 1841. Not reported. Andrews stated that, in this case, the plaintiff tendered two issues, one of which brought in question the rector's title to tithes: and that the Court of Exchequer held that the title could not come in question before the assistant commissioner or upon the issue. Byles denied that this had been decided.

the words of sect. 54 authorize it. [COLERIDGE, J. You pass at once from sect. 45 to sect. 54; but between the award and the apportionment there is a new set of proceedings.] There is no independent proceeding. Those who apportion will inspect nothing but the award. [COLERIDGE, J. The commissioners may have nothing to do with the apportionment.] In *Barker* v. *The Tithe Commissioners*, 9 M. & W. 129, 153, ROLFE, B., says: "The object of the act was in the first place to ascertain conclusively the existence or *non-existence of all moduses and exemptions as speedily as possible, consistently with giving to the parties the opportunity of trying whether such exemptions did or did not exist. But surely, when the legislature is concluding parties for ever, it must be very strong language that could lead us to suppose that they meant to give less time and less facilities to the parties to raise those questions than they had before by the common law, when they were only to be concluded pro hâc vice in each particular suit." No greater burden of proof ought to be laid upon the landowner on the present issue than if Sir H. E. Bunbury had tried, independently of this act, to enforce his right to tithes in equity or at law. In that case he must have set up some title, either as rector or as being entitled to a parcel of tithes. A primâ facie case might have been sufficient. The landowner's situation would have been much better in that event than if, as the defendant's counsel now contend, the award of the commissioners were to operate as a judgment in rem, deciding conclusively that Sir H. E. Bunbury is rector. The award, if it is to have the effect contended for, relieves the party seeking to enforce the payment of tithe from the burden of showing in the one case a primâ facie title to the rectory, which, it may be admitted, would throw the onus of proving a discharge upon the landowner, and in the other case a similar title to the parcel of tithes which he claims, coupled with the additional fact that the lands out of which he claims such tithes are within the metes and bounds of his tithing. If the landowner cannot raise the issue in this form, it is because the commissioner had no jurisdiction to entertain the question: and, if he had no such jurisdiction, his finding cannot place the *landowner in a worse situation than he was in before. If the defendant claims a benefit from the finding of the commissioner that he is a rector, the correctness of that finding may be disputed by the present proceeding. If, on the other hand, he says that that fact cannot be disputed, because the commissioner had no jurisdiction to entertain the question, it has the effect of striking out so much of the award, and the parties are in the same position as before it was made, and the defendant cannot, to enforce the payment of tithe, show by what title he claims it. [*891] [*892]

It is not a matter of indifference to the landowner to what person or in what right he may have to pay tithe. The time to which he may be obliged to carry back his evidence of the enjoyment of the land without payment of tithe may (by the operation of stats. 2 & 3 W. 4, c. 100, and 3 & 4 W. 4, c. 27)(a) be extended from twenty or thirty to sixty years by the fact of the tithe claimant having been an infant, or his estate having been in settlement at any time within thirty years before the commencement of the proceedings: facts which the landowner may have no means of knowing, and which, nevertheless, he must be prepared to meet.

Sect. 77 of stat. 6 & 7 W. 4, c. 71, and sect. 24 of stat. 2 & 3 Vict. c. 62, (amending the former acts for commutation of tithes,) show the intention of the legislature that the commissioners should entertain ques-

(a) See *The Dean and Chapter of Ely* v. *Bliss*, 5 Beavan, 574.

tions of title: and whatever the commissioners have a right to determine, the parties interested have a right to appeal against.

*893] *Lord DENMAN, C. J. I am of opinion that the plaintiff cannot raise the issue in this form, and that such a mode of proceeding was never intended by the act. The observation of Mr. *Paget* is certainly striking, that the right of the landowner may be different according to the circumstances under which the tithe owner claims; and that his right to protect himself by the limitation acts, 2 & 3 W. 4, c. 100, and 3 & 4 W. 4, c. 27, may depend upon these. But it is open to the landowner to avail himself of any advantage of this kind by showing the truth of the case on trial of the issue. The only question here is, on whom the burden of proof ought to lie; and I think it must be on the landowner. The ownership of the tithe must, in the first instance, be taken to be with him who is in a situation to claim it: and, if the landowner disputes that right, he must show that the party claiming is disentitled.

WILLIAMS, J. Though I thought this too important a question to be decided at chambers, I had not much doubt upon the point. The question is, whether the issue as to exemption from tithe should be incumbered with the question of title. I think it would be inconvenient and unnecessary. The decision of the first point might make it superfluous to discuss the other.

COLERIDGE, J. There may be a difficulty of the kind which Mr. *Paget* has pointed out; but we must look at what stat. 6 & 7 W. 4, c. 71, requires of the commissioners in the sections referred to. Where a suit is depending as to the right to any tithes, or a question arises on the existence of a

*894] modus, the commissioners have power *expressly given them to decide. But here the only words to which Mr. *Kelly* can resort are the general ones, "if any difference shall arise whereby the making of any such award" "shall be hindered:" and there appears no way in which the dispute raised here could hinder the making of the award. Mr. *Kelly* contends that it might interfere with the apportionment: but that does not hinder the making of the award. And, if the strict words of the statute are against the plaintiff's argument, surely convenience is so too: for the question on this issue is only between the landowner and the tithe owner; and, if that were decided in the present suit, it might nevertheless be raised again between Sir H. E. Bunbury and another claimant.

Rule discharged.

The QUEEN *v.* The Mayor, Aldermen, and Burgesses of the Borough of HARWICH.

Reported, 2 Q. B. 909.

The QUEEN *v.* PICKLES and ANDERSON.

Reported, antè, p. 601.

*895] *The QUEEN *v.* MERSON.

Where an award has been made under the Tithe Commutation Acts, 7 W. 4 & 1 Vict c. 69, and 2 & 3 Vict. c. 62, settling the boundary of a parish, and is removed into this court by certiorari under sect. 3 of the former act, the court will not, as of course, order a feigned issue under sect. 35 of the latter act, at the instance of a party dissatisfied.

And, where, on motion, for a feigned issue, the attorney for the applicant stated that he, the attorney, had examined several documents and witnesses concerning the boundary, and believed, from such examination, that the commissioner had included in parish A. seventy acres of land belonging to parish B., deposing also that, as he was informed and believed, the applicant, as one of the inhabitants of B., and a large portion of the landowners of B., were desirous of trying by such issue the validity and accuracy of the award, and whether the seventy acres were in A. or B.:

Held, that grounds were not shown on which the court, in its discretion, ought to direct an issue.

A RULE was obtained in last Easter term, calling on the Tithe Commissioners for England and Wales, the Assistant Tithe Commissioner after mentioned, and the tithe-owner and land-owners of the parish of Burliscombe, Devonshire, to show cause why the court should not direct one or more feigned issues or issue to be tried as to the boundary line between the said parish and the parish of Sampford Peverell, in the said county, upon notice to be given to a majority in value of the said land-owners, to the tithe-owner, to the commissioners or their clerk, and to the said assistant commissioner.

The rule was granted on an affidavit sworn by the attorney of William Farrant Merson, of Sampford Peverell, Devonshire, stating that the judgment of James Jerwood, Esquire, one of the assistant tithe commissioners for England and Wales, dated August 4th, 1841, relating to the boundary of the parish of Burliscombe, Devonshire, had been removed into this court by certiorari at the instance of the said W. F. Merson. The deponent further stated: "That he has carefully examined several papers, documents and writings, and several witnesses for and relating to the boundary of the said parish of Burliscombe, and the adjoining parish of *Sampford Peverell, aforesaid; and from such examination he this [*896 deponent verily believes that the said J. Jerwood has included within the boundary of the said parish of Burliscombe about seventy acres of land which belong to and form part of the said parish of Sampford Peverell. And this deponent has been informed, and believes it to be true, that the said W. F. Merson, as one of the inhabitants of Sampford Peverell aforesaid, together with a large portion of other inhabitants, owners and occupiers of land in the said parish of Sampford Peverell, are desirous of trying the validity and accuracy of the said judgment, and whether the said seventy acres are in the parish of Burliscombe, or in the parish of Sampford Peverell, by any one or more feigned issues as the court may direct."

Affidavits were sworn in opposition to the rule; but their contents are not material.

Sir *W. W. Follett*, Solicitor General, and *Butt*, showed cause.(*a*) The power of the court to make this order is not disputed. Stat. 2 & 3 Vict c. 62, amending and explaining former tithe commutation acts, gives to the commissioners power, (by sect. 34,) in case of dispute, and application to them as therein directed, to adjust, set out and define the boundaries of parishes, and extends to every such case the powers and provisions of former acts, one of which (7 W. 4, & 1 Vict. c. 69, ss. 2, 3) gave the like power, with liberty to persons interested to remove the commissioner's judgment into this court by certiorari. And, by sect. 35, of stat. 2 & 3 Vict. c. 62, it is enacted, "That in every case in which *any [*897 judgment or determination of the commissioners or of any assistant commissioner respecting the boundary of any parish, district, or lands,

(*a*) The case was partly heard on November 22d, and adjourned to the 23d.

shall have been or shall be removed into the Court of Queen's Bench, it shall be lawful for the court to direct the trial of one or more feigned issues upon such points as the court shall think fit, and also to direct who shall be the plaintiff or plaintiffs, and who shall be the defendant or defendants on such trial, or determine the same in a summary manner, or otherwise to dispose of the question or questions in dispute, and to make such other rules and orders therein as to costs and all other matters as may appear to be just and reasonable." That is a discretionary authority; and the affidavit in support of this rule shows no reason for exercising it. It gives no proof that the assistant commissioner has decided improperly, and does not show that the party on whose behalf the motion is made knows any thing of the question, or has any interest in it.

Erle and *M. Smith*, contrà. The decision appears to have been contrary to evidence. The legislature could not mean to make the assistant commissioner's judgment final on a complicated question of law and fact: and in sect. 35 of stat. 2 & 3 Vict. c. 62, it seems to have contemplated the inconvenience of trying a question of this kind by affidavit. The Tithe Commutation Act, 6 & 7 W. 4, c. 61, ss. 45, 46,(*a*) makes the feigned issue in the cases there referred to (one of which is, "if there shall be any question," "touching the situation or boundary of any lands") a matter of course; and, by analogy, it should be so here. [COLERIDGE, J. Different words are used in the two statutes.]

*898] *Stat. 7 W. 4, & 1 Vict. c. 69, s. 2, gives the commissioner power to award as to boundaries, and sect. 3 authorises "any person interested in the judgment or determination," "who shall be dissatisfied with such determination," to remove it by certiorari. And then stat. 2 & 3 Vict. c. 62, s. 35, enacts that, when the issue is so removed, "it shall be lawful for the court to direct the trial of one or more feigned issues." Taking the last two sections together, the result seems to be that a feigned issue may be granted without further ground than that on which the certiorari was awarded. Indeed an issue becomes necessary if, when the judgment is removed, the question turns upon evidence. [COLERIDGE, J. Do you say that on a feigned issue you would have a right to make out a new case? The proceeding would be like a new trial. [WILLIAMS, J. Your argument would not fall short of this, that we have no discretion as to granting a feigned issue.] According to the argument it would be a matter of course, though not strictly ex debito justitiæ. [COLERIDGE, J. You scarcely give us the option, which sect. 35 allows, of determining the question, "in a summary manner."]

Lord DENMAN, C. J. In this case a certiorari has been obtained to bring before us the judgment of an assistant tithe commissioner on a question of boundary between parishes. That judgment is delivered after examination on oath, public notice of the proceeding being first given to the parties interested, according to stat. 7 W. 4, and 1 Vict. c. 69, s. 2: it is the result of a solemn inquiry, and is conclusive, unless removed by certiorari under sect. 3. It is now assumed that, in case of such removal, the power exercised by the commissioner may be questioned by any person

*899] under almost any circumstances: for Mr. *Erle's* argument amounts to nothing unless we are absolutely bound to grant an issue on the application of any person who feels dissatisfied with the judgment of the commissioner. But I think that the power given to the commissioner is not so qualified. The act assumes that he may do justice by his decision;

(*a*) See p. 886, note (*a*), antè.

and, unless it be shown to us that he has done wrong, we ought not to set it aside merely because a party expresses dissatisfaction with it. This is not like a question of tithe, which lies between two parties, one of whom must necessarily be prejudiced. It may be here that the boundary is satisfactory to every person in the two parishes except a single individual. The only complaint is that seventy acres are included in the wrong parish; and how minute an interest is that, to disturb an arrangement affecting so many persons! If we have any discretion, this falls far short of the case which would induce us to interfere. From the affidavit we can collect only that, without inquiry, and without looking at the evidence given before the assistant commissioner, the party making this application believes his decision to be erroneous; a belief for which no reason is given, and I see none. I think that in granting an issue we should do what is arbitrary and wrong.

WILLIAMS, J. We must, in construing sect. 35, say that there is some discretion vested in the court; and, if they grant an issue, that they see something wrong in the judgment of the commissioners. In the present case I do not see that.

COLERIDGE, J. The question is whether there be any exercise of discretion reserved to the court. If there be, I see no ground here on which we can exercise it as *desired. No one deposes that he has seen and is dissatisfied with the evidence laid before the assistant commissioner, or that the parish of Sampford Peverell is dissatisfied. It appears only that the attorney for the applicant has seen some papers, and thinks the decision wrong, and that some parties in the parish desire the trial of an issue. It is consistent with the statement that the evidence before the commissioner may on the whole have been in favour of the judgment. The deponent says that he has examined papers, but does not say, if used upon the inquiry, on which side they were adduced. The clauses referred to in stats. 7 W. 4, & 1 Vict. c. 69, and 2 & 3 Vict. c. 62, must be read as part of the first Tithe Commutation Act, 6 & 7 W. 4, c. 71. What then is their effect, if read together? Stat. 7 W. 4, & 1 Vict. c. 69, s. 3, gives a certiorari in the case of a judgment as to boundary, leaving nothing to the discretion of the court. Stat. 2 & 3 Vict. c. 62, s. 35, makes it lawful for the court, on such removal, to order a feigned issue, and to direct who shall be plaintiff and who defendant, or to determine the question in a summary manner, "or otherwise to dispose of the question or questions in dispute," and to make such other rules and orders therein as may appear just and reasonable. Does not this language imply that the court, in granting an issue, is to exercise its discretion on certain materials laid before it, and that some ground must be stated, in fact or in law, for directing the issue to be tried? I think we clearly have a discretion, and that in the present case there are no materials on which we can form the decision prayed for.(a) [*900

Rule discharged with costs.

(a) Wightman, J., was sitting in the Bail Court for Patteson, J., who was absent.

*The QUEEN v. The Inhabitants of PEMBRIDGE. [*901

Under stat. 5 & 6 W. 4, c. 50, s. 98, if an indictment for non-repair of a highway is found at the assizes and removed by certiorari, the judge who tries the cause at Nisi Prius has power to certify that the defence is frivolous and to award costs.

Stat. 6 G. 4, c. 50, s. 34, authorizing the judge "before whom the cause is tried" to certify for the costs of a special jury, applies to criminal cases.

If defendants are required by a side-bar rule to pay costs awarded under stat. 5 & 6 W 4, c. 50, s. 98, and fail to do so, this court will award an attachment against them for contempt.

THIS was an indictment for non-repair of a highway. The bill was found at the Spring assizes, 1841, and removed into this court by certiorari, by the prosecutor. On the trial, before COLERIDGE, J., at the Summer assizes for Herefordshire, 1841, a verdict was found for the Crown. The learned judge certified that the defence appeared to him frivolous, and awarded costs, and also certified, by a separate certificate, that the case was fit to be tried by a special jury. A side-bar rule was afterwards obtained for taxing the prosecutor's costs. In last Trinity term, *W. J. Alexander* obtained a rule for setting aside the two certificates.(*a*)

Talfourd, Serjt., and *Greaves*, now showed cause. First, the judge who tried the cause had power, under stat. 5 & 6 W. 4, c. 50, s. 98, to certify that the defence was frivolous, and to award costs. It is true that the words there are "the court before whom any indictment shall be preferred;" but the word "preferred" will apply to the trial, which is a carrying on of the indictment.
*902] In **Rex* v. *Chadderton*, 5 T. R. 272, it was held that this court could not certify for costs, under stat. 13 G. 3, c. 78, s. 64,(*b*) because there the words are "the court before whom any indictment or presentment shall be tried." In stat. 5 & 6 W. 4, c. 50, s. 98, the word "preferred" is used, with the view of including all methods of trial, as upon a demurrer, for instance. The trial scarcely ever takes place at the sessions or assizes where the bill is found: therefore the construction contended for on the other side would render the provision nugatory. Stat. 13 G. 3, c. 84, s. 33, enables the court before whom an indictment or presentment for non-repair of a turnpike road "shall be preferred" to proportion any fine, imposed for the repair, between the inhabitants and the trustees: and, in *Rex* v. *Upper Papworth*, 2 East, 413, an indictment having been found at the assizes, but removed into this court by certiorari, it was held that this court might apportion the fine. Upon the authority of that case, WILLIAMS, J., in *Regina* v. *Preston*, 7 Dowl. P. C. 593, held that this court had power, under stat. 5 & 6 W. 4, c. 50, s. 98, to award costs on a frivolous defence, where the indictment was found at sessions and removed hither by certiorari. It is true that ALDERSON, B., in an earlier stage of the same case,(*c*) is reported to have held otherwise: but some misconception appears to have prevailed as to that case: it rather seems to have arisen under s. 95, which makes it imperative on the court to award costs out of the highway rate where the
*903] justices direct an indictment on *denial of the liability, as was afterwards held in *Regina* v. *Yarkhill*, 9 C. & P. 218. [Lord DENMAN, C. J. I held that clause to be imperative, at the Sussex assizes, upon consulting with the other judge.] The ninety-fifth and ninety-eighth sections are perfectly distinct; *Regina* v. *Chedworth*, 9 C. & P. 285. The proper practice is, where the judge certifies, to obtain a side-bar rule, as here, for taxation; *Rex* v. *Clifton*, 6 T. R. 344.

(*a*) No application was made to discharge the side-bar rule; and it was contended that this would have been the proper way of raising the question, as in *Rex* v. *St. John the Baptist, Margate*, 6 M. & S. 130. But upon this point the court pronounced no decision. *Wright* v. *Elliott*, 5 A. & E. 818, 822, was cited against the objection. See *The South Eastern Railway Company* v. *Sprot*, 11 A. & E. 167.

(*b*) In some editions of the statutes, owing to a mistake in the numbering of all the sections from the forty-ninth inclusive, this is called sect. 65. See note (w) to 1 Chit. Stat. 456.

(*c*) *Regina* v. *Preston*, 2 Moo & Rob. 137

As to the costs of the special jury, Lord KENYON is stated to have refused to certify for such costs in a criminal case, in *Rex* v. *Lord Abingdon*, 1 Esp. N. P. C. 229. But stat. 6 G. 4, c. 50, s. 30, gives the power to appoint a special jury in cases criminal (except treason or felony) as well as civil; and the enactment as to the costs in sect. 34 is quite general. And this appears to have been taken for granted in *Rex* v. *Moate*, 3 B. & Ad. 237.

W. J. Alexander, contrà. In *Regina* v. *Preston*, 2 Moo. & Rob. 137, ALDERSON, B., at Nisi Prius, considered that he had no power to order costs on a frivolous defence to an indictment removed by certiorari, under stat. 5 & 6 W. 4, c. 50. *Rex* v. *Upper Papworth*, 2 East, 413, was not exactly a question between the parties to the suit: all that was there done was to apportion a fine between the inhabitants and the trustees who were not parties to the record. The decision, therefore, of WILLIAMS, J., in *Regina* v. *Preston*, 7 Dowl. P. C. 593, which proceeded upon *Rex* v. *Upper Papworth*, seems not to be sustainable on that authority. *Rex* v. *Chadderton*, 5 T. R. 227, shows that the word *"tried" in stat. 13 G. 3, c. 78, s. 64, is applicable only to the proceedings at Nisi Prius. [*904 *Rex* v. *St. John the Baptist, Margate*, 6 M. & S. 130, where the judge at Nisi Prius certified, was also a case under that statute. In legal language the preferring an indictment is perfectly distinct from trying it. Sect. 34 of stat. 6 G. 4, c. 50, giving the costs of the special jury to the party applying for it, in case "the judge before whom the cause is tried" shall certify, was held not applicable to a case where the plaintiff was nonsuited; (*a*) and a clause (s. 35) was inserted in stat. 3 & 4 W. 4, c. 42, to make express provision for extending the judge's power to the costs of a nonsuit. Stat. 7 G. 4, c. 64, s. 23, gives costs to a party appearing, in certain cases, "before any court on recognisance or subpœna, to prosecute or give evidence:" and in *Rex* v. *Richards*, 8 B. & C. 420, it was held that this did not apply to the case of a party bound by recognisance to prosecute at sessions, where the indictment was removed into this court, and the party bound appeared at the assizes. A similar decision was pronounced on sect. 22 of the same act in *Rex* v. *Kelsey*, 1 Dowl. P. C. 481. If the statutory provision in this respect be inadequate, the remedy is with the legislature.

As to the costs of the special jury, *Rex* v. *Lord Abingdon* shows the practice before stat. 6 G. 4, c. 50. Then sect. 34 of that stat. speaks only of "the cause," *a word which, in its legal acceptation, seems properly to be confined to civil cases. [*905

Lord DENMAN, C. J. I cannot entertain a doubt on the last point: the language of sect. 34 of the last Jury Act, 6 G. 4, c. 50, is perfectly general. Lord KENYON, under the old practice, does not appear, from the report of *Rex* v. *Lord Abingdon*, to have done more than express an unwillingness to exercise the power; and, when he had given that intimation, he probably would not be pressed.

As to the other point, the principal difficulty arises from my brother ALDERSON's decision in the first case of *Regina* v. *Preston*. My brother WILLIAMS afterwards took a different view in the second case of *Regina* v. *Preston*. And I think that the first decision is open to strong observation. For, if the application was made under sect. 95, the judge had no power to refuse. In fact, however, it is reported to have been made under sect. 98.

(*a*) See *Wood* v. *Grimwood*, 10 B. & C. 689.

(*b*) See S. C. 1 Archb. Peel's Acts, 214, 3d ed., where the court is stated to have held that the statute does not apply to indictments "removed by certiorari at the instance of the prosecutor." Also *Rex* v. *Johnson*, 1 Moo. C. C. 173.

If so, no doubt the decision would be entitled to great respect: but still we should merely have authorities balanced. *Rex* v. *Upper Papworth* seems not to have been brought under the notice of my brother ALDERSON: and that case is a direct authority as to the meaning of the word "preferred," the only word on which a doubt can be raised. The word "tried" might be more directly applicable, because it describes the particular case: but "preferred" is the general word, and admits of several applications; and in *Rex* v. *Upper Papworth* it was held to include the trying. We are fully
*906] warranted in adhering to that authority, *especially in a case where, if we confined our interpretation, we should be rendering the provision nugatory. I do not consider this decision at all inconsistent with that in *Rex* v. *Richards*, 8 B. & C. 420.

WILLIAMS, J. I am of the same opinion, and for the same reasons. If the word "preferred" could not admit of the larger interpretation, it would be otherwise: but the question is, whether it does so. I certainly should not have decided in contradiction to my brother ALDERSON's view if he had had *Rex* v. *Upper Papworth* before him. I thought that case warranted me in giving the larger interpretation to the word.

COLERIDGE, J. I am quite of the same opinion. The clause in question is very short: but one thing is clear; that the person who framed it took for granted that the court before which the indictment was "preferred" would be the court to dispose of the case; for the words which follow are "if it shall appear *to the said court* that the defence made to such indictment was frivolous or vexatious." Now Mr. *Alexander* scarcely denies that this extends to trials at Nisi Prius as well as Quarter Sessions: yet he calls upon us to give a construction which in fifteen cases out of twenty would make the clause of no effect. We know that, unless there be indifference or negligence, not fifteen such indictments out of twenty are tried at the assizes at which they are preferred. The intention therefore could not be as he would construe the clause. Now clearly the word "preferred" will bear the meaning of "carried on." The change of expression, from
*907] the former act, must *have been introduced to enlarge the effect: and I think the word is applicable at any stage to which the prosecution is carried on.(*a*) Rule discharged.

The costs having been taxed, and not being paid after demand, a rule nisi was obtained, in Hilary term, 1843, for an attachment against Turner and Hill, the two defendants, who appeared and pleaded to the indictment. In the ensuing term, (May 10th, 1843,)

W. J. Alexander showed cause. In Com. Dig. *Attachment*, (A 3,) 4th ed., it is said that "an attachment will not be granted" "where there is another remedy, unless that remedy be difficult to obtain." Here it is not; for, by sect. 103 of stat. 5 & 6 W. 4, c. 50, under which this prosecution was instituted, "all penalties and forfeitures by this act inflicted or authorized to be imposed for any offence against the same, and all balances due from a surveyor, and all costs and charges to be allowed and ordered by the authority of this act" (unless where the statute directs otherwise) "shall, upon proof and conviction of the offences respectively before any two or more justices, either by the confession of the party offending, or by the oath of any credible witness or witnesses, (which oath such justices are in every case hereby fully authorized to administer,) or upon order made as aforesaid, be levied, together with the costs attending the information, summons, and

(*a*) Wightman, J., was absent.

conviction, by distress and sale of the goods and chattels of the offender or person liable or ordered to pay the same respectively, by warrant under the hands of two or more *justices before whom the party may have been convicted (which warrant such justices are hereby empowered and required to grant"). It may be contended that the provision as to costs here relates only to the costs of proceedings for penalties and forfeitures. But this court held, in *Sellwood* v. *Mount*, 1 Q. B. 726, that "the 103d section must be read reddendo singula singulis, and the true construction of it is, that the justices shall issue their warrant upon a conviction, where there has been an offence for which a penalty or forfeiture is inflicted or authorized to be imposed; and 'upon order made as aforesaid,' when costs have been awarded and not paid; notwithstanding the words 'under the hands of two or more justices before whom the party may have been convicted.'" If this indictment had been tried at sessions, the court there might have ordered costs under sect. 98; and payment of them must have been enforced under sect. 103. That section applies equally to the award of costs in the present case, which is the order of a court under the authority of the act. If there is any difficulty, the prosecutors have brought it on themselves by not proceeding under sects. 94 and 95.(*a*) [*908

Talfourd, Serjt., contrà. Sects. 98 and 103 are substantially the same, as to the point now in question, with sects. 64 and 72 of the old Highway Act, 13 G. 3, c. 78: if the new statute ousts this court of authority, the former one would have had the same effect. The *costs here are not due, as the defendants suggest, upon an order, but on a rule of court, the side-bar rule, without which the judge's certificate was inoperative. There is no other order upon which execution can issue for the costs. This court will not make an order to be laid before two justices that they may grant their distress warrant. A contempt has been committed by disobeying the rule. The decision in *Sellwood* v. *Mount* related to an order made at sessions, and turned on points quite different from those arising here. (*Greaves*, on the same side, was not heard.) [*909

Lord DENMAN, C. J. We should call our own jurisdiction greatly into question if we submitted it to the interferences of justices in the manner suggested. A judge of this court having certified, and the court having made a rule for taxation of costs in pursuance of that certificate, non-payment of costs upon the allocatur is a contempt for which an attachment must issue.

PATTESON, WILLIAMS, and WIGHTMAN, Js., concurred.

Rule absolute.

(*a*) It appeared by the affidavits in opposition to the rule that the liability to repair was disputed, and that the prosecutors had not, before preferring the indictment, proceeded before magistrates for an order to repair.

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*LAMOND v. EIFFE. [*910

A party may be held to bail by a judge's order under stat. 1 & 2 Vict. c. 110, s. 3, on affidavit that he is about to quit England, and that the plaintiff is apprehensive of thereby losing his debt, though the defendant's place of residence be in the country to which he is going, and not in England, and though such country be within the United Kingdom.

THE defendant, residing in Dublin, made his promissory note (29th March, 1842) for 880*l.*, payable on 1st August, 1842, to the manager of the Caledonian Insurance Company of Edinburgh, who endorsed it to the

plaintiff. The defendant afterwards (June 1842) came for a short time to England, then went to France, and, in September, 1842, returned to England and took lodgings in London. The note having in the mean time been dishonoured, plaintiff, on September 22d, caused defendant to be arrested by order of a judge, on an affidavit stating the deponent's belief, for reasons therein alleged, that defendant would "almost immediately return to France again, and thus defeat the payment of the said debt," and that unless he were immediately arrested plaintiff would be without any remedy for the recovery of the same. The defendant applied to a judge at chambers to order his discharge, on affidavit stating that, before his arrest, he had been in France for the purpose of placing his children at school, and that at the time of his arrest in London he had no intention of returning to France or of quitting the United Kingdom, but was on the point of returning to Dublin, where his home and place of business was, and where he held the office of an auditor to the corporation. Facts (not material here) were also stated for the purpose of showing that the order, even if legal, ought not to *911] have been made. The learned judge, considering the case *too important to be disposed of at chambers, declined to make an order; and now

Kelly moved for a rule to show cause why the judge's order for the arrest should not be rescinded and the defendant discharged out of custody. By stat. 1 & 2 Vict. c. 110, s. 3, a defendant may still be held to bail by a judge's order if there is "probable cause for believing" that he is "about to quit England." But that does not affect a party going to his place of abode in Ireland. The reason of the enactment does not apply; for the law of this country may be put in force against such a party after he is in Ireland.

Byles consented to show cause in the first instance.(*a*) Assuming this debt to accrue on a contract made out of England, the defendant, when in England, was liable to the process of this country, and might have been arrested without a judge's order before the statute. A limitation is now placed upon the power of arrest: but there are no words which prevent the use of it under a judge's order, in a case like the present: the enactment is, generally, that "it shall be lawful" for the judge to order a party to be held to bail where "there is probable cause for believing" that he is "about to quit England." Whether he be going to Ireland or elsewhere out of England can make no difference. If this had been an equitable demand, a writ of ne exeat regno might have issued. Mr. Beames,(*b*) speaking of that writ, says: "The result, however, of the decisions, though little *912] in unison with principle, *seems to be, that the court will grant the writ, although the defendant be a foreigner, or, although the defendant's general residence be in the West Indies, Scotland, Ireland, &c.; and in a recent case," (*Howden* v. *Rogers*, 1 Ves. & B. 129,) "the writ was accordingly granted against a person usually resident in Ireland, and in this country for a temporary purpose merely." And, as to the affidavit on which the writ may issue, he says,(*c*) "It may be considered as settled, that the affidavit will be sufficient, if it state, that the debt will be endangered by the defendant's quitting the kingdom, without stating, that the object is to avoid the jurisdiction."

Kelly, contrà. Whatever power may be supposed to exist on a literal

(*a*) On additional affidavits to that used in obtaining the judge's order.
(*b*) Brief View of the Writ, Ne exeat regno, 2d ed. p. 68.
(*c*) Brief View, &c., p. 39.

construction of the act, it cannot be just that a person resident in Ireland and subject to arrest there should be held to bail for a debt demandable in England, merely because he has come to this country for a temporary purpose. [WILLIAMS, J. The judges conferred upon the construction of the statute, and were of opinion that the words did apply to the case you are supposing; and they have constantly acted on that view. COLERIDGE, J. We have made these orders again and again, in the cases of masters of ships going to Ireland and Scotland.] The construction admits of argument, if the question were open. [WILLIAMS, J. I do not say it is not open. Lord DENMAN, C. J. We only apprize you of the difficulty.] According to this construction, if a bill abolishing arrest on mesne process in Ireland had passed, a party coming to England under the circumstances of this defendant would be *liable to arrest, though as a resident he would be exempt from it in each country. [COLERIDGE, J. The liability arises when the party is about to withdraw himself from the jurisdiction.] He would not be out of the reach of legal process by going to Ireland. The argument for holding to bail is stronger where a party is forsaking his domicile and property: here he is returning to them; and his detention may be ruinous on that very account. [*913

Lord DENMAN, C. J. We can look only to the terms of the act of parliament: and the words creating the jurisdiction which, when the case occurs, we are bound to exercise are, that, if there appears by affidavit "probable cause for believing that the defendant or any one or more of the defendants is or are about to quit England unless he or they be forthwith apprehended, it shall be lawful" to order that such defendant be held to bail. We are now called upon to restrict this provision to the case of a person domiciled, or having property or connections, in this country, or to lay down some other condition, quite arbitrary, and which should exclude any exercise of discretion. I think that the introducing such qualifications of legislative enactments is one of the reproaches on the practice of the law. As to the hardship suggested here, how do we know that the defendant has not property in England? The argument on his behalf admits that a party going to France might be arrested, though the laws of that country, if he were there, would be perfectly effectual for the purpose of giving the creditor his remedy; yet the same argument would prevent the arrest of a debtor going to Calcutta, where there would be much more difficulty in following him for the recovery of a debt due here. This *shows the absurdity of attempting to qualify the provision of an act of parliament by arbitrary restrictions. The rule must be discharged. [*914

WILLIAMS, J. If the statute had said only that a party leaving England for the purpose of defrauding his creditors, or of going to a country where he was not domiciled, should be held to bail, the case would be different. The legislature might introduce an act containing such restrictions; but at present the words are quite general; and I agree that the conclusion stated by my lord must prevail, unless we are to abandon all construction founded on the words of the statute, to introduce a supposed meaning, which they do not furnish.

COLERIDGE, J. By the statute, the debt must be one for which the party could have been arrested before the act passed, and he must be about to leave England. Those things must concur. I do not say that when they do an order must necessarily be granted; but parties will be in the same situation as they were before the act in cases where it was necessary to obtain a judge's order to hold to bail. If, in a case of this kind, it were an

answer to a plaintiff's application that the defendant was domiciled elsewhere, or had property in another country, and we were on that account to hold our hands, we should not only abandon former practice, but depart from the intention of the statute, which was to preserve the former law of arrest in particular cases.(a) Rule discharged.

(a) Wightman, J., was sitting in the Bail Court in the absence of Patteson, J.

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*915] *MICHAELMAS VACATION.(a)

BRANDON v. NEWINGTON.

Plea, in debt for goods sold, &c., Never indebted, except as to 1l. 17s., and as to that a tender. Replication, that a larger sum, viz. 2l. 7s., including the said 1l. 17s., was due from defendant to plaintiff on account of the causes of action, &c., and that before the tender, and while the 2l. 7s. remained unpaid, plaintiff demanded of defendant the 2l. 7s., which included the 1l. 17s., and he refused payment.

Held, on special demurrer, no reply to the plea of tender.

DEBT for goods sold and delivered, and on an account stated.

Plea, except as to 1l. 17s., parcel, &c., never indebted; conclusion to the country. And as to the said 1l. 17s., parcel, &c., that defendant, at the time when the said sum of 1l. 17s., parcel, &c., became due, was, and from thence hitherto hath been, and still is, ready to pay plaintiff the said sum of 1l. 17s., parcel, &c., and that, after the time when the said 1l. 17s., parcel, &c., became due, and before the commencement of this suit, to wit, on, &c., defendant was ready and willing to pay, and then tendered and offered to plaintiff to pay him, the said sum of 1l. 17s., parcel, &c.: verification.

Replication, joining issue on the plea of never indebted. And, as to the plea of defendant by him lastly above pleaded, that, before and at the time of the making of the alleged tender, and before and at the time of the making of the demand and the refusal hereinafter mentioned, a debt or sum amounting to a larger sum than 1l. 17s., to wit, the sum of 2l. 7s., and including the said sum of 1l. 17s., was due from defendant to plaintiff for and on account of divers of the causes of action in the said declaration mentioned: *916] and that, before the said *tender, and while the said sum of 2l. 7s. remained unpaid, to wit, on 20th March, A. D. 1842, plaintiff demanded payment from defendant of the said debt or sum of 2l. 7s., which said sum included the said sum of 1l. 17s., parcel, &c.: yet defendant did not then pay the said sum of 2l. 7s., or any part thereof, but then wholly neglected and refused to pay the said debt or sum of 2l. 7s., and every part thereof: and that no set-off or other just cause then existed for non-payment by defendant of the said sum of 2l. 7s. or any part thereof: verification and prayer of judgment, "and his damages by him sustained by reason of the non-payment of the said sum of 2l. 7s."

Demurrer, assigning for causes that the replication admits the tender of the said sum of 1l. 17s., but does not avoid the effect of that tender by showing any subsequent demand of that particular sum, but alleges a demand of a greater sum before the tender was made, which is no answer whatever in law to the plea of tender; and also for that the said replication should either deny the tender, or admit it and acknowledge satisfaction as to the amount tendered and brought into court, or else show a subsequent demand of the particular sum tendered: and also for that the said replication offers

(a) The court sat in banc on November 26th and 28th, and December 3d.

no material issue, and concludes with a prayer of judgment for damages by the plaintiff sustained by reason of the non-payment of the sum of 2*l*. 7*s*., although the plea is only pleaded as to the damages in respect of non-payment of the sum of 1*l*. 17*s*., and the plaintiff at the commencement of his replication to the said plea of tender professes only to plead as to the damages sustained by reason of the non-payment of the sum of 1*l*. 17*s*., &c. Joinder in demurrer.

**Petersdorff* was called upon by the court to support the replication. A replication like this was held good on demurrer in *Cotton* v. *Godwin*, 7 M. & W. 147, where PARKE, B., (delivering the judgment of the court,) said: "The principle of the plea of tender is, that the defendant has performed, so far as he could perform, his part of the contract, by being always ready to pay the debt, and actually offering to do it; but this replication shows that there was a time when the defendant was not ready to perform his part, viz., when the demand was made of the whole amount of the note, at which time he ought to have been ready to pay the whole, as the whole was then due, according to the averments in the replication, which must be taken to be true on this demurrer. That being so, a subsequent tender of part was unavailing." In that case a set-off only was pleaded to the excess of alleged debt above the sum tendered; here the existence of any such debt is denied; but that can make no difference. The replication in each case disposes of part of the claim, and answers the residue by stating a tender. In *Tyler* v. *Bland*, 9 M. & W. 338, the replication was in nearly the same words as this; and the Court of Exchequer thought it good. *Jones* v. *Owen*, 5 A. & E. 222, may be cited on the other side: but there it did not appear that the sum alleged in the second plea to have been tendered was not the whole which at that time was due. [*917

Bovill, contrà. The decision in *Tyler* v. *Bland* seems to have proceeded on the authority of *Cotton* v. *Godwin*, 7 M. & W. 147. In neither case was the attention of the *Court of Exchequer drawn to *Spybey* v. *Hyde*, 1 Camp. 181, where a tender of 5*l*. 1*s*. was pleaded, and the plaintiff replied a subsequent demand and refusal of 5*l*. 1*s*., but proved that he had demanded 11*l*. 6*s*., and this evidence was held not to support the replication. *Rivers* v. *Griffiths*, 5 B. & Ald. 630, is a decision in banc to the same effect. These cases establish the proposition that demand and refusal of a larger sum before or after tender are not equivalent to demand and refusal of a smaller. [*918

Petersdorff was heard in reply.

Lord DENMAN, C. J. It appears that the Court of Exchequer, in the two cases which have been cited, did not advert to the principle laid down in the earlier decisions. And the point is clear. The defendant by his plea answers, as to the sum of 1*l*. 17*s*., that he was always ready to pay and did tender that sum. The plaintiff then says, "I demanded more, and you owed more." But the defendant had a right to say, as he does by his pleading, that 1*l*. 17*s*. was all he owed, and that he tendered 1*l*. 17*s*.; and to that the replication is no answer. The defendant is entitled to judgment

COLERIDGE and WIGHTMAN, Js., concurred. Judgment for defendant

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*HALL v. FEARNLEY. [*919

In trespass for driving defendant's cart against plaintiff, throwing him down, and wounding him, defendant cannot show, under Not guilty, that there was no negligence on

his part, but that plaintiff accidentally slipped from the pavement, and defendant unintentionally drove over him.
Inevitable accident, arising from superior agency, would have been a defence admissible under that issue.

TRESPASS for driving defendant's cart and horse with great violence against plaintiff, and thereby knocking him down, bruising and wounding him, &c.

Plea, Not guilty.

On the trial, before WIGHTMAN, J., at the Middlesex sittings, in Hilary term, 1842, it was proved that the plaintiff was walking on a narrow part of the pavement in a public street, where there was a considerable curvature in it. The defendant was driving a cart in the road near the pavement at the edge of which the plaintiff was walking. The case for the plaintiff was that there was want of due care on the part of the defendant, who had driven so close to the pavement as to knock the plaintiff down, and run over and break his leg. The defendant endeavoured to show that the plaintiff had slipped from the curb-stone at the moment when the cart was passing, and had so got his leg under the wheel. The defendant called no witnesses. WIGHTMAN, J., told the jury that the question for them was, whether the injury was occasioned by unavoidable accident or by the defendant's default; and that, if they thought the plaintiff had accidentally slipped off the pavement as the defendant's cart was passing, and had been run over in consequence of such accident, they ought to find for the defendant. Verdict for defendant.

In the same term *Crowder* obtained a rule nisi for a new trial on the ground that the judge had misdirected the jury, by telling them that, on the issue, if the injury was accidental, the defendant was entitled to a verdict.

*920] **Knowles* now showed cause. The jury have in effect negatived all fault on the part of the defendant. This was an inevitable accident, as in *Gibbon* v. *Pepper*, 2 Salk. 637, where the defendant's horse ran away with the rider, and struck the plaintiff, and the court held it to be no trespass, and therefore properly evidence under Not guilty. The new rules of pleading make no alteration in pleadings for trespass to the person; and the case therefore stands on the old forms of pleading. This was in fact no assault or battery at all; for to constitute one some degree of negligence is always necessary; 3 Starkie on Evidence, 1119, 3d ed. *Gough* v. *Bryan*, 2 M. & W. 770, is to the same effect. There a special plea, alleging collision by the improper driving of the plaintiff himself, and concluding to the country, was held to be bad as amounting to the general issue. *Griffin* v. *Parsons*, reported in Selwyn's Nisi Prius, tit. *Assault* and *Battery*, sects. 1, 25, 26, note (1), 10th ed., shows that a seizure of the person is not necessarily an *assault*, but that the animus with which the act was done is material; therefore, on a replication denying a prior assault, evidence was admitted to show that the alleged assault was only to part the defendant and another who were fighting. It is at all events evidence in mitigation. [Lord DENMAN, C. J. If the plaintiff has suffered damage by a trespass not justified, the defendant should pay the whole amount without inquiry into the question of animus. The case would be different, if the defendant was not a voluntary agent. So it may be different where an action on the case for negligence is brought, and the negligence is denied; there negligence is the fact in issue.]

*921] **Crowder*, (with whom was *H. S. Cooper*,) contrà. The case of *Gibbon* v. *Pepper*, as reported in 1 Lord Raymond's Reports, 38, appears to

have been one of mere involuntary accident occasioned by the act of a third person in frightening the defendant's horse. A flash of lightning may have the same effect, and would certainly exculpate the rider from all blame. But here there was nothing inevitable. *Weaver* v. *Ward*, Hob. 134, 5th ed., is in point. There an accidental injury done by a soldier who was exercising, was held to be actionable, for there was nothing to show that it was unavoidable. *Griffin* v. *Parsons* is only a Nisi Prius case, and the doctrine contained is against the current of authorities. *Milman* v. *Dolwell*, 2 Camp. 378, and *Knapp* v. *Salsbury*, 2 Camp. 500, also show that, if the trespass is in fact committed, the fact of its being excusable by some accident or by negligence of the plaintiff is matter for a special plea. [He was then stopped by the court.]

Lord DENMAN, C. J. The authorities show that if the accident had resulted entirely from a superior agency, that would have been a defence, and might have been proved under the general issue; but a defence admitting that the accident resulted from an act of the defendant would not have been so proveable.

COLERIDGE, J. Any defence, which admits the trespass complained of to be the act of the defendant, must be pleaded specially.

*WIGHTMAN, J. The act of the defendant was primâ facie unjustifiable, and required an excuse to be shown. When the motion in this case was first made, I had in my recollection the case of *Wakeman* v. *Robinson*, 1 Bing. 213. It was there agreed that an involuntary act might be a defence on the general issue. The decision indeed turned on a different point; but the general proposition is laid down. I think the omission to plead the defence here deprived the defendant of the benefit of it, and entitled the plaintiff to recover. [*922

Rule absolute for a new trial.

RAYNER v. WRIGHT.

Declaration in debt: 1st count demanding 45*l.* for work, &c., as plaintiff's agent; 3d count demanding 45*l.* on an account stated.

Plea, that the moneys in the 1st and 3d counts mentioned are claimed for work done as a broker of the city of London, and that plaintiff was not duly admitted a broker.

***Held* bad, on special demurrer, for not averring that the account mentioned in the third count was stated in respect of the work mentioned in the first.**

DEBT. The declaration stated that defendant, on, &c., was indebted to plaintiff in 45*l.* for work done by plaintiff as the agent of and for defendant, upon his retainer and at his request, and for commission and reward due and of right payable from defendant to plaintiff in respect thereof, and in 45*l.* for money paid by plaintiff for the use of defendant at his request, and in 45*l.* for money found to be due from defendant to plaintiff on an account then stated between them, which said several sums were to be respectively paid by defendant to plaintiff on request, whereby, and by reason of the non-payment, &c., an action hath accrued, &c.: *yet defendant hath not paid the said several sums, &c., or any part thereof: to the damage, &c. [*923

Plea. The defendant, "as to the first and last counts of the declaration, says that the moneys in the first and last counts of the declaration mentioned are claimed by the plaintiff for and in respect of work done heretofore, to wit, on," &c., "and on other days," &c., "within the city of London and the liberties thereof, and not elsewhere, by the plaintiff as a broker, and as the broker of and for the defendant, in and about buying

and selling goods and merchandise as such broker, and the plaintiff was not, before or at any of the times when the said work was so done, admitted to act as a broker," &c., "in pursuance of the statute in such case made; and the plaintiff then on those several occasions acted as a broker within the said city and the liberties thereof, not being admitted in pursuance of the said statute, contrary to the form of the statutes in such case made:" verification.

Demurrer to plea to the first and last counts, assigning for causes "that, although the cause of action stated and set forth in the first count of the declaration is a debt of 45*l.*, therein alleged to be due from the defendant to the plaintiff for work done by the plaintiff as the agent of and for the defendant upon his retainer and at his request, and for commission and reward due and of right payable from the defendant to the plaintiff in respect thereof, and the cause of action stated and set forth in the last count of the declaration is a debt of 45*l.* for money found to be due from the defendant to the plaintiff on an account then stated between them, yet the defendant hath in and by his said plea alleged that the moneys in
*924] the first and last counts of the declaration *are claimed by the plaintiff for and in respect of work done heretofore, to wit, on," &c., "and other days," &c., "within the city of London and the liberties thereof, and not elsewhere, by the plaintiff as a broker, and as a broker of and for the defendant, in and about buying and selling goods and merchandise as such broker, which allegation is wholly inconsistent with and contradictory to the cause of action claimed in the last count of the said declaration: and also for that the said plea neither directly traverses nor confesses and avoids the cause of action stated in the last count, but amounts only to an argumentative and circuitous traverse of the existence of that cause of action: and also for that the defendant hath not in or by his said plea offered to take, or taken, any proper issue upon the first and last counts of the said declaration, but hath pleaded and shown other matters, and hath improperly attempted to confine and limit the plaintiff to one cause of action instead of two distinct and separate causes of action in respect of the said first and last counts. And also for that the said plea is in divers other respects uncertain," &c.

Joinder in demurrer.

H. S. Cooper, for the plaintiff. The first and third counts contain demands different in their nature; and the plea answers only one. [WIGHTMAN, J. It does not allege that the account was stated in respect of work done as mentioned in the first count.] That should have been pleaded, and that the sums mentioned in the two counts formed one identical debt. One thing may be demanded in different ways; but, if a party means to allege that two sums are in reality claimed for the same cause of action,
*925] he must aver that fact, as was done, and held to be *done correctly, in *Mee* v. *Tomlinson*, 4 A. & E. 262; it cannot be supplied by intendment in favour of the party pleading. And the objection is good on special demurrer. In *Tayler* v. *Herbert*, Freem. K. B. & C. P. 367, where the declaration contained counts on an indebitatus assumpsit for 10*l.* and a computasset for 35*l.*, the defendant pleaded the statute of usury to the indebitatus, and averred that the indebitatus and the computasset were for the same cause of action; and the averment was held bad; "for the ground of the indebitatus is the debt, and the ground of the computasset is the account; and so it cannot be averred that there is the same cause of both:" and HALE, C. J., said "he should have pleaded the statute to

the indebitatus, and then, that afterwards they came to an account for the same wares," &c. *Sheldon* v. *Clipsham*, T. Ray. 449, S. C., 2 (T.) Jones, 158, also shows how a defence of this kind may be pleaded. The plea is clearly objectionable on the last special ground stated in the demurrer. The plaintiff is entitled to have each count of the declaration treated as containing a distinct cause of action, unless the contrary be shown in pleading. Here the count on an account stated is wholly independent of the count for work done. The plea of Nunquam indebitatus, which would have answered both, is not pleaded. The defendant pleads another single plea which, if good, should be equivalent to Nunquam indebitatus, and which, therefore, must profess to answer both counts; but it makes no answer to the account stated. Unless, therefore, that count can be treated as a nullity, the plea is defective.

**Erle*, contrà. Where two counts evidently may be for the same cause of action, as in this case, the defendant may treat the causes as identical without a formal averment. PATTESON, J., said, in *Mee* v. *Tomlinson*, 4 A. & E. 270, "The new rules allow an account stated to be joined with any other count for a money demand, although there be not distinct subject matters of complaint. Therefore a sum due upon a consideration mentioned in another count may be the same as that claimed in the count upon an account stated." Then the defendant here may well plead one plea as to "the moneys in the first and last counts of the declaration mentioned." [WIGHTMAN, J. Can you assume that they are "claimed by the plaintiff" on the same account?] The defendant may say that, in whatever way claimed, they are really claimed for services as a broker, and that the plaintiff was not duly qualified. [COLERIDGE, J. You would drive the plaintiff to take issue on the identity of the claims, and admit the other matters of defence. WIGHTMAN, J. You might have pleaded the same defence to both counts, first identifying the subject matters. Your plea may be true, but is not properly introduced. Lord DENMAN, C. J. The demand in the last count is for money found due upon an account stated. Are you in a condition, without further averment, to say that that demand is for work done under an illegal contract? COLERIDGE, J. Ought not you to have said that the account was stated of and concerning work done as a broker?] The objection, if valid, is not such as the language of the demurrer points out. The averment that the claim is for work done, &c., is not *"inconsistent with," or "contradictory to," the cause of action in the last count; nor is the plea argumentative. The demurrer does not specify as a defect that the causes of action in the two counts are not identified. The authority of *Mee* v. *Tomlinson* is shaken by the subsequent cases of *Mitchell* v. *Townley*, 7 A. & E. 164, and *Marshall* v. *Whiteside*, 1 M. & W. 188; S. C., Tyr. & G. 485 In *Wright* v. *Acres*, 6 A. & E. 726, a question resembling that in the present case arose, but was rendered immaterial by a nolle-prosequi as to one count. The Court of Exchequer held, in *Noel* v. *Davis*, 4 M. & W. 136, that, to a declaration of four counts, each claiming 100*l*., the defendant might plead a set-off of 27*l*., without saying how much of the moneys in each or either of the counts the set-off was intended to cover.

H S. Cooper, in reply, was stopped by the court.

Lord DENMAN, C. J. The objection is rather refined; but the plea ought to have been introduced by a proper averment. The plaintiff must have judgment.

COLERIDGE, J., concurred.(a)

WIGHTMAN, J. The defendant must fail for want of an averment that the two counts are for the same identical sum of money.

Judgment for plaintiff.

Erle asked leave to amend, but it was refused.

(a) Williams, J., was absent.

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*928] *VEITCH *v.* MARY ANN RUSSELL.

A physician has in general no legal right of action for his fees; but he may have it by actual contract, the onus of proving which, in an action for such fees, is upon the plaintiff.

Defendant, a lady of moderate fortune, requested plaintiff, a physician, to attend her brother, who was ill, and in indigent circumstances. After plaintiff had so attended for some time, defendant wrote to him: "As your account against me for attendance on my brother must be formidable, you will oblige me by letting me have it." "My wish is to present you with such a sum as you would call upon me to pay you." "I do not know what you would deem, under the circumstances, a suitable acknowledgment." "I hope you will at once tell me what sum will be agreeable to you to accept from me." Plaintiff named 150*l.*, which defendant said was more than she had expected, or could afford to pay, and, after some other communications, she wrote: "Let me know the name of your bankers, that I may pay 70*l.* to your account in liquidation of my debt to you up to the present time. You will further oblige me by letting me know on what terms you will continue your visits."

Plaintiff brought assumpsit for the higher sum. The judge left it to the jury to say whether there had been any contract between plaintiff and defendant for payment of fees. The jury thought not, and found a verdict for the defendant. On motion for a new trial: *Held*, that the jury had drawn a right conclusion from the evidence.

Held also, that plaintiff could not recover his travelling expenses incurred in visiting plaintiff's brother, as money paid to defendant's use; for that such payments were made to plaintiff's own use in the ordinary exercise of his profession.

ASSUMPSIT "for the work and labour, care, diligence, journeys, and attendances of the plaintiff by him done, performed, given, and bestowed for the defendant at her request:" for money paid, and on an account stated.

Particular of demand.

"To fifty visits paid by the plaintiff as a medical adviser, at the request of defendant, upon Mr. Thomas Beckley, then residing in London, from Richmond, between the 1st of September, in the year 1839, and the 23d of April, in the year 1840.	
"To thirty-nine similar visits paid by plaintiff in succession, between the 22d July and the 29th August, in the year 1840, upon Mr. Beckley, from Richmond to Camberwell.	
"To eleven similar visits paid by plaintiff between the 30th of August and the 17th day of September, in the year 1840, from Richmond to London - - - - - -	£73 0 5
*929] *"To cash paid by plaintiff in performing the journeys from Richmond to London, and incidental thereto, in paying the said fifty visits and the said eleven visits - -	35 0 0
"Charges for a fly used in paying the above-mentioned thirty-nine visits, at 1*l.* per day - - - - - - - -	39 0 0
"Allowance to flyman - - - - - - - - - -	7 16 0
"Tolls - - - - - - - - - - - - -	2 13 7
	£157 10 0"

Plea, Non assumpsit. Issue thereon.

On the trial, before WIGHTMAN, J., at the sittings in Middlesex after Hilary term, 1842, it appeared that the plaintiff was a physician, and had in that capacity attended the defendant's brother at the times and in the manner, and had on those occasions incurred the expenses stated in the particular. The material question was, whether the defendant had rendered herself liable for the remuneration now claimed by the plaintiff: and it was contended on his part that, admitting no action to be in general maintainable by a physician for such recompense, the defendant had, in this case, bound herself to make it by actual contract.

With reference to the first series of visits, letters from the defendant to the plaintiff were put in, the first two describing the brother's symptoms, and requesting the plaintiff to visit him: the third stating as follows: "As regards his going to the sea, he seems rather to dislike it, thinking it will add to the expenses. I told him, if you thought it absolutely necessary for his recovery, he should go, however dear it might cost my purse; and, therefore, if you conceive it absolutely necessary, I *would be sorry to prevent, as all depends upon me. You are aware of all this, and of my sincere desire to have him restored, if possible, to health." [*930

As to the visits from July to September, 1840, the plaintiff put in the following, among other letters, from defendant to plaintiff.

"*July 21st*, 1840.

"Dear Dr. Veitch. My brother Richard is just come to tell me that poor Thomas" (the brother first mentioned) "was taken suddenly ill this morning. He is in a state of stupour, not knowing any one. I am anxious to apprize you of this sad affliction, believing you to be the only medical friend who can restore him. A medical gentleman was sent for: the result of his opinion I know not. Pray go and see him." (The address was then given.) "I am fearful of sending any physician from town, as they might not understand him as you do."

"*August 30th*, 1840.

"As your account against me for attendance on my brother must be rather a formidable one, you will oblige me by letting me have it, up to his removal to town."

The following correspondence, which took place during September, 1840, was also put in during the trial.

Plaintiff to defendant:

"I have received your letter of the 30th ult.; and I will see you soon, being fully convinced that no claim that is just, and contracted in so good a cause, will be formidable to you."

Defendant to plaintiff:

"I have thought a great deal upon the subject of our conversation on Monday last; and the more I think of *it, the more perplexed I feel as to what I should do. My wish is to present you with such a sum as you would call upon me to pay you. Now, as this can only be done by your telling me what that sum should be, I shall feel greatly obliged to you by your doing so. I really do not see how I can spare you this trouble; for I do not know what expenses you have incurred, or what you would deem, under the circumstances, a suitable acknowledgment of your great professional skill and attention. Having thus explained to you my feelings on this subject, I hope that you will at once tell me what sum will be agreeable to you to accept from me." [*931

Plaintiff to defendant.

"In answer to your letter of the 9th instant, I hope you will regard 150 guineas as only a very moderate compensation for my long, expensive, and successful attendance on your brother at your most earnest request."

Defendant to plaintiff.

"I have received your letter, which painfully surprises me. From your general kind and friendly deportment to me, and especially from the confidence you have more than once reposed in me," &c., "I was induced to consider you my friend; and in that character, as regards professional remuneration, I ventured to view your attendance on my poor brother on the late and present occasion. Feeling, however, that I ought not to lose an opportunity of refunding to you the money you had expended on his account, and of paying you any small fee which you might, under the circumstances stated, deem right to charge me, but which fee I never thought would exceed twenty or thirty guineas, I solicited you, on my brother's
*932] removal to town, to let me *discharge my debt to you. You are aware," &c., (mentioning that defendant's brother was dependent on her for support, and other family circumstances, which limited her means.) "I have entered into this explanation to show you that it is not in my power to meet your demand. I fully appreciate the consummate skill and talent which you have displayed in the treatment of my brother; and I wish it was in my power to recompense you as you deserve; but really I cannot do so: 60*l.* or 70*l.* is as much as I can afford."

Two other letters, from plaintiff to defendant (expressing hopes of a satisfactory arrangement, and proposing a conference) were then put in; and after them the following from defendant to plaintiff, dated September 15th.

"As it would be painful to me to have any conversation on the subject of our late correspondence, will you be so good as to let me know the name of your bankers, that I may pay 70*l.* to your account, in liquidation of my debt to you up to the present time; and you will further oblige me by letting me know on what terms you will continue your visits to my brother in future."

In a subsequent letter the plaintiff declined further attendance, on account of other engagements.

It appeared that the plaintiff and defendant had been on terms of friendship independently of the plaintiff's professional attendance; and that he had occasionally dined with the defendant in the course of his visits to her brother.

WIGHTMAN, J., in summing up, told the jury that although such an action as this was unusual, because there was a conventional mode of payment generally adopted, it did not follow that a party might not contract
*933] with a *physician to remunerate him by a specific rate of payment; the cases deciding only that a contract of that nature could not be inferred from the mere fact of attendance. He said that he should, therefore, leave it to them to say, (judging by the correspondence and the other circumstances of the case,) whether there was a contract that the plaintiff should be remunerated for his services, or whether the transaction between the parties was left in the ordinary state of circumstances between physician and patient. He commented on the letters produced in evidence, putting it to the jury, whether or not the defendant's letter of August 30th showed a foregone agreement; and he observed that until the last the defendant did not so much object to paying as to paying 150 guineas. And he said that, if the jury thought there was a special agreement, they would find a verdict

for the plaintiff in such amount as they deemed proper: but that, as to money paid out of pocket, if they inferred from the facts a definite contract to pay that, a precise sum (about 50*l.*) was fixed by the evidence. The jury expressed their opinion that there was no contract, and found a verdict for the defendant.

Sir *F. Pollock*, Attorney General, in the ensuing term, obtained a rule nisi for a new trial, on the ground that the verdict was against the evidence, and that the plaintiff was at all events entitled to the money paid out of pocket for the purpose of making the visits.

Thesiger, *Warren*, and *Bovill* now showed cause. The established rule of law is, that a physician cannot recover for fees; *Chorley* v. *Bolcot*, 4 T. R. 317; *Lipscombe* v. **Holmes*, 2 Camp. 441; they being only "honorarium," as are those of a barrister; *Preface* dedicatory to Sir John Davys's Reports. And, the remuneration being of this nature, a promise of it, even for past services, cannot be ground for an action at law, though Popham, Attorney General, asserted the contrary in *Marsh and Rainsford's Case*, 2 Leon. 111. And, supposing that a physician might recover on a special contract, here none was pleaded: and the existence of such a contract was a question of fact, which the jury were the fit persons to decide, and have decided rightly. The letters show an intention to make a present, but not to admit a legal liability. Had there been an express contract, some rate of remuneration would have been fixed. [*934

Sir *F. Pollock*, Attorney General, *Peacock*, and *Lutwyche*, contrà. The inability of a physician to recover fees appears to have an unsettled point before the decision in *Chorley* v. *Bolcot*, 4 T. R. 317. In note (a) to *Wennall* v. *Adney*, 3 B. & P. 247, 252, the reporters do not question the law laid down in *Marsh* v. *Rainsford's Case*, that, "if a physician, who is my friend, hearing that my son is sick, goeth to him in my absence, and helps and recovers him, and I being informed thereof, promise him in consideration, &c., ut supra, to give to him 20*l.*, an action will lie for the money." And this is not the mere dictum of Popham, but a point decided in *Style* v. *Smith*,(*a*) to which he refers. [Lord DENMAN, C. J. I do not think we have any doubt that, if there is an express *contract for remuneration, the character of physician will not prevent a party from availing himself of such contract. The case is like that in which a barrister was held entitled to recover for services rendered to the Guardians of the Kensington Union as a returning officer.(*b*) So it has been held that arbi- [*935

(*a*) Cited 2 Leon. 111. See the discussion on the legal right of physicians to remuneration, in Willcock's "Laws relating to the Medical Profession," 111—113, Part I. ch. 6, sect. 1. Also p. 938, note (*b*), post.

(*b*) *Egan* v. *The Guardians of the Kensington Union*, tried before Lord DENMAN, C. J., at the sittings in Middlesex after Hilary term, 1841. The action was for work and labour done by the plaintiff as returning officer on an election of guardians of the union. An express contract was proved for remuneration at so much per day. Sir *J. Campbell*, Attorney General, for the defendant, objected that a barrister could not recover on such a contract, but that the fees must be considered as merely honorary. Lord DENMAN, C. J., held the objection not maintainable, the professional character of the plaintiff not affecting his rights under this special contract; and he left it to the jury to say how much the plaintiff was entitled to for his services. Verdict for plaintiff for 257*l.* The case came before the court on motion to alter the amount of damages (Hilary vacation, 1842): but no question was raised as to the plaintiff's right to recover.

The declaration in this case was in assumpsit "for the work, labour, care, diligence and attendance of the plaintiff, by him before then done, performed and bestowed, upon the retainer and at the request of the defendants, in and about the superintending and conducting for the defendants a certain election of divers persons before then to be elected, and elected accordingly, guardians of the poor of the said Kensington Union,

trators might recover fees on an express promise, without which they would
*936] have *had no legal claim, *Hoggins* v. *Gordon*, antè, p. 466.] Then, an express contract for remuneration was sufficiently proved in this case. The correspondence shows that the parties had dealt throughout on the footing of an intended payment. The principle on which a physician in general is disabled from recovering his fees is, not the supposed honour or discredit attending one or another mode of obtaining that recompense, but the presumption, from usage, that he is paid his fees as they become due, or else that he has dispensed with them. But here both presumptions are negatived. Then the terms of the contract are to be collected from the evidence, as in ordinary cases. No rule requires that the precise amount of remuneration should have been ascertained beforehand. Assuming that no contract appears to have been entered into till the services were past, still, as they were rendered at the defendant's express request, the consideration was sufficient. At all events the plaintiff ought to be reimbursed as to the money paid out of pocket.

Lord DENMAN, C. J. It must be assumed as clear that physicians and counsel usually perform their duties without having a legal title to remuneration. Such has been the general understanding. To prevent that from operating, some express agreement must be shown: but, in considering whether such an agreement existed, we cannot lose sight of the general understanding. The one party, in a case of this kind, expects and trusts that he will be paid according to the practice: the other expects and hopes so to pay him; but that does not raise a contract; indeed the inference is
*937] rather to the *contrary. Letters are relied upon here, which, if they had passed between conveyancers, or between a tradesman and his customer, would undoubtedly have had a strong effect. But these are the letters of a lady writing to a physician on occasion of her brother's illness, she being a person of limited fortune. In such letters she might use the expressions "debt," "your account against me," "power to meet your demand," without having intended him to understand that she meant to make herself legally liable for his professional charges. No inconvenience can result from this view of the case. If a physician cannot continue his attendances without payment, he may give notice of that, or may forbear attending when he finds that remuneration is not made. As to the money paid out of pocket, it was not paid to the use of the patient but to that of the physician himself, while he was carrying on his business with a view to the ordinary remuneration.

COLERIDGE, J.(a) I am of the same opinion. To support such an action as this, there must be, not indeed an express contract, but an actual contract. The physician has a claim, usually recognised, to remuneration for his ser-

and in and about the examining divers parochial rates and books relative thereto for the defendants upon their like retainer and at their like request, and in and about the preparing divers voting lists and issuing divers voting papers relative thereto respectively, and receiving back and examining the same for the defendants upon their like retainer, &c., and in and about other the business of the defendants upon their like retainer, &c.

	£	s.	d.
Particular of demand: "For work and labour done as returning officer in conducting the election of guardians for the said Union for the year ending March 25th, 1841, at the request and upon the retainer and according to the instructions of the guardians of the said Union and the orders of the Poor Law Commissioners, seventy-two days and eighteen nights, at the rate of 5 guineas per day."	472	10	0

Plea, payment into court of part; as to the residue, Non assumpsit.

(a) Williams, J., was absent.

vices, but he has no legal title to it. If we were considering evidence in a case where presumption was in favour of a contract, the proof in this particular instance is strong: but, the legal presumption being against any contract for remuneration, we must look at the evidence accordingly; and the result seems to be, that the plaintiff must have expected remuneration, but not have considered himself as having a legal title to it; *and that the defendant must have expected to pay him as a person would pay any other physician. And here, if a contract were to be presumed, we must suppose the plaintiff to have expected the ordinary remuneration of a physician; but the amount actually claimed is something less than that; something irregular. If the plaintiff meant to stand upon some terms different from the ordinary ones, notice of that intention might have been expected. [*938

Wightman, J. It was conceded at the trial that the plaintiff, according to *Chorley* v. *Bolcot*, could not set up a legal title; but it was said that a special contract might be inferred from the evidence: and the question was, whether any thing appeared, beyond the mere circumstance of the plaintiff having attended at the defendant's request, from which the jury could infer a contract. The physician, in every case, attends on request; that fact alone is not sufficient for the inference. The case went to the jury without any undue pressure against the interests of the plaintiff: and they thought there was not sufficient evidence of a contract or understanding, and that the parties had dealt on the ordinary terms, and that the defendant meant to offer the plaintiff a gratuity if he would accept of it. It has been held (a) that a surgeon who delivered a bill leaving blanks for the sums to be paid him for attendances could recover no more for them than the employer thought fit to give; and this is a similar case.

Rule discharged.(b)

(a) *Tuson* v. *Batting*, 3 Esp. N. P. C. 192.

(b) See, as to the right of counsel and physicians, generally, to recover fees, *Morris* v *Hunt*, 1 Chitt. Rep. 544, judgments of Bayley and Best, Js.

*IN THE EXCHEQUER CHAMBER. [*939

(Error from the Queen's Bench.

The QUEEN on the Prosecution of PAGE *v.* The Master, Wardens, and Assistants of the Society of SCRIVENERS of the City of LONDON.

Under stat. 41 G. 3, (U. K.) c. 79, a person having served his full time of apprenticeship with a notary was not qualified to be enrolled and admitted a notary if, during part of that time, he had served also under articles as an attorney's clerk, though to the same master, performing as much service in one capacity as in the other.

So held by the Court of Exchequer Chamber, reversing the judgment of the Queen's Bench.

See now stat. 6 & 7 Vict. c. 90.

Mandamus. The writ stated that the prosecutor was bound by indenture of apprenticeship to William Sagon Page the elder, a notary public, and did serve for the full and complete term of seven years, and did continue, and was actually employed by his said master, in the proper business, practice, and employment of a public notary during seven years: that he applied to become a member of the said company, in order to become and practise as a notary in the city of London, and the defendants refused to admit him.

The return set forth the following provisions of stat. 41 G. 3, (U. K.) c. 79, s. 2. "That, from and after," &c., "no person shall be sworn, admitted, and enrolled, as a public notary, unless such person shall have been bound, by contract in writing or by indenture of apprenticeship, to serve as a clerk or apprentice, for and during the space of not less than seven years, to a public notary, or a person using the art and mystery of a scrivener, (according to the privilege and custom of the city of London, such scrivener being also a public notary,) duly sworn, admitted, and enrolled, and that such person, for and during the said term of seven years, shall have continued in such service." It also set forth sect. 7, which enacts: "That every person who shall, from and after," &c., "become bound by contract *940] *in writing or indenture of apprenticeship to serve any public notary as hereby directed, shall during the whole time and term of service to be specified in such contract or indenture of apprenticeship, or during the time and space of seven years thereof at least (if bound for a longer term than seven years) continue and be actually employed by such public notary or scrivener, being also a public notary, in the proper business, practice, or employment of a public notary." The return then alleged that the prosecutor did not, under the said indenture, continue for the space of seven years in the service of W. S. Page the elder, as such public notary, as required by the statute: and that the prosecutor did not, during the whole term of seven years specified in the said indenture, continue to be, nor was he, actually employed by W. S. Page the elder, as such notary in the proper business, practice, and employment of a public notary, as is directed by the said act, &c.

Pleas to the return. 1. That prosecutor did, under and by virtue of the said indenture, continue for the space of seven years in the service, &c., as such public notary, as required, &c., in manner and form, &c., conclusion to the country. Issue thereon. 2. That prosecutor did, during the whole term of seven years specified, &c., continue to be, and was during the said term, &c., actually employed by the said W. S. Page the elder, as such public notary, in the proper business, &c., as is directed, &c.: conclusion to the country. Issue thereon.

The issues came on to be tried before MAULE, J., at the Spring assizes for the county of York, when a verdict was found for the Crown, subject to the opinion of this court on the following case.

*941] Before and on the 3d April, 1828, and during all the *time hereinafter mentioned, William Sagon Page the elder was a public notary, duly sworn, admitted and enrolled, and during all that time used and exercised the profession and business of a public notary. The said W. S. P. the elder also during all that time was an attorney and solicitor, and used and exercised the profession and business of an attorney and solicitor conjointly with that of a public notary, in the same office, at Scarborough in Yorkshire. The extent of the business of the said W. S. P. the elder was considerable in both the said professions, the average amount of each being on the whole about equal one to the other. His business as a public notary comprised all the usual details of notarial practice, such as noting and extending protests, preparing and attesting powers of attorney, average statements, and other instruments for the purpose of being sent abroad, noting and protesting bills of exchange, and other business of the like kind. On the 3d April, 1828, the said W. S. P. the younger was bound by indenture of apprenticeship, mentioned in the writ of mandamus, to serve as a clerk or apprentice for and during the space of seven years to the said W. S. P. the elder, in the

said profession and business of a public notary, as in the said writ of mandamus mentioned: and, on or about 22d November, 1832, the said W. S. P. the younger was in due manner bound to the said W. S. P. the elder, as an articled clerk in the profession and business of an attorney and solicitor. The said W. S. P. the elder carried on the said business and profession of a notary public, and attorney and solicitor in the same office: and W. S. P. the younger, and another clerk in the said office, were employed in both businesses according to the wishes and direction of the said W. S. P. *the elder, who personally managed and superintended the whole. At the time of the execution of the indenture of 3d April, 1838, the said W. S. P. the younger was in the actual service of W. S. P. the elder, in his said office in the said profession and businesses, and thenceforward served the said W. S. P. the elder, as an attorney's clerk as well as his clerk as a notary, and was employed as much in one of those businesses as in the other, until the said 22d November, 1837. During the said term of seven years the said W. S. P. the elder occasionally attended the York assizes to conduct causes and prosecutions at York, distant forty miles from Scarborough, and there stayed on such business of an attorney for several days. On some of these he took W. S. P. the younger with him to York to employ, and did there employ him, as an attorney's clerk. The said W. S. P. the younger, in pursuance and by virtue of his said service as an articled clerk to the said W. S. P. the elder, in the profession and business of an attorney, was, on or about 23d November, 1838, in due manner admitted an attorney of her majesty's Court of Queen's Bench, and is now practising as such attorney, and for the purpose of his admission he made the following affidavit. The affidavit stated that W. S. P. the younger, in pursuance of the articles of clerkship thereto annexed, bearing date 22d November, 1832, had really and truly served and been employed by W. S. P. the elder, of, &c., one, &c., as his clerk in the practice of an attorney and solicitor, from the day of the date of the said articles, inclusive, to the 22d day of November, 1837, inclusive, being the full term of five years. The affidavit then stated publication of notices of W. S. P.'s intended application to be admitted. [*942

*The court was "to be at liberty to draw any inference or conclusion from the facts which it may seem fit to them so to do." The pleadings accompanied and were to form part of the case. [*943

If the court should be of opinion that the verdict should be entered for the Crown, then the verdict was to be entered accordingly: but, if the court should be of a contrary opinion, then the verdict was to be entered for the said master, wardens, and assistants.

The case was argued in the Court of Queen's Bench in Michaelmas term, 1841,(a) by Sir *W. W. Follett*, Solicitor General, for the Crown, and Sir *F. Pollock*, Attorney General, for the defendants. The alteration of the law, since the decision of this case, by stat. 6 & 7 Vict. c. 90, "for removing doubts as to the service of clerks or apprentices to public notaries," &c., makes it unnecessary to report the argument. The cases cited are mentioned in the judgment of the court. Counsel also commented upon stats. 41 G. 3, (U. K.), c. 79, sects. 1, 2, 7, 13; 3 & 4 W. 4, c. 70, s. 2; 22 G. 2, c. 46, s. 8. *Cur. adv. vult*

Lord DENMAN, C. J., in the same term, (November 25th,) delivered the judgment of the court. After stating the nature of the issue, his lordship said:

(a) November 20th. Before Lord Denman, C. J., Williams, Coleridge, and Wightman, Js.

The verdict was taken for the Crown, subject to a special case, which has been argued before us. The substance of the statement was that, during the last five years of his service as a notary, he had also served the same
*944] master, his father, as an attorney; the Company *alleging that the service with a notary cannot be such as the act requires if it be accompanied by a different service under another contract, the full execution of which might occupy the whole term, and interfere with that required for a notary.

But, after consideration, we are of opinion that this is a question of fact, and that, if the master really carried on the business of a notary, and the service was bonâ fide performed whenever it was wanted in that business, the qualification described in the act has been obtained, such service being neither incompatible with the enjoyment of some leisure, nor with considerable attention to other studies. The Attorney General admitted in his argument that the service with a notary may be complete though the party should engage in literary works demanding the daily devotion of some hours, or should undertake to give mathematical lessons, meaning no doubt both a contract and a service subordinate to the binding with a notary on which the qualification is claimed, and never in fact interfering with them. If this may be, we can discover no reason why service with an attorney, not impeding that performed with a notary, should render it incomplete.

The business of a notary, far from tending to estrange the mind from legal pursuits, may be truly said to fall within that description; and a general knowledge of an attorney's profession would be favourable to the instruction of a notary. Yet it would follow from the arguments urged against this application that a young man might transact for five years all the business of an attorney's office, and during seven fulfil all the duties charged upon a notary, without becoming qualified to act as a member of either profession.

*945] *We do not consider this judgment as clashing with any of the authorities, nor feel any desire to introduce a looser practice. We fully agree with what we conceive to be the principle that guided Lord TENTERDEN and this court, in deciding *In the matter of Taylor*, 5 B. & Ald. 538,(a) and the case of *Rex* v. *The Scriveners' Company*, 10 B. & C. 511. Where two co-ordinate obligations exist at once, and the time is not really at the employer's command throughout his period of service, the words of the statute according to their true meaning are not satisfied. But we find nothing in the facts here particularized which lead us to the conclusion that such was the case in the present instance. It seems therefore to us that our judgment ought to be given for the Crown. Judgment for the Crown.

The special case having, by consent, been turned into a special verdict, and judgment given for the Crown without argument, the defendants brought a writ of error: and the case was argued in the Exchequer Chamber in Trinity vacation, 1842,(b) by Sir *F. Pollock*, Attorney General, for the plaintiffs in error, and *Kelly* for the Crown. In addition to the cases and statutes cited in the argument below, *Ex parte Blunt*, 2 W. Bl. 764, and 3 Burn's Eccl. Law, tit. *Notary public*, were referred to. *Cur. adv. vult.*

TINDAL, C. J., now delivered the judgment of the court.

*946] *The question raised upon this writ of error is, whether the facts found by the jury warrant the entry of the verdict upon the two issues

(a) And see *In the matter of Taylor*, 4 B. & C. 341.

(b) June 20th and 21st. Before Lord Denman, C. J. Coltman, and Maule, Js., and Parke, Alderson, and Rolfe, Bs.

joined on the record, and also the judgment of the court thereon in favour of the Crown. Those issues were, first, Whether the prosecutor of the mandamus did, under the indenture of apprenticeship in the writ of mandamus mentioned, continue for the space of seven years in the service of his father as a public notary, as required by stat. 41 G. 3, (U. K.), c. 79, according to the provisions of that act; and the second issue was, Whether he did, during the whole time and term of seven years specified in the said indenture, continue to be, and was, during the same term, actually employed by his said father as such public notary, in the proper business, practice, and employment of a public notary as is directed and required by the said act of parliament in that behalf, according to the provisions of the said act.

And, upon reference to the language of the act itself, and to the cases which have been referred to in the course of the argument, we cannot bring ourselves to think that, upon the finding of the jury, either the continuance in the service of the notary, or the actual employment in the service of his master as a public notary during the whole of the seven years' apprenticeship, has been such as amounts to a compliance with the statute.

From the year 1828 down to the execution of the indentures of clerkship to his father as an attorney in 1832, there was, undoubtedly, a continuance and an employment that was entirely unobjectionable: but, when, in 1832, he voluntarily entered into a binding engagement on his part as clerk to his father in his profession *of an attorney, it appears to us he did thereby, and by the service consequent thereon, disenable and disqualify [*947 himself from giving his time and attention to the employment which he had covenanted to perform under his indenture of apprenticeship to his father as a notary. And, as the special verdict finds in terms that "he was employed as much in one of those businesses as in the other" from the commencement of his clerkship, we cannot reconcile this with the direct enactment that he shall, during the time and space of seven years at the least, 'continue and be actually employed by such public notary," "in the proper business, practice, or employment of a public notary." We cannot see any legal distinction that can be drawn between the second engagement entered into by the apprentice being an engagement to serve as clerk to an attorney, or a banker, or a surgeon, or any other trade or profession; or that there can be any difference made between the second employment being carried on under the same roof as the first or another; nor indeed between the second engagement being entered into with the same master or another person. And, when we consider the case of *In re Taylor*, 5 B. & Ald. 538, and that the words of the statute now under consideration follow those used in the act for the regulation of attorneys,(a) we cannot but think that, if the prosecutor had applied for admission as an attorney under the service stated in this special verdict, he would have been unable to obtain it, and that the act for the regulation of notaries, being in the same terms, ought to receive precisely the same construction.

*Indeed the decision of the case of *Rex* v. *The Scriveners' Company* [*948 appears to us to govern in principle the present; and therefore, although we can agree with the court below that but little of the inconvenience intended to be prevented by the statute might follow from the mode of employment of the apprentice in this particular instance, we think it safer to adhere to the more close construction of the act of parliament: and we therefore hold that the two issues ought to be found for the defendants, and that the judgment must be reversed. Judgment reversed

(a) Stat. 22 G. 2, c. 46, s. 8.

FRANCIS JAMES v. HENRY HEWARD.

Quære, whether judgment signed on a warrant of attorney without filing the original warrant, as required by Reg. Gen. Mich. 42 G. 3, be absolutely void?

A warrant of attorney was executed on 6th October, 1834, judgment signed in B. R. on the 8th, and a fi. fa. issued and executed in March, 1842. The defendant becoming bankrupt in April, his assignees obtained a rule nisi for setting aside the judgment and execution. On inquiry made before moving for the rule, no original warrant of attorney could be found in the Warrant of Attorney Office, but only a copy, with copies of the defeasance and affidavit of execution. The judgment paper, however, bore the stamp used by the clerk of the Warrant of Attorney Office, to denote that the original warrant had been filed; and the clerk himself could give no explanation except that a copy must have been imposed upon him for the original. The attorney employed at the time of signing the judgment had ceased to act for the plaintiff.

Held that, under these circumstances, it lay upon the party impeaching the judgment to show that the irregularity had been caused by some fault in the plaintiff or his attorney, and not by the mistake of an officer of the court. And, this not appearing, the rule was discharged.

C. Saunders, in last Trinity term, obtained a rule nisi for setting aside the judgment signed in this cause and the execution thereon issued, on the ground that the original warrant of attorney on which the judgment appeared to be founded had not been duly filed. The following facts were stated on affidavit in support of the rule.

*949] *The plaintiff signed final judgment against the defendant on October 8th, 1834, on a warrant of attorney, dated 6th October, 1834, to confess judgment in this court for 6000*l.* and 65*s.* costs. A fi. fa. on the judgment was sued out, March 28th, 1842, and was executed on the following day; and the plaintiff, on the 30th, took an assignment from the sheriff. A fiat in bankruptcy issued against the defendant in April, 1842; and assignees were appointed. The attorney for the assignees made search in the Judgment Office and Warrant of Attorney Office of this court for the original warrant of attorney, but was not able to find it. He further deposed as follows:

"Saith that he believes the said alleged warrant of attorney has not been filed in this honourable court, but this deponent saith that he found in the said Warrant of Attorney Office a paper writing which purports to be a copy of a warrant of attorney, bearing date the 6th day of October, 1834, given by the above named defendant H. H. to the above named plaintiff F. J., to confess judgment for 6000*l.* and 65*s.* costs, which copy was filed on the 8th of October, 1834, being the day on which the judgment in this cause was signed, (and an office copy of which said copy of the alleged warrant of attorney is hereto annexed,) together with an affidavit verifying the said copy, and of the due execution of the said alleged warrant of attorney; and which said copy appears to be the only document on the file of this honourable court on which the said judgment is signed. Saith that, upon the occasion of such search, he, this deponent, asked the clerk officiating in the Warrant of Attorney Office, how it came that judgment had been signed upon a copy of the warrant of attorney delivered to be *950] filed, instead of the original; whereupon the clerk *said that he could not account for it otherwise than that at the time of signing the said judgment, the said copy must have been imposed upon him as and for the original, and in ignorance on the part of the officer of this honourable court of it having been a copy only." A copy of the warrant of attorney (with the defeasance) and affidavit of execution was added.

The plaintiff put in an affidavit (sworn by the clerk to his attorneys) with

an incipitur or judgment paper in this cause annexed, bearing certain stamps; as to which paper the deponent stated as follows:

"That the said judgment paper appears to be regular in all its requisite formalities according to the then practice of this honourable court. That the said judgment purports to have been signed on the 8th of October, 1834. That the circular stamp in the margin thereof is the official stamp used by the clerk in the Appearance Office, denoting that an appearance had been duly entered for the defendant. That the stamp in *Roman* characters of the word 'Filed,' also in the margin of the said judgment paper, is the official stamp used by the clerk of the Warrant of Attorney Office, denoting that the original warrant of attorney has been filed with him: and the stamp K. B. in a square is the stamp impressed by the clerk of the judgments or clerk of the dockets on signing the judgment, upon which he also marks the costs and day of signing the judgment."

The affidavit also stated that the present attorneys for the plaintiff were not employed by her till March, 1842.

Sir *W. W. Follett*, Solicitor General, and *J. Greenwood*, showed cause in the last term.(*a*) This application *is grounded on the rule, Michaelmas, 42 G. 3, 2 East, 136: "That from and after," &c., "no judgment be signed upon any warrant authorizing any attorney to confess judgment, without such warrant being delivered to, and filed by the clerk of the dockets; who is hereby ordered to file the same in the order in which they shall be received." But that rule does not make the judgment void if the original warrant be not found in the office. A second branch of the same rule orders "that every attorney of this court, who shall prepare any warrant of attorney to confess any judgment, which is to be subject to any defeasance, do cause such defeasance to be written on the the same paper or parchment, on which the warrant of attorney shall be written; or cause a memorandum in writing to be made on such warrant of attorney, containing the substance and effect of such defeasance." But in *Shaw* v. *Evans*, 14 East, 576, where the attorney had neglected to write the defeasance or a memorandum on the warrant of attorney, and a motion was therefore made for setting it aside, Lord ELLENBOROUGH said, "It would be the greatest injustice to cut down the whole security of the party on account of the omission of the attorney employed to prepare it. The court only meant to impose a duty upon the attorney, as an officer of the court, which if he has not duly exercised, the defendant may move the court against him:" and the rule was discharged. *Partridge* v. *Fraser*, 7 Taunt. 307, was a similar decision on the same branch of the rule. Stat. 3 G. 4, c. 39, s. 2, enacts that, if a warrant of attorney to confess judgment be given, and a commission of bankrupt issue after twenty-one days against the party giving *it, such warrant of attorney shall be void as against the assignees, unless it, or a copy, shall have been filed with the clerk of the dockets and judgments in the Court of King's Bench within twenty-one days from the execution, "or unless judgment shall have been signed, or execution issued on such warrant of attorney within the same period." The statute has been complied with; and, by the language of this clause, the legislature appears to have considered the rule of court as merely directory. The assignees, representing the defendant, assume that an omission to file, by whose fault soever, though by a mistake of the officer, destroys the plaintiff's right. Even if that were so, the word "filed" on the incipitur is a statement made by an officer of this court, and ought

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(*a*) November 25th, 1842. Before Lord Denman, C. J., Williams, and Coleridge, Js

to prevail against an allegation by the attorney to the assignees that he could not find the original filed. If it amounts to no more than the officer's assertion that the original was placed in his hands to be filed, it establishes a reasonable probability that the rule was obeyed; and the court will act upon this unless satisfied of the contrary by complete proof.

Jervis and *C. Saunders*, contrà. The affidavits show sufficiently that a copy has been put upon the files of the court by some mistake, and that, in consequence of such mistake, the clerk has stamped the word "filed" upon the judgment paper. The negative words in the first part of the rule of court, Mich. 42 G. 3, 2 East, 136, cannot be construed as merely directory. Stat. 3 G. 4, c. 39, (sects. 1, 2,) enables the holder of a warrant of attorney to secure himself against the consequences of a bankruptcy by filing the
*953] warrant of attorney or a copy, *if the judgment be recoverable in the Queen's Bench, or by filing a copy if the judgment be recoverable elsewhere, with the clerk of the dockets and judgments, within twenty-one days next after the execution of such warrant: but that does not dispense with the rule of court that the warrant of attorney itself must be filed before signing judgment; on the contrary, the enactment as to judgments in this court seems to have in view the practice of filing the original. The affidavits here do not show that the original document is not now in the hands of the plaintiff or his attorneys. Possibly a clerk of the court may have been negligent in affixing a stamp; but the parties appear to have violated the rule of court, and must abide the consequence. If they now required leave of the court to enter up judgment on the warrant of attorney, they would not be allowed to do so without producing the original; *Jacobs* v. *Neville*, 8 Dowl. P. C. 125. There it was explained that an attorney of the court had the warrant and would not deliver it up; yet the leave was refused. Here no explanation is given. The decisions referred to, in the King's Bench and Common Pleas, turned upon a part of the rule distinct from that now in question, and differently worded. *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered judgment.

This was an application by the assignees of the defendant, whose act of bankruptcy had been committed on the 1st of April, in the present year, to set aside a judgment, signed in October, 1834, on a warrant of attorney
*954] executed a very few days before. Execution had *issued on the 28th of March of this year: the seizure had been on the 29th, and a bill of sale executed on the 30th.

The ground of the application was, that the warrant of attorney had not been filed before the judgment was signed, as required by the rule of Michaelmas term 42 G. 3, to be found in 2 East, 136. This is a rule of all the three courts: and it is a part of the same rule that every attorney who prepares a warrant of attorney to confess judgment which is to be subject to any defeasance shall cause the defeasance to be written on the same paper or parchment with the warrant, or cause a memorandum to be made on the warrant, containing the substance and effect of such defeasance. It was admitted that it had been determined, both in this court and the Common Pleas, (*Shaw* v. *Evans* and *Partridge* v. *Fraser*,) that a neglect to comply with this rule, though censurable in the attorney as an officer of the court, did not avoid the instrument. But it was said that the language in the two parts of the rule was different, that respecting the defeasance being affirmative, and clearly directory only, while in the former it was negative, prohibiting absolutely the signing of the judgment until the warrant had been filed.

This difference is certainly not immaterial: and, in a matter of so much importance, and which has been made part of the practice of all the courts, we should be sorry to do any thing, even in a hard case, which might tend to introduce any laxity. It may not, however, be necessary to decide on the construction of the rule: for we think that it is incumbent on those who seek to set aside a judgment signed eight years ago, and *without any imputation of fraud, to leave no shadow of doubt either as to [*955 the fact, or of some fault committed by the plaintiff or her attorney; and we think this has not been done. It appears that, within twenty-one days after the signing, the requisites of stat. 3 G. 4, c. 39, ss. 1, 2, were complied with; and a judgment paper and copy of the warrant with affidavit of execution were produced, all with the regular marks and seals of the office on them. If now it were shown that the original had been brought to the office and tendered to the officer for filing at the time when the copy and affidavit were, and it had been merely the fault of our officer that the copy, through oversight, had been filed instead of the original, we should certainly not have held the rule so imperative as to compel us to set aside the judgment in that case. That indeed has not been done by the plaintiff; but it is not negatived on the part of the defendant or the assignees. The plaintiff states that she has changed her attorney; and, if she had not, it might have been too much to expect a distinct recollection on the subject at this distance of time. The same remark applies also to the assignees: they are under the same difficulty.

There is, then, an uncertainty in the case as to the fact, and the cause of the omission or mistake: but it is the defendant who must, under the circumstances, suffer by that uncertainty. He is to establish a clear right to his rule; and, failing to do so, it must be discharged, but without costs.

Rule discharged.

*GOODERED v. ARMOUR. [*956

Assumpsit against acceptor of a bill of exchange. Plea, that, before and at the time of the accepting, &c., a fiat in bankruptcy had issued and was in prosecution against defendant, and defendant then owed plaintiff a debt provable under the commission; and that defendant, in consideration that plaintiff would prove such debt under the commission, agreed to accept, and accepted, the bill in part payment of the debt to be so proved; whereby the bill was and is void. Replication, denying the acceptance in part payment of such debt. Issue thereon.

Held, that the statements in the plea did not oblige the plaintiff to produce the bill at the trial, nor entitle the defendant to offer evidence of it without having given notice to produce.

Assumpsit by drawer against acceptor of a bill of exchange for 20*l*. Count on an account stated.

Pleas. 1. That, after the making of the promises and accruing of the causes of action, &c., defendant became a bankrupt, &c.: conclusion to the country. Issue thereon. 2. To the first count. That, before and at the time of the making and accepting of the bill therein mentioned, defendant was a bankrupt according to the statutes, &c., and a fiat of bankruptcy had been issued and was then duly in prosecution, &c., and defendant was then also indebted to plaintiff in a certain sum, viz. 38*l*., which debt was provable by plaintiff under the said fiat, and was and is barred by defendant's certificate, which he hath since duly obtained under the said fiat according to the statutes aforesaid; and thereupon, to wit, on, &c., in consideration that plaintiff would prove the said debt due to him under the said fiat against

defendant, defendant then agreed with plaintiff to accept, and did accept, the said bill in the first count mentioned, as therein mentioned, by way of part payment of the said debt of 38*l*., so to be proved under the said fiat: and defendant further says there never was any other consideration or value for the acceptance and payment of the said bill except as aforesaid; whereby the said bill was and is void: verification. 3. Non assumpsit, to the last count. Issue thereon.

*957] *Replication to plea 2. That defendant did not accept the said bill of exchange by way of part payment of any debt provable under the said fiat in the said plea mentioned, in manner and form, &c.: conclusion to the country. Issue thereon.

On the trial before WILLIAMS, J., at the sittings in Middlesex, in Hilary term, 1842, the defendant's counsel put in a paper signed by a person named Davis, who was said to have been the plaintiff's attorney, acknowledging the receipt of defendant's acceptance for 20*l*.: and counsel then proceeded to ask a witness called by him whether 20*l*. had not been paid to Davis by a bill; which bill it was proposed to identify with the bill declared upon. It was objected that defendant could not go into this course of examination without producing the bill, which he did not do, nor had he given the plaintiff notice to produce it. The defendant's counsel then urged that the plaintiff ought to have produced the bill declared upon, in proof of his own case. The learned judge thought otherwise, and refused to admit the proposed evidence: and the plaintiff had a verdict.

G. T. White, in the same term, obtained a rule to show cause why there should not be a new trial.(*a*)

Jervis now showed cause. The form of the record made it unnecessary for the plaintiff to produce this bill. No fact relating to it was questioned but the consideration. [Lord DENMAN, C. J. We are with you on that
*958] point.] The defendant could not offer secondary *evidence of the bill without having given the plaintiff notice to produce it. Notice is indeed unnecessary where the pleadings themselves make the document the subject of inquiry, because there the party holding it knows that by the rules of law he must produce it or allow secondary evidence to be given. Here that was not the case. An expression in *Reed* v. *Gamble*, 10 A. & E. 597, note (a), S. C. 5 Nev. & M. 433, may have been relied upon on the other side; the action there was assumpsit on a check, and the defendant pleaded that it was given for money lost at hazard, upon which issue was joined. It was there argued that the defendant was entitled to call upon the plaintiff to produce the check, though no notice to produce had been given; and that the plaintiff ought to have put it in as part of his own case. Lord DENMAN, C. J., said: "You were not prevented from proving it on your part:" or, as the words are reported in 5 Nev. & M., "the non-production of the check did not prevent the defendant from going into his defence." [Lord DENMAN, C. J. That is, that the defendant might have proved the check if he had used the proper means.] In *Shearm* v. *Burnard*, 10 A. & E. 593, S. C. 2 Per. & D. 565, an action by endorsee against maker of a note, the defendant pleaded that, the endorser being holder of a prior note drawn for his accommodation by defendant, the note declared upon was drawn to enable that party to take up such prior note; and that the note declared upon had been paid. The replication was De injuriâ. Neither note was produced at the trial; and a question arose whether the

(*a*) Or why a verdict should not be entered for the defendant on the first and last issues; but this part of the motion does not require farther notice.

defence pleaded could be proved without production of the first note; and the judge, at the trial, *ruled that it could not. This court held the [*959 averments as to the first note immaterial, and therefore did not decide the question as to the mode of proof; but, as production of the second note was clearly unnecessary, they granted a new trial. PATTESON, J., said there, 10 A. & E. 596: "It is clear that the first part of the plea was not proved; for it was necessary to produce the note mentioned in that part, in order to prove its existence. But it is otherwise of the second note, which is admitted on the pleadings, and therefore need not be produced." This agrees with the argument for the present plaintiff.

G. T. White, contrà. The defendant relies mainly on *Shearm* v. *Burnard*, the report of which in 2 Per. & D. is more full on the point now material than the other report cited. That point does not appear to have been considered unimportant by the court. The language of LITTLEDALE and PATTESON, Js., there shows that the plaintiff in this case ought to have produced the bill without notice. His omission to do so entitled the defendant to give evidence of it without having served notice to produce. The words of Lord DENMAN, C. J., in *Read* v. *Gamble*, already cited, appear to support this conclusion: and PATTESON, J., in *Shearm* v. *Burnard*, 2 Per. & D. 567, observes that in *Read* v. *Gamble*, "the rule was refused, because the 'non-production of the check did not prevent the defendant from going into his defence.'" In 2 Phillips on Evidence, 223, 9th ed., part 2, c. 6, (p. 668, of ed. 8,) it is laid down that "The principle of the rule, *which requires that a party shall have previous notice to produce a written [*960 instrument in his possession, before the contents can be proved as evidence in the cause, will not apply to cases, where, from the nature of the proceedings, the defendant has notice, that the plaintiff means to charge him with the possession of the instrument." Here the plea gave full notice that the bill of exchange would be called for. [Lord DENMAN, C. J., mentioned *Lane* v. *Mullins*, 2 Q. B. 254.](a)

Lord DENMAN, C. J. It is perfectly clear, as a matter of practice, that where one party to a cause wants a document which the other is not under the necessity of producing for the purpose of his own case, he must take the proper means to have it produced, or enable himself to give secondary evidence, at the trial. This rule must be discharged.

WILLIAMS, J., concurred.

COLERIDGE, J. No part of *Shearm* v. *Burnard*, 10 A. & E. 593, S. C. 2 Per. & D. 565, has any thing to do with this case, except what is observed, obiter merely, by my brother PATTESON. Rule discharged.(b)

(a) An unreported case of *Wellbourn* v. *Pouchee*, in the Exchequer, was mentioned at the bar.

(b) Wightman, J., was absent.

*DALTON v. WHITTEM and FOX. [*961

If a landlord, under a distress for rent arrere, sever fixtures from the freehold and dispose of them, he is liable in trover, and the articles may be described in the declaration as goods and chattels: and the plaintiff does not thereby waive his right of maintaining that the distress is illegal because fixtures cannot be distrained for rent arrere.

TROVER for "certain goods and chattels, to wit, two metal counters," &c. Plea. Not guilty, (by statute 11 G. 2, c. 19, s. 21.)

On the trial, before Lord DENMAN, C. J., at the Middlesex sittings, after

last Hilary term, it appeared that certain articles named in the declaration were fixtures attached to a house of which the plaintiff was tenant under the defendant Whittem. Whittem sent in a distress for rent due to him from the plaintiff. The distress was executed by the defendant Fox, for Whittem. Fox entered the premises, gave a notice of distress, and afterwards severed from the freehold the articles above mentioned, and sent them to an auction room, where they were sold for Whittem. For the plaintiff it was contended that the fixtures could not be taken under a distress for rent. The counsel for the defendants admitted this, but contended that for such taking trespass was the proper remedy, and that the plaintiff could not bring trover without waiving the tortious severance, and treating the articles as chattels. The Lord Chief Justice directed a verdict for the plaintiff on this count. There were other counts, on all of which the defendants had a verdict. His lordship reserved leave to move for a nonsuit: and, in Easter term, 1842, *Thesiger* obtained a rule accordingly.

*962] **Erle* and *Udall* now showed cause. It is true that trespass might have been brought for severing the fixtures from the realty: but trover will lie also for converting them after the severance. In 1 Chit. pl. 164, (7th ed.,) it is said of trover, "This action is confined to the conversion of goods or personal chattels. It does not lie for fixtures eo nomine; nor for injuries to land or other real property, even by a severance of a part of what properly belongs to the freehold, *unless there has also been an asportation.*" The plaintiff may waive so much of the tort as consists in the severance which converts the fixtures into chattels. The decisions which show that trover cannot be maintained for fixtures apply only to such articles as continue to be fixtures at the time of the conversion. Such is *Minshall* v. *Lloyd*, 2 M. & W. 450. In *Pitt* v. *Shew*, 4 B. & Ald. 206, fixtures were distrained, and the owner recovered; it is true that the action there was shaped in trespass; but it was held that the plaintiff might recover damages under the charge of "taking divers goods, chattels, and effects;" and, if the objection made in the present case were valid, those words would not have comprehended fixtures severed by the defendant. This same argument arises upon *Darby* v. *Harris*, 1 Q. B. 895. It was contended here, at the trial, that, the plaintiff's complaint being the seizure of fixtures, he could not be allowed to treat them as goods and chattels: but the same objection might have been made in *Pitt* v. *Shew*. In *Higgon* v. *Mortimer*, 6 C. & P. 616, PARKE, B., said: "The wrongful act of a party otherwise entitled to possession frequently revests the right of possession in
*963] him who has the right of property. I am of opinion, that, *if a tenant, during the tenancy, remove virgin soil, it becomes, by operation of law, the personal property of the landlord, and is so completely revested in him as to enable him to maintain trespass de bonis asportatis, and, à fortiori, trover." The same learned judge, in *Twigg* v. *Potts*, 1 C. M. & R. 89, 93., S. C. 3 Tyrwh. 969, 972, remarked that, where trespass for taking goods, chattels, and effects was justified under a distress, the plaintiff might reply that the articles taken were fixtures: but, according to the argument for the defendants, this would have been a departure. There are many cases in which the party may bring trover or trespass at his election; as in *Rackham* v. *Jesup*, 3 Wils. 332. In *Hallen* v. *Runder*, 1 C. M. & R. 266, S. C. 3 Tyrwh. 959, a tenant sold some fixtures, which he had a right to remove during the term, to the landlord, the price to be settled by valuation: and afterwards, the term having expired and the fixtures having been left unremoved at the landlord's request, the valuation was made, and

the tenant then brought indebitatus assumpsit for fixtures bargained and sold, and sold and delivered: and it was held that the action would lie. Many authorities are collected in *Boydell* v. *M'Michael*, 1 C. M. & R. 177,(*a*) where it was held that fixtures are not goods and chattels which can be in the order and disposition of a bankrupt under stat. 6 G. 4, c. 16, s. 72. In Amos and Ferard on Fixtures, p. 244, there is a note pointing out "that several of the most important questions respecting fixtures have, in fact, been determined in actions of trover:" and, in the text, p. 249, the authors speak of the action of trover as frequently preferable to that of *trespass in the case of fixtures. The defendants here attempt to take advantage of their own wrong, and insist that they are trespassers. [*964

Crompton, contrà. Trover cannot be brought for fixtures while they remain so: after severance trover may be brought, as for ore severed wrongfully from a mine. But here the plaintiff cannot treat the articles as chattels without affirming the distress; for, if they were chattels, the right to distrain is admitted. Suppose, instead of the plea of Not guilty under stat. 11 G. 2, c. 19, s. 21, the distress had been pleaded specially; it is clear that the plaintiff in trover could not have replied that he sued for taking fixtures; that would have been a departure on the record: and so this is an inconsistency in the claim. It is said that so much of the tort as consists in the severance is waived: if so, the distinction between fixtures and chattels is waived, and, for the purpose of this action, the goods distrained are to be considered as chattels. This was held in an old case, as to a lime-kiln, which might, or might not, be a chattel.(*b*) In *Darby* v. *Harris*, 1 Q. B. 895, and other cases cited, the point now before the court was not raised: where the action is shaped in trespass, either fixtures or chattels may be the subject. The distinction between trover and trespass is fully explained by Lord MANSFIELD, in *Cooper* v. *Chitty*, 1 Burr. 20, 31, S. C. 1 W. Bl. 65; where he shows that trover is a remedy for goods and chattels wrongfully *converted, and that the form of action "supposes the defendant may have come lawfully by the possession of the goods." But such a supposition cannot be made here, unless the goods be treated as chattels at the time of the defendants' taking possession. The defendants cannot, it is true, take advantage of a wrongful severance by themselves: but they are entitled to the benefit of the plaintiff's waiver of objection to the severance. The case then is as if the severance, which in this form of action cannot be complained of, had been made by a stranger: how could the plaintiff, in that case, have objected to the distraining of articles so severed? In *Boydell* v. *M'Michael*, the articles were fixtures at the time of the bankruptcy, and the present question could not arise.(*c*) [*965

Lord DENMAN, C. J. I am of opinion that trover will lie in this case. The defendants cannot say that the articles which they have distrained for rent are not goods and chattels. They say, however, that if the articles are chattels the distress is lawful. That is not a correct view. They cannot commit the wrong of severing the fixtures from the realty, and then take advantage of such wrong and treat them as goods and chattels for the purpose of distress.

WILLIAMS, J., concurred.

(*a*) See note (*a*), p. 180, S. C., 3 Tyrwh. 974.

(*b*) Probably *Niblet* v. *Smith*, 4 T. R. 504. There, to an avowry for rent arrere, the plaintiff pleaded in bar that the kiln was affixed to the freehold; and this was held a departure, the replevin being for "goods and chattels, to wit, one lime-kiln."

(*c*) *Lee* v. *Risdon*, 7 Taunt. 188, and *Nutt* v. *Butler*, 5 Esp. 176, were cited on the motion for the rule.

COLERIDGE, J. The argument for the plaintiff assumes only that the re-
*966] moval was improper. Mr. *Crompton argues tnat the articles cannot be called chattels for the purpose of this form of action, and yet fixtures for the purpose of showing the distress to be illegal. I think, however, that it is open to the plaintiff so to treat them. What he says is that they are now goods and chattels, and therefore trover lies; but that the defendants have wrongfully made them so, and shall not defend their distress by such unlawful act. It is like the case of money had and received where the plaintiff's goods have been wrongfully taken and sold. The action, to a certain extent, assumes the legality of the sale: but still the plaintiff may say that the property was not in the vendor. The sale is, as it were, protested.(a) Rule discharged.

(a) Wightman, J., was absent.

TRACEY *v.* TAYLOR.

The Bridewell for Westminster was erected (under stat. 7 G. 4, c. xlii., local and personal, public) and fitted up, and the land on which it was built purchased, by commissioners at the expense of the county rate, and appropriated to the reception of criminals and of prisoners under the local Court of Requests. The building, and its fittings up, furniture, &c., were vested in the justices of Westminster. The powers of the Commissioners of Sewers were expressly saved. The building derived benefit from the sewage. The governor resided in one part of the building; but no one resided in the other part, except the persons confined there, and the turnkey and matron, who were required by law to reside, and whose duty it was to take care of the prisoners. The Bridewell was the Queen's prison.

Held, that in respect of the part last mentioned no sewers' rate could be imposed, there being no occupier.

TRESPASS for taking and distraining a table of plaintiff, "being in that part of the Bridewell or House of Correction for the City of Westminster which does not constitute the residence of the governor of the said Bridewell or House of Correction," and carrying away the table, "as a distress for a certain alleged sewers' rate then pretended to be due and payable
*967] in respect of that part of the said Bridewell or House of Correction, *which does not constitute the said residence of the said governor."

Pleas. 1. That the trespass was done by defendant by the authority of a certain Commission of Sewers for Westminster, and part of the county of Middlesex, under the great seal of the United Kingdom, bearing date 5th December, 1837.

2. That the trespass was done by the authority of a certain Commission of Sewers for Westminster and part of the county of Middlesex, according to the tenor, purport and effect of a certain act of parliament, &c., (23 H. 8, c. 5.)

Replication to both pleas: De injuriâ. Issues thereon.

The following case was stated, under stat. 3 & 4 W. 4, c. 42, s. 25, for the opinion of this court.

This action is brought to try the legality of a distress, under which the table mentioned in the declaration was taken by the defendant in and upon that part of the Bridewell or House of Correction, mentioned in the declaration, which does not constitute the residence of the governor thereof, as a distress for 36*l.* 2*s.*, alleged on the part of the defendant to have been then payable in respect of the said part of the said Bridewell or House of Correction, for the sewers' rate after mentioned.

The facts of the case relating to the said Bridewell are as follows.

Previously and up to the year 1826, there had been a Bridewell or House of Correction under the control of the magistrates for the city and liberty of Westminster, but which was too small, and inadequate for classification, and to give effect to the statutes (4 G. 4, c. 64, and 5 G. 4, c. 85) for regulating prison discipline.

In that year an act (7 G. 4, c. xlii., local and personal, public) passed "for building a new Bridewell or House *of Correction, for the city [*968
and liberty of Westminster;" the material provisions of which, so far as relates to the present question, are as follows. It was enacted that certain justices of the peace, acting for the city and liberty of Westminster, also certain justices acting for the county of Middlesex, should be constituted commissioners for building a new Bridewell or House of Correction for the city and liberty of Westminster, and disposing of the site of the old Bridewell. The commissioners were empowered (sect. 13) to contract for the purchase of certain premises, in a schedule mentioned, for the purposes of the act, in fee simple; which premises were to be conveyed to such persons as the justices of the peace for the city and liberty of Westminster, in General or Quarter sessions of the peace, should direct, in trust for the uses and purposes of the act, and under the regulations and directions in the act contained. The commissioners were required, sect. 32, to cause to be erected on those premises a convenient new Bridewell or House of Correction, with sufficient outcourts and outlets for the confinement of criminals and other offenders, and also infirmaries or apartments for sick and infirm prisoners, and a convenient room for the accommodation of the visitors, and proper places for the residence of the keeper or keepers or other officers, and also all other erections and easements of every description, as the commissioners should judge necessary for the purposes of the act, and of the several other acts and regulations to which the then present Bridewell was subject. Also to cause the said new Bridewell and other buildings as aforesaid to be fitted up and furnished in a complete and effectual manner for the reception, security and *health [*969
of such prisoners in such manner as to them should seem best adapted to answer the purposes of that act and the other acts and laws before mentioned or referred to: and for doing which the commissioners were empowered to make contracts, &c., at their discretion. By sect. 34 it was enacted that, when the said new Bridewell should be finished, it should be the Bridewell or House of Correction for the said city and liberty of Westminster, and the justices of the peace for the said city and liberty of Westminster should have the keeping of such new Bridewell; and, when the new Bridewell should be fit for the reception of prisoners, and notice given, they were to be removed from the old Bridewell to the new. And (by sect. 35) after the removal of the prisoners, the commissioners were to sell and dispose of the materials and site of the old Bridewell, and to sell and dispose of such part of the goods, furniture, and effects as they thought proper, and convert the residue to the use of the new Bridewell and to apply the proceeds of the sale to defray the expense of erecting, furnishing and completing the new Bridewell.

For raising money for the purposes of the act, the justices of the peace for the county of Middlesex, in Quarter sessions assembled, were required from time to time to borrow on the credit of and to charge the county rate with such sums as the said commissioners should require; and the money to be raised by virtue of the act was (sect. 41) to be paid to the treasurer for the time being of the county of Middlesex, and to be applied by the

commissioners or justices of the said county in Quarter sessions assembled in paying all expenses of obtaining the act, &c., purchasing the premises as aforesaid, and in discharging the expenses of erecting, making, fitting up, *970] and furnishing the said new *Bridewell, and paying and discharging all other expenses, &c., incident to the carrying the act into effect. And (by sect. 42) it was enacted that, so soon as the new Bridewell should be in all things completed, finished, and fitted up, and the prisoners removed, and such costs, expenses, &c., paid, then and thenceforth all the trusts, powers, offices, and authorities by that act given to and vested in the commissioners should cease and determine, and the said new Bridewell and the appurtenances, and the direction, management, and control thereof, should be from thenceforth vested in the justices of the peace for the said city and liberty of Westminster, subject to the same laws, rules, regulations, and liabilities as the said old Bridewell then was, except that no person or persons other than the said justices of the peace for the said city and liberty of Westminster, and the commissioners for executing (*a*) the local act 23 G. 2, c. 27, (since repealed by stat. 6 & 7 W. 4, c. cxxxvii., local and personal, public,) should have any power to commit any person to the said new Bridewell: provided that the said new Bridewell should for ever thereafter be kept in repair by and at the expense of the said county rate, by the said last-mentioned justices, who were empowered to charge such repairs thereon. And (by sect. 44) the property of all and every the furniture, utensils, chattels, provisions, clothing, and materials to be from time to time had, brought, procured, and provided for the use of the prisoners in the said new Bridewell, and for carrying into execution the purposes of the act, was enacted *971] to be, and was, vested for the uses and purposes *of that act in the said justices of the peace for the said city and liberty of Westminster; and they were empowered to bring actions and prefer indictments in respect thereof.

By sect. 49 of the same act, it is enacted as follows:

"Provided always, and be it further declared and enacted, that nothing in this act contained shall extend or be deemed or construed to extend to prejudice, diminish, alter, or take away any of the rights, powers, or authorities vested in the commissioners of sewers for the city and liberty of Westminster, and part of the county of Middlesex; but all the rights, powers, and authorities vested in them shall be as good, valid, and effectual, as if this act had not been made."

It was understood that the several sections of the statute above referred to, and also the several statutes and commissions under which the commissioners of sewers act, were to be referred to if necessary, and were to form part of this case.

There were no laws, rules, regulations, or liabilities of or relating to the old Bridewell affecting this question.

The new Bridewell was built by the said commissioners under the provisions of the said act, on the land mentioned in the act, which was purchased for that purpose according to the provision of the same. And it is, and before and at the time of the making of the presentment and rate hereafter mentioned was, the Bridewell or House of Correction for the city and liberty of Westminster, according to the said thirty-fourth section, and was in all things completed, finished, furnished, and fitted up, and the prisoners re-

(*a*) The two acts mentioned are for the recovery of small debts within the city and liberty of Westminster and an adjoining part of the Duchy of Lancaster. Stat. 23 G. 2, c. 27, was explained and amended by stat. 24 G. 2, c. 42.

moved, according to the said act; and all the costs, charges, and expenses specified in the said act had been fully paid *and satisfied, and all other matters done and performed according to the said act by the said commissioners: so that, by virtue of the said forty-second section, the said Bridewell or House of Correction and appurtenances, and the direction, management, and control thereof, and the property in the said furniture, &c., provided in pursuance of the said act, were, and from thence until and at the time of the making of the said presentment and rate continued to be, vested in the justices of the peace for the said city and liberty of Westminster, as by the said act provided: and the powers of the said commissioners had ceased. [*972

This new Bridewell is the Tothill Fields Bridewell mentioned in the said presentment and rate: and the governor's house mentioned in the said presentment and rate is the residence of the governor of the said new Bridewell: and Augustus Frederick Tracey, mentioned in the said presentment and rate as the owner or occupier of the part in question of the said Bridewell, was, at the time of the making of the said presentment and rate, the governor or keeper of the said Bridewell, and is the plaintiff in this cause.

The part in question of the said Bridewell, ever since its completion, has been, and at the time of making the said presentment and rate was, merely used for the purpose of keeping prisoners therein upon criminal charges, and prisoners in execution under the process of the courts of requests for the recovery of small debts within the city and liberty of Westminster, and that part of the Duchy of Lancaster which adjoins thereto, under the several acts passed in the reign of G. 2, for establishing such courts, and under the statute 6 & 7 W. 4, c. cxxxvii., (before alluded to,) which repealed those prior acts.

The plaintiff did not before or at the time of the *making of the said presentment and rate reside in the said part of the said Bridewell, but then resided in the said governor's house, which is separately rated in the said rate: nor did he own or occupy the said part not constituting his residence, or exercise any control over the same, further or otherwise, or in any other right, than under the said act as governor of the said jail. No persons reside in the said part except such prisoners as aforesaid, during the periods of their imprisonment, and the chief turnkey and matron, who are appointed by and hold their situations during the pleasure of the said justices of the peace for the city and liberty of Westminster in quarter sessions assembled, and whose duty it is to guard, take care of, and attend the said prisoners, and who are required by the regulations for the government of the said Bridewell, as certified by the secretary under the prison acts, to reside in the said prison. [*973

Before and at the time of the making of the said presentment and rate, the said part of the said Bridewell was a prison of our sovereign Lady the Queen.

There are no goods, chattels, or other personal property whatever, on the said part of the said Bridewell, except such as are provided for the use thereof under the said act of 7 G. 4, c. xlii., and except the property of the prisoners who may be confined therein, and of the necessary attendants and officers of the said prison.

The said part of the said Bridewell was never, since the erection thereof under the said act, rated, until the making of the said presentment and rate, to any sewers' rate; but the site thereof had been always previously rated. The old Bridewell, in lieu of which the said present Bridewell was erected

*974] under the said act, had *been also rated in the years 1746, 1753, and 1760: but the rate had never been paid. The form of which assessments was, "Samuel Attershall, for the House of Correction, with the dwelling-house and appurtenances thereunto belonging, 50*l.*—3*l.* 6*s.* 8*d.*"

The said old Bridewell was built in or about the year 1655.

The plaintiff had not, at the time of the making of the said presentment and rate, nor at any time before or since, any funds, except his own private property, out of which he could pay the sums rated upon him as hereinafter mentioned, or any part thereof: nor were there, at the time of the making the said presentment and rate or at any time afterwards, any funds under the control of the said justices for the city and liberty of Westminster, or the justices for the county of Middlesex, or any other party or person, out of which the said moneys or any part thereof could be paid, except funds raised by the county rate.

On the 30th April, 1841, a session of sewers for, amongst other places, the district in which the said Bridewell is situate, was duly holden before the Commissioners of Sewers duly appointed to be Commissioners of Sewers for the said places for which the said session was holden; at which the jurors, amongst other things, did upon their oaths present that all the charges of cleansing, repairing and amending the common sewers of the district in which the said Bridewell was situate as aforesaid, and also the charges of all other works and all incidental expenses necessarily incurred or to be incurred in and about the said sewers, ought to be borne, paid, and defrayed by the several persons mentioned in the said presentment receiving benefit *975] therefrom, owners or *occupiers of the messuages, lands, grounds, tenements and buildings within the parishes therein mentioned, proportionably and according to their respective interests in the said messuages, lands, grounds, tenements and buildings, and to the several yearly rents and profits thereof, as the said yearly rents and profits were therein-after added to the respective names of the respective owners or occupiers thereof, in manner and form therein mentioned; that is to say, in the said presentment the said part of the said Bridewell, and the owners and occupiers thereof respectively, and the yearly rents and profits thereof respectively, were mentioned in manner following.

"Tothill Fields Bridewell,
except governor's house,
Augustus Frederick Tracey, } 2888*l.*"

which is all that is material in the said presentment, so far as relates to the questions hereinafter proposed.

The plaintiff is rated in the said presentment and rate for the said governor's house separately; on which no question arises.

On 2d July, 1841, the said commissioners of sewers made a rate which followed the said presentment: and the rate assessed for the said part of the said Bridewell was, in respect of the yearly rent of 2888*l.*, at the said sum of 36*l.* 2*s.*; for the non-payment of which sum the distress was so made as aforesaid.

The said Bridewell derived benefit from the sewers for which the said rate was made. And all the proceedings down to the said distress were made and had in a regular and legal manner, and such distress was legally made, if the said table was liable to be distrained under the circumstances aforesaid for the said rate.

*976] The case stated that it was not intended to raise any *question as to the mere form of the present rate or presentment. And, provided

that under the circumstances stated there was any person upon whom a legal rate could be made, or any manner in which the said premises could be legally rated to the sewers' rate, the present rate was to be taken to have been made in such legal and proper form, and upon such person.

The questions for the opinion of the court were stated to be,

1st. Whether the said part of the said Bridewell was legally liable to be presented and rated under the circumstances aforesaid; and whether there is any manner in which it can be legally rated?

2dly. Whether the table mentioned in the declaration, and distrained, could legally be taken as a distress for the said rate?

This case was argued in last Michaelmas term.(a)

Sir *F. Pollock*, Attorney General, for the plaintiff. It might perhaps be urged that the presentment is good until formally traversed. But it is agreed not to raise any technical objection: and the question submitted to the court is whether this presentment can be maintained. The rateability must arise, if at all, from some statute: but no statute gives power to rate any person who does not derive benefit. The language of the commission in the earliest statute, 6 H. 6, c. 5, confines the liability to those persons by whose default the damage happens, or those persons who may have "the defence, profit, and safeguard" from the works. So stat. 23 H. 8, c. 5, s. 3, speaks of persons in default for non-repair, and *persons holding lands, &c., or who "hath or may have any hurt, loss, or disadvantage." It is [*977 clear that it was not intended to lay a rate in respect of property held only by the Crown for the benefit of the public. [COLERIDGE, J., referred to stat. 3 & 4 Ed. 6, c. 8, s. 2.] That enactment contemplates a rate, not on the Crown in that character as beneficially occupying, but upon such tenants of the crown lands as occupy them beneficially. Here is no such person. The sovereign is not known as liable to taxation. If it were otherwise, the royal arsenals might be rated. Nor are lands or tenements in themselves the subject of rate, but only persons who occupy them. In *Soady* v. *Wilson*, 3 A. & E. 248, the commissioners for auditing the public accounts were held rateable to the sewage for a part of Somerset House, because they were rated in fact to the poor, and a local act (52 G. 3, c. xlviii.) made persons so rated in fact to the poor occupiers in respect of the sewers' rate. But, generally, an occupation for purposes merely public produces no liability in the occupier; and, when a person so occupying has also some beneficial occupation of a part, he is liable in respect of this part only.

Sir *W. W. Follett*, Solicitor General, contrà. All real property which derives benefit from the sewage is liable to the rate. Why should the advantage conferred on a building by the sewage not be paid for as well as repairs of any kind? The enactment in stat. 3 & 4 Ed. 6, c. 8, s. 2, was inserted to supply the omission in the earlier statutes which had not expressly made crown lands liable to distress. But, before that, they were in *themselves rateable under stat. 23 H. 8, c. 5, s. 9, as was decided in *Netherton* v. *Ward*, 3 B. & Ald. 21, in which case nothing [*978 turned on the beneficial occupation. *Soady* v. *Wilson* is also an authority to the same effect; for the explanation of this case suggested on the other side cannot hold good: stat. 52 G. 3, c. xlviii., s. 7, does not expressly make the parties rated to the poor rate liable to the sewers' rate, but only gives power to inspect the poor rate books for the purpose of enabling the commissioners of sewers to lay an equal rate. In Callis on Sewers, pp.

(a) November 11th, 1842. Before Lord Denman, C. J., Williams, Coleridge, and Wightman, Js.

222—224, the exemptions are enumerated: and in a note to p. 224, in the edition of 1685, it is shown to have been decided that land in the hands of the king is liable. Then the question is as to the party liable to the distress in the present case. In *Emmerson* v. *Saltmarshe*, 7 A. & E. 266, it was certainly held that a rate could not be laid on a township in general. In *Bow* v. *Smith*, 9 Mod. 94, S. C. 2 Eq. Ca. Abr. 206, it was also held that a rate on a district was bad: but it was said that it was not necessary to name the owners, but only the particular lands. That is done here; and the distress may be on the goods found. Thus, even where the liability, as in the case of an amercement, is on a district, the levy may be on individuals; *Ramsey* v. *Nornabell*, 11 A. & E. 383. That it is enough to name particular lands in the presentment, appears by the *Case of the Level of Hull*, 2 Str. 1127. That also was the opinion of Lord ELLENBOROUGH at Nisi Prius; *Warren* v. *Dix*, 3 C. & P. 71, (note.) From Callis on Sewers, pp. 143, 185, 192, the opinion of that author seems to have been that the commissioners might lay the tax on the grounds, and distrain upon such goods
*979] as could be found there, *though the passage last referred to implies a doubt as to the power of sale. Here, however, the question of sale is not raised. The difficulty as to the occupation can arise only where there is no distress. Here, indeed, the plaintiff must contend that the building is unoccupied; for clearly there is no occupation by the prisoners: so that, unless the governor be occupier, no one is.

Sir *F. Pollock*, Attorney General, in reply. The decision in *Netherton* v *Ward* does not establish that crown lands are in themselves rateable, though it must be admitted that some dicta of the learned judges there countenance such a view. But in fact there was a beneficial occupation in that case. The decision in *Soady* v. *Wilson*, whether right or not, clearly turned on stat. 52 G. 3, c. xlviii. The principle contended for by the plaintiff will produce no inconvenience which might not as well have been imputed to the rule of not rating a borough fund to the poor.(a) *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the court.

The plaintiff, the governor of Tothill Fields Bridewell, brings his action of trespass for the seizure of a certain table of his by way of distress for non-payment of a sewers' rate. The first question raised is, whether the part of Bridewell particularly mentioned in the case was legally liable to be presented and rated, and whether there is any manner in which it can be legally rated.

*980] *The part of the Bridewell mentioned is that wherein the prisoners are confined, deriving as it does a benefit from the sewers, but inhabited by no other person, nor occupied in any other manner. It is attended by servants of the establishment for its purposes as a prison, and is under the superintendence and control of the plaintiff, who occupies a part of the building as his own residence, and is rated and pays to the sewers in respect of that part. The Bridewell appears to be a prison of our sovereign lady the Queen, vested in trustees appointed by the justices of the peace for the county of Middlesex.

And hereupon the plaintiff's learned counsel contends that this public property, devoted to public purposes, is liable to no rate whatever. This large exemption, however, is certainly inconsistent with the judgments delivered by Lord TENTERDEN and BAYLEY, J., in *Netherton* v. *Ward*, 3 B. & Ald. 21. Lord TENTERDEN in that case examined all the acts, and con-

(a) *Regina* v. *The Mayor, &c., of Liverpool*, 9 A. & E. 435; *Regina* v. *Exminster*, 12 A. & E. 2. See now stat. 4 & 5 Vict. c. 48.

cluded that all lands belonging to the Crown, and not those only which are held by its tenants, are liable to the sewers' rate. BAYLEY, J., expressed the same opinion yet more strongly, and observed on the injustice of exempting any lands that might derive a benefit from the drainage, though devoted to the public service. "If it is applied by the Crown to public purposes, then it is for their benefit, and the public ought to pay." We may, however, remark that these very general observations were unnecessary for the decision of that case, which brought into question the rateability of an officer, having the beneficial occupation of a house situate in the dockyard, in respect of *that house. Lord TENTERDEN commences with the remark [*981 that the plaintiff, as the occupier of the messuage, was liable to the rate: and HOLROYD, J., refers to stat. 49 G. 3, c. clxxxiii., s. 33,(a) directing a rate to be made upon every person who shall occupy or inhabit any land, house, or building. "Now," (he adds,) "the plaintiff here is the occupier of a house, and, as such, is assessable under this act of parliament, unless he be exempted by reason of its being land of the king. It seems to me, however, to be clear, that by the ninth section of the statute H. 8, explained as it is by the 3 & 4 Ed. 6, c. 8, s. 2, that the lands of the king are expressly made liable to this assessment." This is indeed perfectly clear from the language of those acts, and is sufficient to warrant the decision in *Netherton* v. *Ward*.

But the prison on which the present doubt arises is not strictly the sovereign's property, though it is called her majesty's prison. It is vested in the justices of the peace for public purposes, and to such purposes alone devoted. If it were the sovereign's, and occupied by a tenant of the sovereign, the liability of that tenant to the sewers' rate, as well as his right to deduct the rate, when paid, from his rent would be unquestionable. But the difficulty here is of another kind, the plaintiff contending that of these parts of the prison neither he nor any other person can be truly called the occupier. Nor was his occupation very strongly asserted on the defendant's part, he rather resting his case on this, that benefit to the property from the drainage is the sole ground of liability, and that that liability attaches to the land itself, even although it should have no occupier.

*On the several dicta, and one case fairly cited for this proposition, [*982 we abstain from commenting, because they were all fully considered by this court in *Emmerson* v. *Saltmarshe*, 7 A. & E. 266, where we gave our judgment that a sewers' rate on a township is bad in law; à fortiori, a rate on lands generally, without taxing township or occupier, is bad also.

One of the cases, however, there cited, as it was on the present occasion, may perhaps require more particular notice; the case of *Bow* v. *Smith*, 9 Mod. 94, S. C. 2 Eq. Ca. Abr. 206, where Lord Chancellor MACCLESFIELD refused relief in equity to certain commissioners of sewers, or officers employed by them, against whom actions had been brought by owners or occupiers wrongfully assessed. The judgment concludes with an observation wholly irrelevant to that suit, but bearing certainly on our present inquiry. "The right way" "is to *assess the particular lands*, according to the danger they lie in; and that *it is not necessary to name the owners or occupiers of such lands*, *for the commissioners may not know them*; for if not naming the owners should make the assessment void, there would be an end of all assessments by commissioners of sewers; therefore, if that was the fact, it might be proper for this court to interpose." Now the judgment itself, far from sanctioning the opinion that lands are the proper subjects of the

(a) Local and personal, public.

sewers' rate, assumes the contrary; and the latter part will be most naturally explained by supposing it to mean that an occupier is not to withdraw himself from taxation by concealing his name from the commissioners. This is
*983] perfectly reasonable; and, where this is attempted and *the name is unknown, the occupier must of necessity be rated by that description. But the remark would be equally correct if applied to the poor rate or any other assessment.

After all, the language of the commission itself, founded on the statute 23 H. 8, c. 5, must decide this point: and it precludes all doubt. The tax is to be laid on the occupiers in respect of their lands benefited, as well when the Crown is the owner as where it may belong to a subject. Such of the more recent acts as speak of lands being chargeable must be understood as using that short form for "lands in respect of which their owners or occupiers are chargeable." This would be made clearer, if possible, by stat. 52 G. 3, c. xlviii. See stat. 4 & 5 Vict. c. 45.

The question then is, whether the plaintiff is the occupier of those parts of the Bridewell in which he does not reside, and which are occupied by none but the unfortunate persons charged with criminal offences who are confined there, unless the plaintiff's residence in a perfectly distinct part of the building, for the purpose of more conveniently visiting and superintending them, can be called an occupation of those parts. We think that that statement alone is sufficient to decide that he is not the occupier; and further that, while the premises are employed as at present, they have no occupier who can be rated: and consequently our judgment must be for the plaintiff. Judgment for plaintiff.(a)

(a) See the next case.

*984] *NEAVE v. WEATHER.

Chelsea Hospital, and the lands attached to it, are the property, partly of the Crown, and partly of trustees for the benefit of the pensioners. Part of the buildings of the hospital are occupied by officers concerned in the government and superintendence of the hospital; the residue is occupied only by the pensioners. *Held*, that no sewers' rate could be imposed in respect of such residue, there being no rateable occupier.

A sewers' rate was laid upon one of the officers in respect both of a part occupied by him (in respect of which he was admitted to be rateable) and also of the said residue; and a warrant of distress issued for the whole, under which goods of the commissioners of the hospital, (acting under stat. 7 G. 4, c. 16,) being upon the residue, were seized. *Held*, that the commissioners might maintain trespass for the seizure, although the officer was liable to be rated in respect of a part.

And although a sewers' jury had presented that a residue was liable to be assessed, and, on traverse of the presentment, such presentment had been affirmed by the verdict.

TRESPASS. The declaration stated that "Richard Neave, the plaintiff in this suit, secretary to the commissioners of the Royal Hospital at Chelsea, in the county of Middlesex, acting under and by virtue of a certain act," &c., (7 G. 4, c. 16,)(a) "and which said plaintiff had been duly nominated and appointed, and now is, secretary to the said commissioners according to the form, force, and effect of the said act of parliament," &c., complains, &c.: the declaration then charged that defendant heretofore, to wit, &c., broke and entered a certain house or hospital called Chelsea hospital, situate, &c., then being in possession of the said commissioners, and then and there seized

(a) "To consolidate and amend several acts relating to the Royal Hospitals for soldiers at Chelsea and Kilmainham." Sect. 35 (as to Chelsea hospital) empowers the treasurer or secretary to sue on behalf of the commissioners.

and took divers goods and chattels, to wit, ten tables, &c., of the said commissioners, then found and being in the said hospital, of great value, &c., and converted, &c.: "and therefore the plaintiff, as such secretary as aforesaid, brings suit, &c."

Plea. That the alleged trespasses were, and each, &c., was committed by defendant under the authority *and in pursuance of a certain commission of sewers of our sovereign lady the now Queen, before and at [*985 the same time, when, &c., being in full force, for tax assessed by the said commissioners, and according to the tenor and effect, true intent and meaning of the several statutes of sewers made, and then and now in force: verification. Issue thereon.(*a*)

Under stat. 3 & 4 G. 4, c. 42, s. 25, a case was stated, for the opinion of this court, in substance as follows.

This is an action brought by the secretary of Chelsea Hospital against a collector of the sewers' rates for the city and liberty of Westminster and part of the county of Middlesex, for distraining certain articles severally within the chapel, common dining hall, and common ward, or pensioner's sleeping room, of the hospital; all which articles were then on the premises assessed by the presentment and assessment to the sewers' rate now in dispute.

The collector justifies such distress under a warrant from the commissioners of sewers, which warrant is in the form following:

"City and liberty of Westminster and part of the county of Middlesex.

"These are in her majesty's name to authorize and require you that, by distress and sale of the goods of ——— Hall, or other occupier or occupiers of the buildings not hitherto rated, and fifty-seven acres of land, of the Royal Hospital, Chelsea, situate in the parish of St. Luke, Chelsea, you levy the sum of 89*l.* 5*s.* 6*d.*, being so much assessed upon the said *premises for and towards the cleansing, repairing, and maintaining certain common sewers within the district called the Ranelagh [*986 District, and all reasonable charges of distraining and selling the said goods; and restore the overplus," &c.: "and for your so doing this shall be your sufficient warrant." "Given under our hands and seals, at a court of Sewers, holden by adjournment at the Sewers' office, Greek Street, Soho Square, on Friday the 2d day of April, in the fourth year of the reign, &c., "and in the year of our Lord, 1841.

"Mr. William Weather."

The assessment upon which the warrant is grounded is in the following form.

"Property not hitherto rated.

"The parish of Saint Luke, Chelsea,

"Royal Hospital.

	Houses.		Lands.	
	Rent.	Rate.	Rent.	Rate.
"Mr. Hall, for buildings not hitherto rated, chapel and wards - - -	3381*l.*	84*l.* 10*s.* 6*d.*		
"Do. do. for land (57 acres) - - - - - - - -			570*l.*	4*l.* 15*s.*"

The assessment so made was upon a presentment made by the jury that such property was liable to be assessed. On this presentment a traverse was duly made, and a jury summoned to try such traverse, when the parties severally appeared by their attorneys; and, after hearing arguments and witnesses for and against the presentment, a verdict was found by the jury confirming the presentment; which said presentment, traverse, and

(*a*) The paper book did not state the form of the replication.

verdict, together with judgment and decree thereon by the court of sewers, are entered of record in the said court of sewers. Afterwards the
*987] decree (a) *was made by the court of sewers: and the plaintiff refused, upon demand and after being summoned, to pay the rate whereupon the distress warrant was issued, and the distress made.

The action is brought by the secretary of Chelsea Hospital, under sect. 35 of stat. 7 G. 4, c. 16: and the Commissioners of Chelsea Hospital derive their authority, as such, under that act and her majesty's letters patent, bearing date 13th April, 1835, and the instructions thereto annexed, dated 4th July, 1837. The Commissioners of sewers act under the authority of a commission under the great seal of Great Britain, dated 5th December, 1837, and the several acts in force relating to sewers.

A common sewer, called the Ranelagh Sewer, within the jurisdiction of the said commissioners of sewers, runs close to a part of the land of Chelsea Hospital and the hospital. And, for the purposes of the present question only, it is to be taken that Chelsea Hospital and the lands thereof derive benefit from this sewer, which is in the district and within the jurisdiction and office of the said Commissioners of sewers.

There are other assessments made by the commissioners upon Chelsea Hospital, charging other parts of the said hospital and land: viz., the governor's house, and all those houses which have been inhabited by persons having separate houses or apartments, or residences, within the hospital, in respect of which the governor and the said persons have been respectively assessed, those persons being also assessed to the poor rates. And this presentment and assessment now in dispute assesses the residue of the hospital and lands not before assessed. The sewers' rate for the
*988] parts of the hospital *and land used as residences and assessed to the poor rate have been paid without dispute. The assessment herein before set forth, upon which the present question arises, is upon the pensioners' wards or sleeping places, and the chapel of the hospital, which is a distinct chapel, and also the dining room of the pensioners, which is a distinct hall, but all having one connected roof, (which roof also covers the governor's house, a part of the same attached range of building, and the lieutenant governor's house, both which were previously assessed and paid for, being assessed also to the poor rate; the sexton's apartments, also previously separately assessed and paid for; and the kitchens;) and which altogether form three sides of the principal quadrangle; and the land upon which the buildings of the hospital stand; also the unenclosed quadrangles, and courts and buildings, used for common purposes within and by the said hospital, which have not heretofore been assessed to the sewers' rate, and are not assessed to the poor rates, or comprised in the parish assessments, but are admitted, for the purposes of the present question only, to derive benefit from the sewers within the jurisdiction of the said commissioners.

John Hall is a clerk of the works appointed by the Commissioners of woods and forests, and attached by the said Commissioners of woods and forests to Chelsea Hospital to superintend the due maintenance and repairs of the buildings of the said Royal Hospital. He resides in apartments of the hospital; which apartments have for many years been, and are now, distinctly and separately assessed to the poor rate and sewers' rate, and for which a sewers' rate has been assessed and paid.

The repairs of the buildings of Chelsea Hospital are under the superin-

(a) This was annexed to the case.

tendence of the Commissioners of *woods and forests: and Hall, under his appointment from them, has to see that they are not out [*989 of repair, and to superintend such repairs as are necessary and proper, after an order from Mr. Phipps, the surveyor appointed by the Commissioners of the woods and forests; and he is to see they are properly done; and Mr. Hall also attends to repairs connected with a part of the land called the Governor's or Burton's court, but not to the quadrangles, which are under the superintendence of Mr. Mann, a clerk of the works in the office of the Commissioners of woods and forests, who also takes care of the burial ground.

The freehold in Chelsea Hospital and the lands and buildings assessed by the assessment in question, and which are not assessed in any former assessment, is in the Crown, except about six acres of the said land, which are not separately assessed, but were purchased with money left by Colonel Drouly for the benefit of the pensioners of the said hospital: and the said six acres are vested in certain trustees for the benefit of the said pensioners.

The goods and chattels distrained by the Commissioners of sewers were the property of the Crown at the time of the distress, of which the commissioners of the hospital were then possessed under the letters patent and instructions before mentioned.

In last Michaelmas term,(*a*)

W. H. Watson appeared for the plaintiff; but the court called on the other side.

**Kelly*, contrà. There is no pretence for treating this building as a palace of the sovereign, for the sovereign never resides in it.(*b*) It is [*990 admitted that, as to a part, (that occupied by the clerk of the works,) the rate is correct. But it is attempted to question the occupation of the residue by him or any other. That question, however, is immaterial. Wherever benefit is derived from a sewage, the land or building deriving the benefit, whether occupied or not, and whether belonging to the Crown or a subject, is liable to the sewers' rate; *Netherton* v. *Ward*, 3 B. & Ald. 21. The same principle may be inferred from *Soady* v. *Wilson*, 3 A. & E. 248, where there was no beneficial occupation. It is true that, under stat. 23 H. 8, c. 5, s. 3, the commissioners are to inquire as to the persons making default and holding lands which require the drainage: but that does not interfere with the main object of the statutory provisions, which was to impose a liability on the land benefited. It is enough to rate the land; and whatever goods are found on the land so rated may be distrained; Callis on Sewers, pp. 143, 185. [*W. H. Watson* referred to *Rooke's Case*, 5 Rep. 99 b.] Such property as the present does not fall within the exceptions in Callis on Sewers, p. 222. In the later editions there is a note on this part of Callis (note (*a*), p. 264, of the 4th edition, by Broderip,) where three cases are cited, *Dore* v. *Gray*, 2 T. R. 358; *Masters* v. *Scroggs*, 3 M. & S. 447, and *Stafford* v. *Hamston*, 2 Br. & B. 691; which show that, when a party disputes his liability, the question is, whether his land derive advantage from the sewage. That the rate need not be made on a person appears *from Lord [*991 MACCLESFIELD's language in *Bow* v. *Smith*, 9 Mod. 94, S. C. 2 Eq. Ca. Abr. 206, and from the *Case of the Level of Hull*, 2 Str. 1127; and *Warren* v. *Dix*, 3 C. & P. 71, (note.) In Com. Dig., *Sewers*, (E 2,) it is said, "It is sufficient to charge the visible owner or occupier; for if he is

(*a*) November 18th, 1842. Before Lord Denman, C. J., Williams, Coleridge, and Wightman, Js.

(*b*) See *Attorney General* v. *Donaldson*, 10 M. & W. 117.

not liable for the whole, he may be remedied by application to the commissioners." That is the proper remedy where a party is improperly rated. And, where such a party does not so relieve himself, he is liable to be amerced: but the rate itself can be obtained only by distress. If the presentment be not traversed, the commissioners are bound to levy the rate. Trespass cannot be maintained for carrying into effect the judgment of a competent court, even if it be erroneous. [COLERIDGE, J. Then you say that the question, whether the proper party be rated, cannot now be raised.] That is so: no pleading could properly raise the question on the record. [COLERIDGE, J. The party might surely insist that his lands were not benefited.] This action is not brought by the owner of the land rated, but by the owner of the chattel. [COLERIDGE, J. The proceedings of the commissioners can be conclusive only where they have jurisdiction: the question is, had they jurisdiction here?] They clearly had jurisdiction to rate for the land. [COLERIDGE, J. But had they jurisdiction to lay any rate except on persons? And then, is this person within their jurisdiction?] No argument arises as to the goods seized being themselves crown property: for, first, the plaintiff in trespass affirms his property in the chattel: and, secondly, sect. 9 of stat. 23 H. 8, c. 5, makes the king's lands liable to
*992] the rate, and consequently carries with it the remedy of distress. *As to the part of the land purchased with Colonel Drouly's money, that has never been out of the ownership of a subject.

W. H. Watson, contrà. The property, with the exception of a small part, is in the Crown. But the rate is made on Hall, who is not liable in respect of the property named, having no possession. Suppose it to be true that, as contended on the other side, the rate may be either on the land or the visible owner; yet this rate is on neither. If the rate were on land, (assuming that such a rate can be laid,) then the owner of the land might traverse; or, if it were wrongly laid on an individual, such individual might traverse. But how can the parties here represented by the plaintiff, the Commissioners of the hospital, be bound, when they are neither the owners nor individuals rated, and have had no opportunity of being heard? But, further, the rate must be on the person in respect of the land: a rate on the land is bad, under stat. 23 H. 8, c. 5, s. 3; and this view is clearly recognised by the local and personal act, stat. 52 G. 3, c. xlviii., which assumes the principle of rating to be as in the case of a poor rate; *Soady* v. *Wilson*, 3 A. & E. 248, (see p. 253.) At p. 127 of Callis on Sewers the editor of 1685 has added a note, in which he shows that the rate can reasonably be only on the person, not on the land. Lord MACCLESFIELD's remark, in *Bow* v. *Smith*, is merely a dictum: the decision is rather in favour of the present plaintiff. It does not clearly appear what the exact form of rate was in the *Case of the*
*993] *Level of Hull*. **Hetley* v. *Boyer*, Cro. Ja. 336, S. C. 2 Bulst. 197, and *The Case of the Isle of Ely*, 10 Rep. 141 a, 143 a, are authorities against rating the land. The cases are reviewed in *Emmerson* v. *Saltmarshe*, 7 A. & E. 266, where it was held that a rate on a township is bad. The analogous decisions on the poor law support the same view. And at any rate Hall has no occupation in respect of which he can be rated; nor have the Commissioners. Something more than an occupation for the purpose of superintending the affairs of the hospital is necessary. On this point also, the rules laid down in the poor law cases are applicable; as *Rex* v. *Tynemouth*, 12 East, 46; *Rex* v. *Terrott*, 3 East, 506. Further, here is a single distress for separate assessments. [Lord DENMAN, C. J. We will consider whether you need continue your argument further.] *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the court.

This was another special case (a) reserved in order to try the validity of a sewers' rate. The plaintiff represents the Commissioners for managing Chelsea Hospital, who complain that their goods have been seized for non-payment of an illegal rate imposed on Mr. Hall, their clerk of the works.

It is imposed on Mr. Hall, not only in respect of that part of the building which constitutes his dwelling, for which exclusively he has always hitherto been assessed, but also on the chapel kept for the use of the pensioners, for their wards or sleeping places, for their *dining hall, and for fifty-seven acres of land, namely the burial ground, the ground on which the kitchens and the buildings of the Hospital stand, and likewise the open land within the quadrangle. [*994

The freehold in all except six acres, which were purchased with money left by Colonel Drouly for the benefit of the pensioners, and vested in trustees for the Hospital, is in the Crown.

As to the rateability of all and every part of this property, the case which we have now just decided (a) governs the present. Here is, except as to Mr. Hall's house, no occupier, and hence no good rate. We can look only to the statutes and commission; we must find an occupier before the property benefitted can be pronounced liable to the rate.

We are not led the more easily to this conclusion by the plaintiff's observation that the land vested in the Crown was not liable to rate before it became Chelsea Hospital, since the Crown's land is assessable in the hands of its tenants. Nor are we impeded by the defendant's argument that the land purchased with Colonel Drouly's money might formerly have contributed to the rate; for it must have been then occupied by some person; and, if the occupation has ceased, so has the rateability. Inconvenience and loss may arise to the other occupiers from the change: but both probably very minute in extent, possibly even with comparison to the share of each individual in the public benefit derived from the national charity. If we could balance inconveniences, there is expense and trouble thrown away, on the other hand, when public taxes are imposed on public property.

*But we act in no degree on speculations of this sort, looking only to the powers given by the statute, and leaving it to the legislature to make any new provisions that justice or expediency may require. [*995

It would be superfluous to explain that herein we do not differ from our former decision in *Soady* v. *Wilson*, 3 A. & E. 248; for there the occupation was considered to be apparent from the case stated.

But this special case refers other points to our consideration. It states that the solicitor for Chelsea Hospital attended the commissioners on behalf of Mr. Hall, and traversed the presentment that the property was liable to be assessed, which issue was submitted to a jury, and decided in favour of the liability, after hearing evidence and argument on both sides. It sets out too the form of the assessment, comprising Mr. Hall's house, admitted to be rateable, along with the other matters as to which this question is raised. And the defendant insists, first, that he cannot be guilty of a trespass in enforcing an assessment which has been pronounced lawful by a court of competent jurisdiction; and, secondly, that this court will enter into no inquiry into the amount of the rate, if there be any rateable property.

The jurisdiction of the court of sewers is said to depend on one thing only, the benefit derived from the drainage. That fact established in the present action, their power of adjudicating on every other is said to arise;

(a) See *Tracy* v. *Taylor*, antè, p. 966.

and that, when once the jury have found the benefit, the person designated as occupier is barred from denying his occupation. But there is no question made that the benefit is a fact which the court of sewers is competent to *996] decide, and yet, if the jury in *an action of trespass brought afterwards shall entertain a contrary opinion to theirs, the first verdict shall not prevent the plaintiff from recovering for the distress as an illegal act. On the other hand, the first jury, by finding the benefit, take not a single step towards discovering who is the person occupying: why then should a true verdict on the former issue preclude one who, if not an occupier, is a stranger, from making that assertion in another proceeding. The truth is, that this argument assumes the chargeability of the lands themselves, on which our judgment was given in the last case.

Still more unreasonable would it be to hold that, where a party is assessable for some land, he must submit to any addition that might be made in respect of other land for which he is not assessable. The proposition is too monstrous to be maintained, or even combatted; it falls of itself. The amount of money which it may be right to raise, the court of sewers must in the first place determine; and with their determination no superior court could interfere, unless fraud were distinctly proved: but this quantum must not be increased by introducing other lands into the rate, not legally subject to it, because not in fact occupied by any one. No reason can be stated why this fact of occupation may not as well be inquired of in an action of trespass as the question of benefit: and, if it is disproved, the chargeability of any one, either named or only described, in respect *of these lands* is also disproved, and the rate which improperly includes them is void.

On the whole, the plaintiff is entitled to judgment. Judgment for plaintiff.

*997] HAZELDINE *v.* GROVE, Esquire.

Stat. 21 Ja. 1, c. 12, s. 5, enacts that actions against justices of the peace for any thing done by virtue or reason of their office shall be laid *in the county where the fact is committed.* Stat. 24 G. 2, c. 44, s. 8, enacts that no action shall be brought against any justice of the peace for any thing done in the execution of his office, unless commenced *within six calendar months* after the act committed. Stat. 10 G. 4, c. 44, s. 1, empowers the Crown to appoint two justices of the peace for the counties therein named, to execute the duties of a justice of peace at the Metropolitan police office: and sect. 41 enacts that all actions against any person for any thing done in pursuance of that act shall be laid *in the county where the fact is committed,* and be commenced *within six calendar months* after the fact is committed. Stat. 2 & 3 Vict. c. 71, s. 1, makes the justices of the several police courts of the metropolis justices of the same counties: other sections give such justices additional powers not possessed by ordinary county justices: by sect. 55, the act is to be construed as one act with stat. 10 G. 4, c. 44: and sect. 53 enacts that no action shall be brought against any person for any thing done in pursuance of the act, unless commenced *within three calendar months* after the act committed, and laid *in the county of Middlesex.*

Held, that actions for any thing done by a justice appointed under stat. 2 & 3 Vict. c. 71, though within the ordinary province of a county justice, must be brought within three months, and the venue laid in Middlesex.

A charge being brought before defendant, a justice appointed under stat. 2 & 3 Vict. c. 71, plaintiff was examined for the defence on that charge; and, his evidence being unsatisfactory to defendant, he was removed into an adjoining room, while defendant considered the charge, as to which defendant decided that he had no jurisdiction; but he then held plaintiff to bail, suspecting him of perjury, to a future day (some witnesses in contradiction having gone away,) and on that day (the witnesses appearing) committed plaintiff for perjury. The bill for perjury was thrown out. Plaintiff sued defendant for false imprisonment in less than six months but in more than three, and laid the venue out of Middlesex, in the county where the imprisonments took place. On these facts the plaintiff was nonsuited.

Held, that the nonsuit was right, defendant not appearing to have acted otherwise than

bonâ fide, and being therefore entitled to the protection of stat. 2 & 3 Vict. c. 71, as to limitation of time, and venue; and that plaintiff, not having demanded that the question of bona fides should be put to the jury, could not demand a new trial on the ground that the judge had nonsuited him on the objection.

TRESPASS for assault and false imprisonment.

Plea, Not Guilty (by statute). Issue thereon.

The cause was tried before ALDERSON, B., at the Kent Spring assizes, 1842, when the following facts appeared, as stated by the Lord Chief Justice on delivering the judgment of this court in banc.

"The defendant is a police magistrate at Greenwich, appointed under stat. 2 & 3 Vict. c. 71. A person, the master of the plaintiff, had been brought before him on a charge under the pawnbrokers' act. Two witnesses were examined in support of it; and the master proposed to call the plaintiff in his defence. The *defendant, who appeared to entertain [*998 suspicions of the truth of the testimony about to be offered, cautioned the plaintiff, with some earnestness of manner, before he gave his evidence, of the consequences if he should prevaricate or forswear himself. The evidence, however, was given; and, it appearing to be wholly unsatisfactory to the defendant, the plaintiff was removed to another room, while he considered the principal case; in which, on examination of the statute, he found he had no jurisdiction, and dismissed the complaint. The plaintiff was then called in; but, the two witnesses having in the mean time departed, the plaintiff was told he would be committed unless he found bail to appear on the 4th of August. The bail were immediately found; and he was discharged. On the 4th of August, the witnesses appeared, and the plaintiff: the charge of perjury was gone into, and the plaintiff committed to take his trial at the Central Criminal Court. At the sessions, the bill was preferred, and thrown out by the grand jury. The action was brought more than three but less than six months after either imprisonment; and the venue was laid in Kent, where the trespasses were committed. The defendant's counsel insisted that he was entitled to the protection of sect. 53 of stat. 2 & 3 Vict. c. 71, and that the venue therefore should have been in Middlesex, and the action brought within three months. The judge was of this opinion, and nonsuited the plaintiff." The case at Nisi Prius was discussed principally on the effect of the statutes, neither party requiring that any question as to bona fides should be put to the jury.

In last Easter term, Sir *W. W. Follett*, Solicitor *General, obtained a rule nisi for a new trial. In last Michaelmas term,(a) [*999

Thesiger and *Bodkin* showed cause. It is contended on behalf of the plaintiff, first, that the magistrate had no power to proceed at all, inasmuch as he could not commit for perjury: and that, having no jurisdiction over the subject-matter of the charge, he was not protected by any of the limiting clauses which apply to the case of magistrates acting in the execution of their office. But the argument is founded on a misapprehension of the authorities. The justices in quarter sessions have, indeed, no power to entertain indictments for perjury: but they have authority to take the preliminary proceedings. Hawkins's Pleas of the Crown was cited for the plaintiff. It is there said, vol. iii. p. 77 (b): "It hath been of late settled, that justices of peace have no jurisdiction over forgery or perjury at the common law; the principal reason of which resolution, as I apprehend,

(a) November 23d, 1842. Before Lord Denman, C. J., Williams, and Coleridge, Js.

(b) Ed. 7, book 2, ch. 8, s. 64.

was, that inasmuch as the chief end of the institution of the office of these justices was for the preservation of the peace against personal wrongs and open violence; and the word 'trespass,' in its most proper and natural sense, is taken for such kind of injuries; it shall be understood in that sense only in the said statute and commission, or at the most to extend to such other offences only as have a direct and immediate tendency to cause such breaches of the peace; as libels, and such like, which on this account have been judged indictable before justices of peace. And for this reason prin-
*1000] cipally, as I apprehend, the Court of *King's Bench in the case of one Pitt, since the above-mentioned resolution concerning perjury and forgery, refused to quash an indictment founu at a session of the peace for a libel, but ordered the defendant to demur to it if he thought fit." *Regina* v. *Bainton*, 2 Str. 1088, and *Regina* v. *Yarrington*, 1 Salk. 406, are referred to in the margin: those cases, as well as the whole passage in Hawkins, show that the author is speaking only of the trial, not of the preliminary proceedings. In 3 Hawk. P. C. p. 75,(*a*) it is said that the justices of the peace have no jurisdiction to hear and determine certain felonies; but it is added that they can take examinations for any kind of felony. Sect. 3 of stat. 7 G. 4, c. 64, gives express power to every jus tice of the peace to take examinations, bind over, &c., on charges of misdemeanor: and perjury is classed among misdemeanors in sect. 23 of the same statute; and at any rate the power to bind over to prosecute or give evidence in cases of perjury is there recognised: but who can bind over except a magistrate?

It will, however, be contended that the defendant either acted in the supposed execution of his general power as magistrate, and can therefore be protected only by stat. 24 G. 2, c. 44, s. 8, or as a metropolitan justice of the peace, in which case he would be protected by stat. 10 G. 4, c. 44, s. 41; and that, in both these statutes, the limitation is six months. Also that, in the former case, by stat. 21 Ja. 1, c. 12, s. 5, and in the latter, by stat. 10 G. 4, c. 44, s. 41, the venue is to be laid in the county where the fact was committed, that is in Kent. But the defendant is appointed under
*1001] stat. *2 & 3 Vict. c. 71, the object of which act is not the same as that of statute 10 G. 4, c. 44. Stat. 2 & 3 Vict. c. 71, erects a jurisdiction for the metropolitan police courts, and makes the justices appointed to them justices of the counties of Kent, &c.; and, by section 14, one of such justices may act singly in cases where the law ordinarily requires two county justices, except that they cannot act where the law requires the act to be done at a special or petty session of all the justices of the division, nor at quarter sessions. This jurisdiction is very different from that under stat. 10 G. 4, c. 44. The defendant therefore acts under stat. 2 & 3 Vict. c. 71, the fifty-third section of which limits the action to three months and requires the venue to be in Middlesex. If, however, there were an inconsistency, and any of the earlier statutes applied, as well as stat. 2 & 3 Vict. c. 71, then the later statute must prevail; *Rex* v. *The Justices of Middlesex*, 2 B. & Ad. 818. And this answers any argument which may be suggested from sect. 55 of stat. 2 & 3 Vict. c. 71, whereby it is enacted that stat. 10 G. 4, c. 44, shall be construed as one act with stat. 2 & 3 Vict. c. 71.

Stat. 2 & 3 Vict. c. 71, s. 23, makes it perjury to give false evidence wilfully before any of the courts appointed: and sect. 36 gives a general power to remand a party charged, or to let him go at large on his personal

(*a*) Book 2, ch. 8, sect. 58.

recognisance. Here, however, it is contended that there was no charge. But the question is not whether the act of the defendant was perfectly legal; for then the protecting clauses would not be wanted. They were passed to protect magistrates who may render themselves liable to actions in the bonâ fide exercise of what they suppose to be their duty. The *question is as to the bona fides, not as to the strict jurisdiction, unless the subject matter of inquiry be itself without the jurisdiction; *Weller* v. *Toke*. 9 East, 364; *Prestidge* v. *Woodman*, 1 B. & C. 12: and the same principle applies to parties not magistrates, acting in the supposed execution of a statute which has a protecting clause; *Beechey* v. *Sides*, 9 B. & C. 806; *Ballinger* v. *Ferris*, 1 M. & W. 628; S. C., Tyrwh. & Gr. 920; *Cann* v. *Clipperton*, 10 A. & E. 582:(*a*) in the last of which cases it was indeed said that the belief must be reasonable; but the facts here leave no doubt on that point. [*1002

Sir *W. W. Follett*, Solicitor General, *Platt*, and *G. T. White*, contrà. The question as to bona fides was never left to the jury: the judge nonsuited the plaintiff. [*Thesiger*. It was for the plaintiff to require that the question of bona fides should go to the jury, if he denied it; *Wedge* v. *Berkeley*, 6 A. & E. 663. The defendant could not be said to be acting as a magistrate at all: no charge was made; no witness was heard; and the supposed perjury was committed in giving evidence on a charge which the magistrate knew he could not entertain. Sect. 36 of stat. 2 & 3 Vict. c. 71, referred to on the other side, applies only to cases where parties are charged, and takes for granted that there will be depositions. There could be no reasonable ground here for the magistrate's belief that he was acting in the execution of his office; and therefore he is not within the protecting clauses, although he may have acted bonâ fide; *Cann* v. *Clipperton; Cook* v. *Leonard*, 1 B. & C. 12. The *defendant could have made no valid return to a habeas corpus, so far as regards the first confinement. COLERIDGE, J. Cannot a magistrate commit a man whom he sees picking a pocket?] If he can, that must be because the fact is unquestionable: but a magistrate cannot, on the mere view or hearing, say that a man is wilfully swearing what is false: and, on the first detainer, the magistrate could not possibly have made up his mind that perjury had been committed. [*Thesiger*. In *Wedge* v. *Berkeley*, the magistrate acted on the view, drawing his inference from what he saw.] That was a case of supposed felony. [*1003

But, further, supposing this act to have been done in bonâ fide execution of the defendant's duty, it was under his general duty as a magistrate, not under any peculiar powers conferred by stat. 2 & 3 Vict. c. 71. Although that statute makes the defendant a justice of peace, it does not impose the limitations of sect. 53 in the case of all acts of a justice of peace so created, but only in the case of the peculiar acts which this statute authorizes; as, for instance, acts done under sects. 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33. Therefore either the limitation is that of stat. 24 G. 2, c. 44, s. 8, and the venue that prescribed by stat. 21 Ja. 1, c. 12, s. 5, or, at any rate, the limitation and venue are determined by sect. 41 of stat. 10 G. 4, c. 44, which statute (sect. 1) makes the police magistrates justices of Kent, &c., and is to be construed as one statute with stat. 2 & 3 Vict. c. 71, by sect. 55 of the latter. The statutory clauses are, in fact, not inconsistent, but applicable to different cases.

*As to the general right to commit in cases of perjury, no argument arises upon sect. 23 of stat. 2 & 3 Vict. c. 71. That section [*1004

(*a*) See *Reed* v. *Cowmeadow*, 6 A. & E. 661; *Lidster* v. *Borrow*, 9 A. & E. 654; *Norris* v *Smith*, 10 A. & E. 188.

makes a particular act perjury; but this offence, as appears by the passage cited from Hawkins, stands on a different footing from other misdemeanors; therefore sect. 3 of stat. 7 G. 4, c. 64, does not apply: and stat. 2 & 3 Vict. c. 71, s. 23, gives no additional power to magistrates in cases of perjury.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the court.

This was an action against a magistrate for trespass and false imprisonment, in which a nonsuit passed on the grounds that the venue was wrong, and the action brought too late. Two questions were made on the argument: the first, whether the defendant was entitled to any statutory protection: the second, whether, if so, the plaintiff had adopted the right limitation of time and selection of venue. It will be found more convenient to consider the latter point first.

(His lordship then stated the facts, as antè, pp. 997, 998, and then proceeded as follows.)

It is now insisted on, for the plaintiff, that the defendant, if entitled to any protection, was only so to that afforded by stat. 21 Ja. 1, c. 12, s. 5, as to the venue, and stat. 24 G. 2, c. 44, s. 8, as to time: that the action therefore was well brought, in Kent, and within six months.

The question then is, was the action brought for any thing done in pursuance of stat. 2 & 3 Vict. c. 71, or in the execution of the powers or authorities given by it? By the third section of the act the queen is em-
*1005] powered *to appoint persons, with certain qualifications there specified, to be "magistrates of the said courts," and any person so appointed "may act as a justice of the peace in and for" the counties and liberties named, "although he may not have the qualification by estate required of other justices of the peace." Before they act, they must take the oaths required to be taken by justices of the peace, except the oath of qualification. By subsequent sections of the act, certain disabilities were imposed on them, which prevent them from exercising their functions in some cases in which ordinary justices may act; and also powers more extended, and a jurisdiction, in many cases, are conferred on them, which ordinary justices have not.

The plaintiff's counsel contended, therefore, that a police magistrate was entitled to two kinds of protection, in respect of his twofold character; that he was a justice of the peace with the ordinary powers, except as to those specially taken from him; and that, when acting "by virtue or reason" of his office as such, (to use the words of the statute of James,) or "in the execution of his office" as such, (to use the words of the statute of George 2,) he was entitled to the protection of these statutes: but that he was moreover a magistrate of the police court; and that, when, as such, he was exercising any branch of the special jurisdiction conferred on him by stat. 2 & 3 Vict. c. 71, he was then acting in pursuance of that act, or in the execution of the powers or authorities under it, and so entitled to the protection of the fifty-third section. But the defendant in the present case derived no special power from the statutes, according to his own case: he conceived
*1006] the crime of perjury to have been committed *before him, and had proceeded, as any ordinary justice might, to the examination and committal of the person accused for trial.

The distinction sought to be established appears to us to be highly inconvenient, not so much to the magistrates, as the parties seeking redress against them for alleged injuries. It must be often very difficult to ascertain which of the statutes a plaintiff must comply with in his notice, venue, &c., if it

is to depend on so nice a point, which can only be determined on full acquaintance with the statute; and the words of the clause do not make it necessary. The queen, acting under the power given her by the statute, appoints an individual under specified circumstances a magistrate of a police court. Both the officer and the court are the creation of the statute law. When so appointed, the statute invests him with the ordinary authority of a justice of the peace, with certain restrictions. It appears to us, therefore, that when he is exercising the most ordinary jurisdiction of a justice of the peace he is acting in execution of a power and authority conferred on him by the act, as much as a commissioned justice doing the same thing would be acting in execution of a power and authority conferred by the commission.

If so, it becomes necessary to consider the first question stated; namely, whether the defendant was entitled to any statutory protection. It was admitted in the argument that the fifty-third section of this act must be construed on the principle which has always been applied to the construction of the analogous clauses in the statutes of James I. and George II. before referred to, and other similar provisions in various statutes. That principle seems to be this: that, where the magistrate, with *some colour of reason, and bonâ fide, believes that he is acting in pursuance of his lawful authority, he is entitled to protection, although he may proceed illegally, or exceed his jurisdiction. Whether he acts with such colour of reason, and bonâ fide, are questions for the jury under all the circumstances, if there be any evidence of them, and the plaintiff desires the opinion of the jury to be taken on them, although it is very common to submit them to the judge first, as in the present case, on an application for a nonsuit. And, if the plaintiff, on such application being made, does not desire the matter to be submitted to the jury, he must abide by the decision of the judge, if the court shall think it warranted by the evidence. [*1007

In the present case we think it abundantly warranted. In the first place there was no evidence of malice of any sort offered. By the twenty-third section of the act it is provided that wilful and corrupt false evidence before a police court shall subject the party to the penalties of perjury. It cannot be doubted that a magistrate may receive informations and take depositions on a charge of perjury, and hold to bail, or commit on such charge of perjury. It is true that no direct charge or information had been laid before the defendant when he first caused the plaintiff to be removed into another room; and he *may have* exceeded his authority in so doing; but there is ample ground for believing that he thought he might himself institute the proceeding when the offence had been committed in his presence; and all his subsequent conduct flowed from this. He was not bound to proceed with the case, if regularly before him, out of its order: he might well direct the party to be detained till the business before him was disposed of. At the *end of half an hour he is about to proceed with it, but the witnesses are gone; and he then, not improperly, still on the supposition that the charge was regularly before him, calls on the plaintiff to find bail for his appearance at a future day. [*1008

There was a fault in the commencement, which made the whole proceedings illegal: but these statutory protections suppose an illegality, so that there is no defence on the merits. For the reasons, however, which we have given, we think there was no illegality of such a palpable nature, no such want of reasonable colour or bona fides, as to disentitle the defendant to notice and the other protection of the statute; and that this rule, therefore, for setting aside the nonsuit, must be discharged. Rule discharged.

*1009] *IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

ELIZABETH WILSON v. FULLER.

SINCE the publication of this case, antè, p. 68, the reporters have been favoured with the MS. of the judgment delivered by the Lord Chief Justice of the Common Pleas, which had not reached them when they prepared their former report. It is as follows.

TINDAL, C. J. We think the judgment of the Court of Queen's Bench in favour of the plaintiff below cannot be supported by the application of the facts found in the special verdict to the allegations contained in the declaration.

The declaration contains two grounds of action. First, that the defendant, Mrs. Wilson, falsely and fraudulently represented and pretended that the premises were in the occupation of a tenant at a rent of 100*l.* a year clear of rates and taxes: and, secondly, that she fraudulently and deceitfully concealed from the plaintiff that the rent payable by the tenant was subject to the deduction of the rent and taxes.

As to the first gravamen, the facts found in the special verdict are inconsistent with the allegation. It is not found that Mrs. Wilson made any representation at all, but that she merely referred her attorney for information to Mr. Bass, who had a lien on the premises; and the jury expressly find she
*1010] did not further interfere in *the matter. This finding completely negatives any fraudulent representation personally made by herself. And, as to any representation made by her agent Mr. Wadeson, which, if fraudulently made, it may be admitted would bind her equally as if made by herself, the finding is that the only representation made by him was precisely that which he received from Mr. Bass: viz., a representation in writing, "that the house No. 3 is in the occupation of a yearly tenant, Mr. Mills, at 100*l.* a year." And this representation is perfectly true.

As to the statement in the declaration of the second gravamen, the fraudulent concealment; so far as Mrs. Wilson is personally concerned, there is no finding which affects her: she had no means of knowing, and, so far as the finding of the jury goes, she did not know, what representation Wadeson had made to the plaintiff below; for it is expressly stated she never interfered after she had referred that gentleman to Mr. Bass; and there is nothing to show that Mr. Bass was not perfectly competent to give Mr. Wadeson all the information necessary. For any thing she knew personally, Bass had made to Mr. Wadeson, and Wadeson had made to the plaintiff, a full disclosure. The only question therefore is whether Wadeson was guilty of a fraudulent concealment; for it must be admitted Mrs. Wilson, the principal, would be bound in a civil action by the concealment of which her agent was guilty.

The concealment with which he is charged is thus put upon the argument. He is found by the verdict to have seen the particulars after they were drawn up by the plaintiff, stating the premises to be let at 100*l.* a year "clear of rates and taxes;" and, inasmuch as he stood by, and, after
*1011] he saw the manner in which the *plaintiff understood his communication, he did not correct and set him right, this, it is contended, amounts to a concealment. But the answer is that the jury have expressly

found that "Mr. Wadeson did not know that the defendant paid the rates and taxes;" and again that they find that he did not correct the particular drawn out by the plaintiff, "because he thought it true;" the special verdict adding that he had considered it the plaintiff's duty, when he was employed to make out the particulars, to go and survey the premises, and inquire of the outgoings. Under such a finding, we think the fraudulent concealment on the part of Mr. Wadeson is directly negatived.

But it is argued that, inasmuch as Mrs. Wilson must have had the knowledge in her own mind that she paid the rates and taxes, her knowledge must be taken in point of law to be the knowledge of Wadeson her agent, and that the not communicating this fact to the plaintiff was a concealment by him in point of law, and a fraud also in contemplation at law, so that the plaintiff was entitled to recover, although no moral fraud had been committed. But the answer to this argument appears to be, and this perhaps is an answer altogether to the action, that the jury find that neither the plaintiff nor Wadeson knew, until after the assignment and the payment of the 600*l.* by the plaintiff, that it had ever been agreed that the rates and taxes should be paid by the defendant; and that, at the time of the payment of the 600*l.*, the plaintiff believed that the premises were let at 100*l.* a year clear of rates and taxes; the special verdict containing no finding that the plaintiff was induced to purchase on the faith of any statement made by Wadeson, or on the ground of his tacit assent to the *statement in [*1012 the altered particulars, but, on the contrary, stating the plaintiff's own personal belief of the fact, which might have been grounded, and probably was grounded, entirely on his own knowledge of the usual course and practice of letting houses and reserving rents as between landlord and tenant, and not upon any act or statement of Mr. Wadeson.

In short, the immediate cause of the injury sustained by the plaintiff appears to us to have arisen from his own misapprehension of the fact, and not from any misrepresentation or concealment on the part of the defendant.

We therefore think, without entering into the question discussed in *Cornfoot* v. *Fowke*, 6 M. & W. 358, that the plaintiff's ground of action, as stated in his declaration, is not supported by the finding of the jury, and consequently that the judgment of the court below must be reversed.

Judgment reversed

In this vacation and on the last days of the term, the Court of Queen's Bench was not full, the attendance of one judge being required in the place of Patteson, J., who was absent from the Bail Court and sittings at Nisi Prius in consequence of a domestic affliction.

END OF MICHAELMAS VACATION.

INDEX

TO

THE PRINCIPAL MATTERS

CONTAINED IN 3 ADOLPHUS & ELLIS, N.S.

The figures refer to the English folios, which will be found in a bracket at the head of the page and in the margin of the text.

By inquisition taken by the coroner of the borough of R., on the oath of jurors of R., in R., upon a body lying dead in the borough of R., it appeared that the death was caused accidentally by the deceased falling, in the county of B., from a carriage, and that he died in R.; and the jury found the death to have happened accidentally, and laid a deodand on the carriage.

This court, before stat. 6 & 7 Vict. c. 12, quashed the inquisition, on the ground

4

HABEAS CORPUS.

Stat. 21 Ja. 1, c. 12, s. 5, enacts that actions against justices of the peace for any thing done by virtue or reason of their office shall be laid *in the county where the fact is committed.* Stat. 24 G. 2, c. 44, s. 8, enacts that no action shall be brought against any justice of the peace for any thing done in the execution of his office, unless commenced *within six calendar months* after the act committed. Stat. 10 G. 4, c. 44, s. 1, empowers the crown to appoint two justices of the peace for the counties therein named, to execute the duties of a justice of peace at the Metropolitan police office: and sect. 41 enacts that all actions against any person for any thing done in pursuance of that act shall be laid *in the county where the fact is committed*, and be commenced *within six calendar months* after the fact is committed. Stat. 2 & 3 Vict. c. 71, s. 1, makes the justices of the several police courts of the metropolis justices of the same counties; other sections give such justices additional powers not possessed by ordinary county justices. By sect. 55 the act is to be construed as one act with stat. 10 G. 4, c. 44: and sect. 53 enacts that no action shall be brought against any person for any thing done in pursuance of the act, unless commenced *within three calendar months* after the act committed. and laid *in the county of Middlesex.*

Held, that actions for any thing done by

Examinations transmitted with an order of removal stated the chargeability as follows. The pauper said: "I and my said children are inhabitants of the parish of A., and we are chargeable to the said parish." Another witness said: "I am one of the relieving officers of the B. union, and administer the relief ordered for the paupers of the parish of A. The said A. F." (pauper) "and her said four children *are now chargeable* to the said parish."

Held not sufficient, for that the examinations stated a conclusion of law, and not the fact of relief, from which the conclusion might have resulted. *Regina* v. *High Bickington.* 790, n.

10. No case being granted, cannot be brought up by certiorari.

Where the sessions, on hearing an appeal against an order of removal, have confirmed it without granting a case, this court will not direct the order of removal, with the examination on which it was founded, and the order of sessions, to be brought up by certiorari, on the ground that the examinations contain no legal evidence in support of the order of removal, and would therefore show that it was made without jurisdiction. *Ex parte Tollerton.* 792

11. No case being granted, cannot be brought up by certiorari.

Where the sessions, on hearing an appeal against an order of removal, have confirmed it without granting a case, this court will not direct the order of removal, with the examinations on which it was founded, and the order of sessions to be brought up by certiorari, on the ground that the examinations contain no legal evidence in support of the order of removal.

Paupers were removed by order of justices to a parish therein described as "the parish of Poplar, in the county of Middlesex." The real description of the parish was All Saints Poplar, in the same county: *Held*, not a material variance. And that, if it were so, the parish could not allege it on motion for a certiorari, having appealed and not raised the objection at sessions. *Regina* v. *Buckinghamshire.* 800

XV. Order of removal.

1. What an order of removal is. *Regina* v. *St. Pancras.* 352

2. Form: complaint by proper officers: churchwardens and overseers of a township.

After appeal against an order of removal, and adjudication thereon at sessions, no case being reserved, the unsuccessful party obtained a certiorari to bring up the order, examination of the pauper, notice of appeal, and order of sessions, and, on the return, moved that the orders might be quashed.

Quære, whether a certiorari ought to have been granted to bring up the examination and notice of appeal, and whether, being brought up, they could be noticed by the court, assuming that the sessions had jurisdiction to dispose of the case.

The order of removal, addressed "to the churchwardens and overseers of the poor of the township of Sheffield," recited a complaint made "by the churchwardens and overseers of the poor of Sheffield aforesaid," that the paupers had come to inhabit, &c., not having gained a legal settlement, &c., nor produced a certificate, and had become chargeable to the township of Sheffield aforesaid;

The parish of M., in the borough of K., is divided into nine districts called wards, for and from each of which, under a local act, (48 G. 3, c. xxii.,) an overseer is appointed; and the nine are, by the act, made overseers of the parish.

Nine lists, each containing the names of the burgesses of one only of the wards, were delivered in severalty by the particular overseers appointed for and from the respective wards, under stat. 5 & 6 W. 4, c. 76, s. 15. Eight of the lists were signed, each by the overseer of the particular ward; no overseer signed the list of any but his own ward; the ninth list was not signed at all.

Held, that each of the overseers of the eight wards, as well as the overseer of the ninth, was liable, in a separate action, to the penalty under sect. 48. *King* v. *Share.* 31

The proceedings which take place with respect to the burgess lists in a borough, under stat. 5 & 6 W. 4, c. 76, between September 5th and November 1st, are only for the preparation of that which is to be the burgess list or roll for the year beginning on November 1st; and, until that day, the placing of a name upon such list or roll gives no qualification under the statute, the list or roll of the former year being the burgess list or roll till November 1st.

Therefore, where a person not a councillor was elected alderman, to supply an extraordinary vacancy, on October 29th, his name being on the revised burgess list finally made up on October 22d, but not being on the burgess list of the preceding October:

Held, that he was not, at the time of such election, "entitled to be on the bur-

WORKHOUSE.

WRIT.

END OF THE THIRD VOLUME.

H.L.GILLASPIE.